

UNIVERSITY OF KWAZULU-NATAL

**THE IMPACT AND THE EFFECT, OF THE MANAGEMENT AND CONTROL OF
JUDGES BY THE EXECUTIVE ON THE INDEPENDENCE OF THE JUDICIARY**

By

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Faculty of Management Studies**

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DECLARATION

I, Anna Johanna Catharina Womack declare that

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ABSTRACT

The independence of the judiciary is not only crucial for the legal community, but for all South Africans, including the business community. It is important for local and foreign investment to have confidence that the judiciary will protect and enforce their interests. It is submitted that if the independence of the judiciary is undermined in South Africa, not only will the judiciary be affected but so will the broader business community.

The aim of this study is to determine what effect legislative and executive interference in managing the judiciary, through its human resource processes (such as selection, training and discipline of judges) as well as through its finances and court administration, has had on the independence of the judiciary. In recent years there has been an increased interest in the activities of the judiciary and an increase in the criticism of its members. This has resulted in the executive proposing amendments to legislation which, in turn has resulted in the ongoing debate in legal circles about the impact of these measures on the independence of the judiciary. The concern is that the proposed measures will enable the executive to further encroach upon the judiciary and undermine its independence. Consequently, members of the judiciary, academics, members of the bar council and the side bar have objected strongly to the proposed legislative changes.

The purpose of this case study is to explore the extent to which the executive has already interfered with, and proposes to further interfere with judicial personnel and the functioning of the judiciary. A further purpose is to establish what effects the aforesaid political interference has had on the independence, the efficient and effective functioning of the judiciary. It is hoped to determine whether the proposed legislative and executive measures will remedy the perceived judicial inefficiencies through holding members more accountable or whether they will compound the problems that already exist.

In pursuit of this broad aim the research takes a grounded, theory-generating approach. The foundation of the research design is a combination of the use of the literature surveyed in Chapter Two together with the responses to the survey questionnaires and the answers to the interview questions from judges of the various superior courts of South Africa. The South African judiciary presently comprises of the Constitutional Court, the Supreme Court of Appeal and 13 divisions and local divisions of the High Court situated in Bisho (Ciskei); Bloemfontein (Orange Free State); Cape Town (Cape of Good Hope Division); Durban (Durban and Coast

Local Division); Grahamstown (Eastern Cape); Johannesburg (Witwatersrand Local Division); Kimberley (Northern Cape); Mmabatho (Bophuthatswana); Pietermaritzburg (KwaZulu-Natal); Port Elizabeth (South Eastern Cape Local Division); Pretoria (Transvaal); and Thohoyandou (Venda). A dual approach using two types of research instruments, namely the survey questionnaire and the interview questionnaire, was used.

In 1999 only two of the ten Constitutional Court judges were women (Sally Baden, Shireen Hassim and Sheila Meintjes, 1999). At that time there were only two female judges in the Labour Court and one in the Land Claims Court. Also, of the total of 186 judges, at the time, 156 were white males, 20 were black males, 7 were white women and 3 were black women. However, the racial and gender composition of the judiciary has changed dramatically since then (Seedat, 2005, page 5) and (Lewis, 2008, page 1).

No random sample was taken, due to the small population size of the judiciary and it was feared that it would further reduce the response rate. Both research instruments (the survey questionnaire and the interview schedule of questions) were sent to the entire population of judges, which at the time that the study was conducted, consisted of 213 judges in total.

The main source of data was obtained from the research questionnaire developed by the researcher. This was posted to each of the respondents, together with a self-addressed envelope. The aforesaid data was obtained from the semi-structured face to face (alternatively telephonic) interviews conducted with the respondents, who were willing to participate and agreed to be interviewed. Amongst the judges surveyed and interviewed some were current judges, some were retired judges and some were acting judges, of the various superior courts (the interview questionnaire was also developed by the researcher), all of whom were spread across the whole of South Africa. Due to distance and time constraints, a number of the judges agreed to be interviewed telephonically instead of face to face, which saved the researcher a great deal of expense, with regards to travelling and accommodation.

The constant comparative method of qualitative analysis was used. Data reduction was carried out in three stages, each representing a progressively higher level of theoretical abstraction. The findings of the research are expressed as an integrated theory and a series of propositions, generalized within the boundaries of the study, relating legislative and executive interference with the judiciary and what the impact and effect these have had on the independence of the judiciary.

The conclusions may be summarized in four statements. Firstly, there is political interference with the personnel of the judiciary, through the Judicial Service Commission being involved in the judicial selection and disciplinary processes. This has negatively impacted on the efficient functioning of the judiciary. Secondly, the judiciary has transformed and no further political inference is necessary to bring about transformation of its structures or its functioning. Thirdly, there is executive interference, by the Department of Justice, with the judiciary's finances and court administration, which has negatively impacted on the efficient functioning of the judiciary. Fourthly, the proposed judicial bills are an unnecessary intrusion and, if enacted, will increase the executive's power over the functioning of the judiciary, further undermining its independence and possibly eventually leading to its complacency. This will have adverse consequences for all South Africans, including the business community, as local and foreign investor confidence in the South African judiciary's ability to protect and enforce their rights. In light of the aforesaid, the recommendation is that all forms of political interference with the judiciary should be removed and that the legislature and the executive should support the judiciary and protect it from judicial criticism. The legislature and the executive should take steps where necessary to remedy the abovementioned, for example to correct the imbalances in the composition of the Judicial Service Commission and allow the judiciary to control its own internal processes thereby ensuring that it functions efficiently and independently.

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CHAPTER ONE

INTRODUCTION

I.1 Introduction

The aim of this study is to establish the impact and the effect that the executive's, albeit indirect, management and control of the judiciary will have on its (the judiciary's) independence. A further issue under scrutiny will be whether it is necessary for the legislature and the executive to interfere with judicial structures, judicial personnel and court administration in order to achieve judicial transformation in South Africa. An assessment will be made of the impact and effect that such legislative and interference has had on the independence of the judiciary, independence which is enshrined in Section 165 of the Constitution of South Africa, 1996. The question will be posed whether the independence of the judiciary can be maintained if there is further interference with its judicial structures, personnel and court administration by the executive and the legislature.

The researcher feels that the independence of the judiciary is essential for local and foreign investor confidence in South Africa. Dam (2006) has found that judicial independence and the strength and efficiency of judiciaries are factors, which are associated with a country's economic growth. Consequently, the objective of this study is to explore and to determine the impact that executive and legislative interference with the judiciary has on the independence of the same.

To achieve this objective, an examination was made of local and foreign literature on this topic. In addition, a survey and interviews were conducted to establish the opinions and perceptions of, inter alia, the members of the judiciary of the executive and the legislative interference with the judiciary's structures, personnel and court administration. Their opinions and perceptions were sought on whether the draft legislation being proposed by the executive, commonly referred to as the "Judiciary or Judicial Bills" could be construed as interference with their judicial independence. The aim of these Bills is to manage and control, inter alia, the judiciary's various human resource processes such as the selection, training and discipline of judicial personnel and various aspects of their judicial administration.

Prior to conducting research on this topic, the researcher was aware of the legal community's vehement opposition to the proposed measures contained in the draft legislation, in particular the Constitutional 14th Amendment Bill and the Superior Courts Bill. It is submitted that the reason for the opposition to the Judiciary Bills, if enacted in their present form containing all their controversial provisions, is the fear that important constitutional principles, such as the doctrine of separation of powers and judicial independence will be undermined and that an imbalance in the South African constitutional system will be created. It is suggested that all South Africans, not only the legal community, should share the same concerns.

The researcher is of the opinion that the South African business community stands to be negatively affected by any imbalance in the South African constitutional system, as it may have an undesirable impact on both foreign and local investor confidence in South Africa. This could result in an international reluctance to invest in South Africa if it is perceived by international companies that the South African judiciary is unable to protect or enforce their rights. It is suggested that this will have a direct negative impact on the South African business environment and should therefore be of great concern, not only to the legal community, but also to the local and the international business community. The focus of this dissertation therefore, has been to study the effect that the Legislative and Executive's interference with the judiciary through the creation of structures such as the Judicial Service Commission to bring about judicial transformation.

Rautenbach and Malherbe (1996) are of the opinion that the judiciary should enjoy both personal and functional independence. Their view, with regard to personal independence of the judiciary, is that the two other branches of government must not control the appointment, the terms of office and the conditions of service of the judicial officers arbitrarily, as this could impact on their personal and functional independence. Dam (2006) is of the opinion that judicial independence relies on the structural independence of the judiciary and the personal independence of the individual judges (which is secured through life tenure, their method of appointment, their judicial education, their economic security and their place in society). The researcher agrees with both authors' views.

Another important point to note is that in terms of Sections 174 and 177 of the Constitution of the Republic of South Africa, 1996, the Judicial Service Commission in South Africa is presently responsible for the recruitment, selection and disciplining of judges in South Africa. However, it is submitted that the process is highly politicised, as the number of politicians and non-judicial

members outnumber the members of the judiciary, in terms of Section 178 of the Constitution of the Republic of South Africa, 1996. In addition, the judges' terms of office and their conditions of service are regulated by Section 176 of the Constitution of South Africa, 1996 and by other pieces of legislation, such as the Judges Remuneration and Conditions of Employment Act No 47 of 2001. However, these constitutional and legislative provisions have not stopped the executive from seeking to interfere with and further encroach upon the independence of the judiciary by proposing legislative amendments to the Constitution, the Superior Courts Act and the Judicial Service Commission Act, as well as by introducing new legislation to create a judicial education institution to deal with judicial education.

1.2 Motivation for the Study

The need for this study was motivated by the attention that has been drawn to the judiciary through judicial criticism, as well as the vehement opposition to the controversial provisions contained in the Judicial Bills mentioned above. The primary concern of critics is that the aforesaid proposed legislative amendments will further undermine the independence of the judiciary and, as previously stated, could have a negative impact upon the South African economy and its business environment. It is therefore submitted that business leaders need to support the preservation of the independence of the judiciary and to participate in the ongoing public and judicial debate. This stance would be in opposition to the executive's proposed draft legislation to amend the Constitution of the Republic of South Africa, 1996 (by the 14th Constitutional Amendment Bill [B60 of 2003]) and those Bills which are collectively referred to as the "Justice /Judicial/Judiciary Bills". These include the Supreme Court Act No. 59 of 1959 (by means of the Superior Courts Act Bill [B52 of 2003]); the Judicial Service Commission Act No. 9 of 1994 (by the Judicial Service Commission Amendment Bill [B50 of 2007]); and the introduction of the South African Judicial Education Institute Bill [B4 of 2007]).

Members of the judiciary as well as the legal fraternity, have expressed a great deal of concern about the possible impact that the above proposed legislative changes will have on the structural independence, the personal independence, and the functional independence of the judiciary as well as on the doctrine of separation of powers. They have also expressed concern about the undesirability of controlling and/or managing the judiciary, stating that the judiciary should not be controlled at all. They are concerned that external or internal control over the judiciary or members

of the judiciary will undermine the impartiality and independence of the judiciary. The focus of the executive and the legislature's interference with the judiciary, since 1994, has primarily been with the transformation of judicial personnel and their leadership, to achieve a judiciary that is more racially and gender representative of the South African population. The Judicial Service Commission was created in 1994 to deal with the recruitment, selection and recommendation of judicial appointments.

However, in recent years, as a result of increased judicial criticism and complaints and allegations of misconduct and incompetence against members of the judiciary as well as of judicial inefficiency and ineffectiveness against the judiciary, the executive and the legislature, have sought through the proposed Judicial Bills, to increase their interference with the judiciary. This has been done by holding the judiciary more accountable and by addressing the allegations of inefficiency, ineffectiveness and complaints of misconduct and incompetence through training, discipline and by trying to impose institutional constraints on the judiciary. If these proposed measures are indeed implemented, the legal fraternity have raised serious concerns about the extent of their impact on the independence of the judiciary and the functioning of the courts and on maintaining judicial independence in South Africa in the future.

It is submitted that the principle of judicial independence, which is specifically guaranteed in Section 165 of the Constitution of the Republic of South Africa, 1996, has always been and still is fundamental to the rule of law and to a liberal democratic system of government. It is also submitted that judicial independence is crucial for the South African business community and for local and foreign investment in the South African economy. Judicial independence is not for the benefit of the judges, it is to guarantee a fair and an impartial hearing, and at the same time, to ensure an unswerving obedience by all, including the judges, to the rule of law as entrenched in the South African Constitution of 1996, as amended. It is a commonly held belief that the judiciary should be allowed to quietly, competently, and with integrity, comply with its mandate of:

- listening to and receiving evidence and Counsel's arguments;
- researching issues raised by the opposing parties;
- interpreting and developing the law on contemporary issues;
- discussing difficult cases with peers;
- writing legal opinions and judgments;
- and overseeing the legal profession and the court system in general.

It has always been and always will be in the public's best interests for the judiciary to remain independent and for there to be creative tension between an independent judiciary and its associated judicial accountability and the other organs of state. It is therefore extremely important that for a truly democratic government to exist, and for the perceived legitimacy of the South African courts' role in government, a proper balance between judicial independence and judicial accountability is maintained. It is submitted that the South African Constitution of 1996 recognizes this important need for the aforesaid balance between judicial independence and judicial accountability to be maintained; and creates the requisite tension between the different organs of state, through its constitutional provisions, which ensure the independence of the South African judiciary whilst at the same time, holding it accountable.

The glaring question is: What has changed so dramatically in the past few years that necessitates political interference and intervention by the executive and legislature with the judiciary's structures, judicial human resource processes of selection, training and disciplining and the structural, functional and personal the independence of the judiciary?

The researcher is of the opinion that the composition of the Judicial Service Commission as well as the inherent flaws in the recruitment of the judicial members combined with flaws in the selection processes for judicial appointments are to blame. Instead of increasing the levels of executive interference with judicial structures, judicial personnel and court administration, these inherent weaknesses should be remedied. It is suggested that a number of the problems perceived by the executive to exist within the judiciary can be addressed through informal internal mechanisms within in the judiciary, without executive interference and that there is no need to formalize and create additional judicial structures. It is also submitted that it is important both from a societal and a business point of view that the independence of the South African judiciary is and should continue to be affirmed for two reasons. Firstly, decisional independence ensures impartial judicial decisions in individual cases and secondly, institutional independence eliminates the overall concentration of power in political branches of government. An attack, in any form, on the independence of the judiciary by either the executive or the legislature or by both, no matter how subtle, is a threat to the independence of the judiciary. If this independence is undermined, it could weaken the South African Constitution and threaten the fundamental rights which South African citizens as a nation as well as local and international business enjoy. This in turn, will have an adverse effect on local and foreign investor confidence in the South African government and its economy.

Therefore, as previously stated, this research problem is not just a legal issue, but is also a business issue so it is important that business leaders are made aware of the situation and lend their support to the legal fraternity in their opposition to political interference with the judiciary.

In this study the qualitative research methodology used is in the form of a case study to determine the impact that legislative and executive interference with the South African judiciary's structures, personnel and court functioning will have on the independence of the judiciary in South Africa. The overall intention of the study is to gain a better understanding of what the effect of executive and legislative interference, through for example, the Judicial Service Commission's selection of judicial appointments has been and how it has impacted upon judicial efficiency, effectiveness and court administration. An additional intention is to estimate what the effect of executive and legislative interference, through the proposed amendments contained in the Judicial Bills, will be and how it will impact upon judicial efficiency, effectiveness and court administration. Prior to drawing these conclusions, the present judicial independence South African judges will be assessed as well as how the balance between judicial independence and judicial accountability in South Africa can be retained and maintained.

In order to undertake an empirical enquiry to investigate the aforesaid contemporary phenomenon within its real life context, the case study approach was used. The reason for this methodology is that the boundaries between the above phenomenon and its context are not clearly evident from the literature surveyed in Chapter Two. It is intended to use multiple sources of evidence which, from the evidence in the literature survey, does not appear to have been done before. Primary sources (namely questionnaires and one-on-one semi-structured interviews or telephonic semi-structured interview with judges), as well as secondary sources, were utilized to obtain the views of judges who declined for whatever reason to participate in the research but who may have commented on the issues in other forums.

Survey questionnaires and interview questionnaires were the two main tools used for gathering the necessary data. The data gathered was then analyzed to establish whether or not:

- The existing legal mechanisms are sufficient to make the South African judiciary accountable; and

- It is justifiable for the executive and/or the legislature to interfere with the independence of the judiciary
- Executive and/or legislative interference with the functioning of the judiciary, in particular its human resource processes of selection, training and disciplining as well as with its judicial administration, should take place
- The Judicial Service Commission's role in the transformation of the judiciary is constitutionally desirable and what the impact of its role has been on the efficiency, the effectiveness and the independence of the judiciary.

This exploratory study took place over a period of approximately one and a half years; it commenced on 15 July 2007 and ended on 31 December 2008.

1.3 Focus of this Study

The study will focus primarily on the level of political interference with the functioning of the judiciary, in particular in the area of its human resource processes (selection, training and disciplining of judges) and judicial administration. The aim is to measure the impact or effect this interference has had on the functional, institutional and personal independence of South African judiciary.

1.4 Problem Statement

What effect and impact will South African executive and legislative (political) interference with the functioning of the South African judiciary, in particular with its judicial human resource processes of selection, training and disciplining of judges as well as with its judicial administration, have on the independence of the South African judiciary? What steps should be taken to confirm the independence of the judiciary and to overcome the effects of political interference, resulting in improved business confidence in the South African economy?

1.5 Benefits of this study

A summary of the value and expected benefits of this study is summarised below:

- To improve the general understanding of the extent to which the executive and the legislature have interfered with the functioning of the judiciary, through the Judicial Service Commission, and what the impact of this interference has been on the independence of the judiciary
- To identify what the inherent deficiencies in the Judicial Service Commission are and what their impact has been on the efficiency and effectiveness of the judiciary
- To improve the general understanding of the extent to which the executive and the legislature have interfered with the functioning of the judiciary, through the executive's control of the judiciary's budget and the administration of the courts, and what the impact of this interference has been on the independence of the judiciary
- To add to the body of knowledge involving the debate over judicial independence versus judicial accountability issues
- To improve business confidence by confirming the independence of the judiciary, so that there is no bribery and corruption

1.6 Objectives of this study

The objectives of this study are to:

1. Identify whether a crucial balance exists in South Africa between judicial independence and judicial accountability;
2. Evaluate whether this crucial balance can be maintained, if there is constant interference by the legislature and/or the executive to control the functioning of the courts (through, inter alia, the judicial human resource processes of selection, training and disciplining; and through restructuring and administration of the courts);
3. Evaluate the impact, if any, that the implementation of judicial transformation has had on the efficiency and effectiveness of the South African judiciary;
4. Determine whether South African judges have a code of conduct to regulate their behaviour;

5. Establish whether a judicial disciplinary body exists in South Africa (and if not, whether one should exist) to enforce the South African Judicial Code of Conduct (if one exists);
6. Evaluate whether the judicial disciplinary body should be situated internally or externally (within the judiciary or outside of it);
7. Measure to what extent judicial disciplinary action has been effective in dealing with complaints against members of the judiciary;
8. Measure to what extent there has been political interference (if any) with the functioning of the judiciary, either through the Judicial Service Commission or some other body;
9. Critically evaluate the role of the Judicial Service Commission in comparison with the role of a judicial ombudsman: and
10. Recommend appropriate legislative interventions, where necessary, to remove political interference with the judiciary and to improve the judiciary's control over its functioning, so that judicial efficiency and effectiveness within the judiciary is improved.

It is submitted that these objectives are realistic, objective and quantifiable.

1.7 Research Questions

The research questions of this study are:

1. Should judges be managed and controlled?
2. Who should control and manage judges?
3. How are judges recruited, selected and appointed?
4. From where are judges recruited, selected and appointed?
5. What are the minimum education and training requirements, which have to be met in order for someone to be selected and appointed as a judge?
6. To what extent and how precisely are the government's affirmative action policies being implemented with judicial personnel?
7. How and to what extent, if any, is the job applicant's past participation in the African National Congress's armed struggle recognized, when a judicial nominee is being considered for a judicial appointment?
8. Do judges need training?
9. If the answer to question 8 above is in the affirmative, to what extent do they require additional training? Precisely what additional training do they require?

10. Should the training be conducted within the judiciary or outside of the judiciary?
11. Who should train judges?
12. Should judges be subjected to discipline? If the answer to the aforesaid question is in the affirmative, by whom?
13. To whom are judges accountable? To whom should judges be accountable?
14. What is judicial independence? Does it still matter today?
15. What are the contemporary threats to judicial independence?
16. What effect will the management and control of judges have on the constitutional principle of judicial independence?
17. How can the need for judicial control and accountability be balanced with the need for Judicial Independence?
18. What are the alternative models for judicial control and accountability?

1.8 Limitations of the Study

The limitations encountered in this research were, inter alia:

- identifying and targeting respondents;
- administering the questionnaire;
- gaining access to the respondents and interviewees;
- the size, scope and sensitivity of the topic;
- time constraints; and
- the high non-response rate of the targeted population.

It was extremely difficult to identify and gain access to the respondents. Due to their high profile status, access to them is very closely guarded and one can only gain access to them through their various gatekeepers, such as their Heads of Court, the Court Registrars, through the judges' secretaries and/or the judges' clerks. Consequently, the researcher had to use various techniques to identify and target the respondents. Their names were gleaned from the January 2008 Butterworths and Juta Law Reports as well as from the 2008 Hortors and Butterworths legal diaries and from various government websites. A letter was then written to the Chief Justice as well as to each of the Heads of Court to obtain their permission to interview the individual judges within their jurisdiction. At the end of January 2008, a covering letter was posted to each judge individually to

the courts where they had presided. This letter outlined the scope of the research and invited them to participate. A copy the survey questionnaire and the interview schedule of questions, together with a self-addressed envelope was sent with each letter. A total of two hundred and thirteen such letters were posted to the various judges including, inter alia, acting judges, current judges and retired judges, of each of the superior courts. Only twenty-two survey questionnaires were completed and returned. There were almost as many refusals as completed questionnaires: some of which were received telephonically, others in writing and some by email. Consequently, the overall response rate was fifty-eight out of two hundred and thirteen potential responses. Of these, twenty-nine were completed surveys and interviews. Twenty-eight of these were male, the majority of whom were white, with quite a few being close to retirement age.

The researcher is deeply grateful and indebted to all the judges who participated in this research for their invaluable contribution, which made this study possible. Although this study is not demographically representative of the South African judiciary in terms of race and gender, it is submitted that it is nevertheless valid, especially if one takes cognisance of the literature surveyed in Chapter Two, as well, as the overall demographics of the legal profession from which the judiciary is selected. In an attempt to improve the response rate, follow up letters were also written to each of judges in May 2008. Letters were also sent to each of the Heads of Court, namely the Judge Presidents of each of the divisions, the President of the Supreme Court of Appeal as well as to the Chief Justice of the Constitutional Court, requesting their assistance in providing the names and contact details of each of the judges under their jurisdiction. This was deemed necessary as it became apparent that some of the judges moved around between superior courts. They had consequently had not received my correspondence at all or would only receive it many months later when they returned to the courts to which the correspondence had been addressed., The letters to the Heads of Court also asked for statistical details on the racial and gender composition of each of the Courts which fell under their respective jurisdiction. However, only two of the Judge Presidents responded positively, but despite their assistance, there was no real improvement in the response rate.

The size and scope of the topic turned out to be much larger and more sensitive than anticipated. Other limitations encountered in the study were time and money. There was limited time available in which the fieldwork research could be conducted. Ideally, interviews should have been conducted with all two hundred and thirteen judges. This was not possible because they are geographically spread across the whole of South Africa, they are extremely busy and it is difficult

for them to sacrifice time to be interviewed. In any event, such a mammoth task would have been too time consuming and would have jeopardised other parts of the dissertation, such as collation, typing, editing, which in turn would have further delayed the submission of the final mini-dissertation. Money was a further limiting resource. Ideally, an administrative assistant would have been a great help. However, due to insufficient funding this was not possible.

Also, although the members of the judiciary were identified and invited to participate, not everyone responded to the surveys and/or the interviews. The reluctance of the members of the judiciary, who refused to participate for various reasons, can be attributed to several factors. The sensitivity of the topic; the negative media criticism against certain members of the judiciary; the political climate of uncertainty; race and gender sensitivity with the transformation of the judiciary; and the fact that judges are extremely busy and very private people may all have been contributing factors.

The majority of the judges who participated in the survey also agreed to be interviewed. The majority of them were white males who had previously practiced as senior advocates and/or as Silks for a number of years before accepting their appointments to the bench. Because of these limitations, the results of the survey and interviews can only be used to gain insight into a segment of the judiciary's opinions and perceptions. The result therefore do not give a true South African picture of the entire judiciary: it provides a "snapshot" of a select group of mainly senior, white male judges, with many years of experience as judges, the majority of whom had practised as Silks for a considerable number of years before accepting their judicial appointments. Nevertheless, it is also submitted that there may be common agreement amongst the majority of the judges across race and gender, if one looks at the research results in conjunction with the literature surveyed in Chapter Two.

1.9 Chapter Summary

Dam (2006) has stated that the strength of judicial independence and the efficiency of judiciary are associated with economic growth. It is therefore important that the policy makers within the South African government recognise this important fact and take heed of the current legislative and executive threats of and interference with the functioning of the judiciary. To ignore it, could have an adverse impact on the South African business community, regarding local and foreign investment in South Africa.

Previous studies have clarified the debate between judicial independence and judicial accountability and have explored related factors. This discourse aims to employ statistical techniques to quantify the problem and the extent to which political interference with judicial structures, judicial personnel, court administration and the functioning of the judiciary has undermined the judiciary. Whether further political interference, through the proposed judicial bills, will undermine the independence of the judiciary even further; and to what extent these identified adverse effects can be curtailed through legislative, or non-legislative intervention will also be dealt with. These interventions will be seen in the context of reviving public as well as foreign and local investor confidence both in the South African judiciary and in the South African economy.

This chapter has provided an overview of this dissertation and has introduced the case study that was conducted. It has also provided reasons why the researcher undertook this study, and has stated what the objectives and research questions are. It has discussed the limitations encountered by the researcher in carrying out this research.

The following chapter will provide a review of relevant literature covering various aspects of the research topic and give an overview of local and international literature surveyed. The literature will include secondary data obtained from websites, newspapers, local and international bar association reports and electronic journals.

CHAPTER TWO

AN OVERVIEW OF LOCAL AND INTERNATIONAL LITERATURE ON THE IMPACT OF LEGISLATIVE AND EXECUTIVE INTERFERENCE WITH THE JUDICIARY, ITS FUNCTIONING, JUDICIAL INDEPENDENCE AND THE SEPARATION OF POWERS

2.1 Introduction

The previous chapter dealt with the background and an overview of the case study. This chapter will detail the literature reviewed in preparation for the case study. Data presented by researchers, both local and international, as well as secondary data from South African judges, academics, members of the legal fraternity will be examined. The information was obtained from local and international law journal articles as well as from local and international General Bar Council symposium articles. The literature reviewed focuses on issues surrounding executive and legislative attempts to manage and control judges through, inter alia:

- the judicial human resource processes of selection and appointment of judges;
- judicial complaint systems (by, inter alia, the Judicial Service Commission);
- the formalisation of a judicial education system in South Africa;
- the functioning of the judiciary through the rationalisation of the South African superior courts;
- the rule making power, court administration and budget; and
- the impact that all of these proposed political interferences will have on the independence of the judiciary.

Three main areas of political interference in the management and control of the judiciary were identified. These factors which could potentially affect the personal and functional independence of the Judiciary are:

- the strong political representation and the outnumbering of the judicial members on the Judicial Service Commission;
- the inherent problems with the Judicial Service Commission's recruitment and selection of a judicial appointment; and
- the executive controlling the proposed judicial education college, whether or not there should be training and performance appraisals disciplining of members of the judiciary internally or externally by the Judicial Service Commission.

A fourth area of political interference with the management and control of the judiciary, has been identified as the institutional, functional and structural independence of the Judiciary, through the executive's proposed changes to the Supreme Court Act No. 59 of 1959 and to the Constitution of the Republic of South Africa, 1996. These proposed changes will impact on, *inter alia*: the rationalisation of the Courts, in particular the superior courts and granting the executive power over the making of rules for the courts. The problems caused by these political interferences when adjudicating in the South African context are highlighted in this literature review. The Chapter closes with some information about the effects of certain managerial control processes on the independence of the judiciary in other countries such as, England and the United States of America. These two countries were selected because of the South African constitutional historical background, which stems from English Law and because of the parallels that can be drawn with the United States of America, Canada and New Zealand for comparative law purposes.

2.2 Brief Background:

The experience in Africa, as well as in the rest of the world, has been that when attempts have been made to interfere with the independence of the Judiciary, through external and internal executive and legislative methods of control, these have had an adverse impact on local and foreign investor confidence in a country (Dam, 2006). This study provides for an important focus to highlight both the problems and the challenges, which face the modern South African judiciary in implementing its constitutional role in adjudicating matters, whilst at the same time retaining its independence in fulfilling that role. There appears to be an ever-growing worldwide desire from various elements of society (public and private sectors), to interfere with the independence of the judiciary and to control it (overtly or covertly, externally or internally) (American Bar Association Commission 1997, page i). The afore-mentioned local and worldwide developments make it crucial for an examination to be conducted of the South African judiciary to identify the extent to which the executive and legislature arms of the South African government are in interfering with the independence of the South African judiciary by various means. It is suggested that this is important for a full understanding of the unfolding picture of the limitations being imposed on the judiciary, and how this political interference is affecting the independence of the judiciary. This study is limited to the South African context.

2.3 Separation of Powers is Essential for Judicial Independence.

The researcher agrees with Kaufman (1980) that the doctrine of separation of powers enables the judiciary to perform their role of judicial independence fearlessly, effectively and independently. Further, the doctrine reflects a sharp sensitivity to interference with any government branch's fundamental role under the constitution; and it protects each of the government branches from encroaching upon each other. This sensitivity is a necessary precondition for the vindication of individual rights and that with the evolution of judicial independence and the supremacy of the rule of law, there is an ongoing battle for supremacy between the different branches of government (Kaufman, 1980, page 671) this appears to be the case in South Africa at present.

Boone (2006) makes a valid point that a balance between the political forces needs to be maintained to prevent power from being concentrated in the hands of those who would be tempted to abuse it. Modern notions of separation of powers have been mainly derived from the French philosopher Charles de Montesquieu's model (Carpenter, 1987, page 258), against which models on separation of powers are still judged (Boone, 2006). Boone (2006) further proposes that the process of judicial review in England is often the process used by the judiciary to hold the activities of the executive up to scrutiny. As a result, government often sees judicial involvement in the activities of the executive as a hindrance and occasionally even attempts to introduce legislation to curtail the jurisdiction of the courts, which has certainly been the case in the past in South Africa. Boone (2006) states that there is overlap between the judiciary and parliament in England with regard to legislation, and that the judiciary shares legislative powers through the common-law system. Despite the overlap, the order of precedence is clear and it is generally accepted in England that the courts are not empowered to rule on the validity of Acts of Parliament (Boone, 2006). By contrast, in South Africa, since the new constitutional dispensation in 1994, South African superior courts are empowered to rule on the validity of Acts of Parliament, which are in contravention of the South African Constitution of 1996 and its Bill of Rights.

The meaning of the terms judicial control, judicial independence and separation of powers in South Africa now differs from the British meaning of judicial independence, which is peculiar to England because of parliamentary sovereignty. In England, although individual judges are accorded a high degree of independence, there is no effective independence of the judiciary collectively (as a branch of government) (Stevens, 1999, page 379). Flinders (2001, page 54) on the other hand, has

suggested that the constitutional equilibrium in England is changing and that the role of the British courts in relation to the British executive could change dramatically in the future.

The researcher fully agrees with Seedat's (2005) argument that the separation of powers which is non-negotiable remains the framework, around which the South African democracy is crafted, (Seedat, 2005, page 1).

2.4 Judicial Independence Ensures the Preservation of the Rule of Law

The importance of the constitutional principles of separation of powers, judicial independence and the rule of law are also highlighted in the following quotation: "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all," (Article 16 of Declaration of the Rights of Man and of the Citizen cited in Saunders, 2006, page 1).

Allan (2003) felt that the debate over the constitutional foundations of judicial review has been marred by formalism, which has obscured the rule of law's point of view and its value. He argues that constitutional theory must regain its connection with political principle and moral value. He concludes that, in substance, judicial supremacism and parliamentary sovereignty have equally become trapped by formalism. Under judicial supremacism, the rule of law marginalizes the role of legislative intent, whereas parliamentary sovereignty undermines the rule of law. He therefore suggests that there should be shared sovereignty, or interdependent sovereignties, which will provide for a better foundation of judicial review. (Allan, 2003, page 563)

It becomes apparent that it is crucial that there is proper respect for the role, function, position, status, standing and expertise of the judiciary, since its role is to be the independent custodian of the rule of law. The purpose of judicial independence is to ensure the preservation of the rule of law (Kriegler J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 47)

2.5 Tension between the Judiciary and the Other Two Pillars of State, namely the Executive and the Legislature, is Good

Tensions between the goals, motives, and procedures of the executive, legislature, and judicial arms of government are good. Boone (2006) also argues that the doctrine of separation of powers requires that these governmental bodies remain in a state of dynamic interplay, with no one body dominating the others. However, as Carpenter (1987) and Krent (1988) point out, there can never be a complete separation of powers (as envisaged by Montesquieu (cited in Krent on page 1253 and Carpenter, 1987, page 259). Krent (1988) also says there are places where they overlap, but that is where the constitutional framework of checks and balances to which the Judiciary is subject, plays an important role (Kriegler J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006 page 47).

Kriegler, J (2006, page 49) says that tension between the judiciary and the other two pillars of state is “perennial, universal, inevitable and actually beneficial”. He also affirms that South African judges are aware of this constitutional tension and that it is recognised in the South African Constitution of 1996, wherein the rule of law is supreme. He also said that the new constitution was drafted, inter alia, to overcome and to alleviate problems of the concentration of power in the legislature and the executive in the future, which had been experienced in the past under the previous constitutional dispensation wherein parliament was sovereign (Kriegler J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 50).

However, this constitutional tension is not unique to South Africa. It exists in a number of countries, for example the United States of America, which recognise the doctrine of separation of powers (Kriegler J, 2006, page 49). As Kriegler, J (2006) points out, since the 11th September 2001, the Americans have become increasingly concerned about international terrorism. This had led to considerable tension between the American judiciary on the one hand and the American executive and legislature on the other with regard to the balance between state security and the rights and freedoms of individual Americans (Kriegler J, 2006, page 49). In Britain, which has been referred to as “the Mother of Parliaments” and “the cradle of the rule of law” (Kriegler J, 2006, page 49), the British judiciary has become embroiled in controversy in the last decade with the Executive. As a result of this, the British legislature, perceiving the English judges to be illegitimately interfering in areas of English executive authority, have made several attempts to

curtail the judiciary's powers of judicial review (Kriegler J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 49).

As previously stated, South Africa's constitution is unique and it differs from that of the United Kingdom. Also, constitutional tension between the three arms of government existed in South Africa in the Transvaal Republic, even before South Africa became a Union or a Republic. For example, in the 1950s, when South Africa was still a Union, there was constitutional crisis when the Appellate Division was enlarged to deal with certain tensional problems, which at the time had caused deep concern and great anguish at all levels of the judiciary (Kriegler J, 2006, page 50). He also cautions South Africans to be more vigilant than the British have been about legislative and executive interference with the judiciary, especially in light of the fact that South Africa is still a fairly young democracy and that it has come from a past in which the rule of law has not been greatly respected. He warns that South Africa is not the kind of country, with which chances should be taken on public opinion and that unbridled power goes awry sooner rather than later. He expresses the opinion that the doctrine of separation of powers (of which the independence of the judiciary is an essential component) is the only protection a nation has against the abuse of state power. The researcher agrees with him that it is only through keeping the powers in equipoise (in checks and balances) within the spirit of Chapter 3 of the Constitution, that South Africa can ensure that it does not slip into some form of abuse of power again (Kriegler J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 53).

The researcher further agrees with both Kriegler J (2006) and Krent (1988) that constitutional restraints on government actions are necessary to promote accountability. There is the need for a constitutional framework of checks and balances and for accountability among the branches of government, which is in the interest of the public (Krent, 1988, page 1253). The provisions of the Constitution bind the executive, the legislature and the judiciary. Each one has governmental authority:

- the executive has the authority to determine government policy and to do whatever it deems necessary to execute such policy;
- the legislature has the authority to make laws and to decide how public money is spent; and
- the judiciary's primary function and reason for its existence is to guarantee and protect human dignity, equality and freedom under the law and in terms of the Constitution.

The judiciary is subject to executive and legislative control and these bodies have a right and a duty to know what the judiciary is doing, how it is going about doing it. As well as having the right, the power and the duty to check on whether the Judiciary is fulfilling its constitutional obligations and to initiate remedial steps, if necessary. However, the legislature and executive are also duty bound to engage with the judiciary in the spirit of cooperation, as set out in Chapter 3 of the South African Constitution (Kriegler J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 53). It would appear that they are currently in contravention of this premise.

However, judicial control over the executive, with regard to the courts' role in ensuring the legality of administrative actions and the rules governing the liability of the state for wrongful acts performed by servants of the state, including the executive's statutory and common law powers, such as prerogative (Carpenter, 1987, page 270), as well as the judicial control over the legislative process, with regard to judiciary's power to strike down legislation which is in contravention with the Constitution has increased the constitutional tension between the three arms of government in South Africa and the combined attack by the executive and the legislature on judicial power.

2.6 Constitutional Judicial Review and Judicial Authority

Since 1994 South Africa has adopted a system of constitutional judicial review to set aside legislation, which is contrary to its written constitution. However, there are criticisms in other countries against the adoption of such a system, such as in America where it has been said, "where unelected judges are granted the power to set aside legislation (contrary to a written constitution), it leads to undemocratic, subjective, and impractical judicial decision-making" (Breyer, 1999, page 153). Nevertheless, Craig (2004) also wrote on the extensive debate about whether judicial review, premised on legislative intent (specific or general), is grounded in the common law in England. He said that the English common law model is defective, as it does not recognize that legislative intent should be conceived in constructive terms; and that the English common law model adopted an inadequate account of the relationship between judicial review and sovereignty. He felt that there are major problems with the idea of constructive legislative intent, and with the relationship posited between judicial review and sovereignty in England. (Craig, 2004, page 237). The researcher is of the opinion that the system of constitutional judicial review adopted in South

Africa to set aside legislation, which is contrary to its written constitution, is preferred over the American and the British systems and is the correct system for the South African context.

In addition, over the past decade through legislation, judicial interpretation, practice of the judiciary and the courts, both judicial independence and the separation of powers have been given further meaning (Albertyn, 2006, page 131).

2.7 Judicial Independence: Institutional Independence and Personal Independence of Judges

The constitutional principles, which set out the basic structure of the Interim Constitution have made provision for a democratic constitution in which there is a separation of powers between the legislature, the executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness, (Chaskalson, J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 15). The former Chief Justice Chaskalson (2006) said that the aforesaid constitutional principles also provided for the judiciary to be independent and impartial and for it to have the power and the jurisdiction to safeguard and enforce the rights under the Constitution. The Interim Constitution gave effect to this by providing for the supremacy of the Constitution, entrenching the Bill of Rights, requiring courts, when deciding constitutional matters, to declare any law or conduct that is inconsistent with the Constitution, to be invalid to the extent of that inconsistency; and making extensive provisions in Chapter 8 for the independence of the judiciary (Chaskalson J, 2006, page 15).

Chaskalson J (2006) also said that the powers of the court to declare laws and the conduct of the Executive and Parliament invalid (when these are inconsistent with the Constitution) are of paramount importance in the context of the independence of the judiciary and on matters, which may impinge upon it. Chaskalson J (2006) said that it is because of these powers, which the courts enjoy in a constitutional state, that there is a particular need for their independence to be vehemently upheld. He stated that Section 165 of the present Constitution vested judicial authority in the courts, assured their independence and ensured that they were subject only to the Constitution and to the law, which they had to apply impartially, without fear, favour or prejudice. He said that the two important provisions, which followed the section, were that: "No person or

organ of state may interfere with the functioning of the courts." (he placed particular emphasis on the word "functioning"); and that the organs of state through legislative and other measures must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness (Chaskalson J, 2006, page 15). It becomes clear that Section 165 of the Constitution of South Africa, 1996, protects the independence of the judiciary in South Africa and in terms thereof, it is the constitutional duty of both the executive and legislature to ensure the independence of the courts (Albertyn, 2006, page 131). It holds true that the executive and the legislature have failed to comply with these constitutional duties and have instead sought to interfere with the independence and impartiality of the judiciary.

The former Chief Justice also said that by means of this Section, the Constitution had made provision for a more open and transparent process for the appointment of judges and for the security of tenure of judges (Chaskalson J, 2006). He referred to the certification proceedings (in which there had been a brief discussion on the separation of powers) and to the Constitutional Court's judgment in S vs Van Rooyen 2002 (5) SA 246 (CC) paragraph 75. This judgement held that the principle of separation of powers and checks and balances recognised the functional independence of branches of government and focused on the desirability of ensuring that the constitutional order, as a totality, prevented the branches of government from usurping power from each other. He said that the Constitutional Court has also held that the doctrine of separation of powers is not a fixed or rigid constitutional doctrine. It has been given expression in many forms and is subject to many kinds of checks and balances (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 15).

Chaskalson J (2006) also admitted that the executive had not previously attempted to interfere with the court's actual judicial decisions but that at times there had been problems in the way that the decisions had been implemented. He also acknowledged that there had also been problems in some of the Provinces. Nevertheless, he maintained that the Executive had never interfered with the basic aspect of judicial independence, which related to what he considered to be the core of judicial independence, namely the manner in which cases were decided (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 15). Kriegler J (2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 46) stated that "the judiciary is the underwriter of the personal liberty of the individual and as such it needs its independence".

There are main two components to judicial independence, namely the judge's individual independence and the institutional independency of the judiciary. The method of selection, security of tenure, salary scale, proper working and living conditions and financial independence of judges could all impact on the institutional and the personal independence of judges. The powers of particular courts and their place in the judicial hierarchy will determine the degree of their institutional independence. Since the higher courts protect the lower courts, the higher courts need the greatest protection (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 15).

2.7.1 Judicial power versus Institutional Independence, Impartiality and Insulation from pressures by political branches

Kaufman (1980) is of the opinion that the core functions of the judiciary must be protected in America. He believes that judicial impartiality constitutes an essential element of due process and endorses the view that a judicial officer, when exercising the authority vested in him/her, must be free to act upon his/her own convictions, without apprehension of personal consequences to himself/herself (Kaufman, 1980, page 671). He therefore argues that judicial impartiality and insulation from pressures by the political branches are essential attributes of judicial power and that a judge's self-interest (for example his fear of reprisal) must not be allowed to taint the deliberative process. The researcher shares his views and is of the opinion that the core functions of the judiciary must be protected in South Africa for the same reasons.

Judicial independence is not only about the judiciary's freedom from control by other branches of government, but also about freedom from control by other judges (Provine, 1988, page 83). Provine (1988) dealt with efficiency and accountability, which took place within the judiciary in her research. She spoke of the need for judges to remain autonomous and argued that preference should be given to their administrative independence and that judicial governance should be democratic, participatory and active (Provine, 1988, page 83). The researcher agrees with her views.

2.7.2 Personal Independence of Judges - Judicial Self-Governance, Freedom from Control

American judges are generally reluctant to exercise authority over each other outside the realm of appeals. They value decentralization, local autonomy and ample room for individual initiative in the organization of their work (Provine, 1988, page 83). The same can be said about the South African judges who participated in the study, expressing similar views in their interviews.

2.8 Judicial Accountability

Seedat (2005) supports the judiciary bills. She says that the words “judicial independence” and “judicial accountability” are frequently bandied about to such an extent that they run the risk of becoming “meaningless words” (Orwell cited in Seedat, 2005, page 5). She said that to assess the Bills honestly, one had to have a clear understanding of what the values of “judicial independence” and “accountability” involved. She understood judicial independence to be “a judiciary, which is confident to give judgements without threat from or influence by the executive, the legislative branches of government and private interests” (Seedat, 2005, page 5) although she believed judicial accountability to be much more difficult to define.

She suggests that judicial accountability could “describe: (a) a lack of bias or personal interest of the judge in pending cases; (b) abstaining from improper behaviour in an official capacity, such as making discriminatory remarks in court or haranguing litigants; or, consistently late or tardy judgements; (c) abstaining from improper behaviour in a personal capacity, such as harassment of one’s colleagues; (d) adherence to the values of the Constitution and certain standards of ethical behaviour, or (e) proper exercise of judicial discretion... which cannot be the subject of regulation and is clearly reserved for the internal mechanics of appeal and review procedures” (Seedat, 2005, page 5). It could be argued that she has defined judicial accountability too narrowly and that there are two aspects to judicial accountability, namely institutional accountability and individual accountability.

2.8.1 Institutional Accountability

In America, the Administrative Office Act of 1939 makes provision for forums for communicating, clarifying and resolving administrative problems and that the actual policy making takes place at circuit councils, where specific duties were mandated (Provine, 1988, page 83). In South Africa, by contrast, discussions take place between the Chief Justice and the Minister of Justice, The Chief Justice also appears before the Parliamentary Committee on Justice and at meetings of the heads of court (Judges President, Chief Justice and President of the Supreme Court of Appeal), which the Minister of Justice also attends.

Provine (1988) commented on the American Judiciary's administrative institution, in the context of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. She felt that efforts needed to be made to make American judicial governing institutions more democratic and forward looking and that the capacities of the current system could be evaluated through interviews, observation at work and an analysis of internal court documents. She also suggested that duly selected agents should be tasked with the policymaking, that there should be mechanisms in place for enforcing the policy choices, for accountability and access as well as for participation values relevant to assessing governing institutions and designing governing institutions. It is submitted that similar efforts need to be made to South African judicial governing institutions to make them more democratic and forward-looking and to evaluate the capacities of the current South African court system.

2.8.2 Individual Accountability

As pointed out by Owen (1983), judicial power is exercised through a multitude of judges and consequently judging in the modern world necessarily entails the sharing of power and responsibility for a decision. He also said that the American society has insisted that each judge (as an individual and as an official) accepts full responsibility for his/her decisions. Furthermore, judges should not project their personal predilections; they should act as officials, disciplined by the norms of their office and profession (Owen 1983, page 1442). The researcher is of the opinion that the same can be said about South African society's expectations of its South African judges.

However, the problem lies in reconciling the principle of judicial independence with extent of control over the judiciary (Rautenbach and Malherbe, 1996, page 235). There is growing concern within the judiciary and the legal fraternity that “an alarming serious consistent trend has developed over the past decade in South Africa towards the attrition of judicial independence and the curtailment of the powers of the independent functioning of the South African which could have serious and wide implications” (Kriegler J, 2006, cited in the General Council of the Bar Human Rights Commission’s transcript on page 47).

However, Ferejohn and Kramer (2002) say, “there are many commentators who believe that judicial independence and democratic accountability stand in irreconcilable tension with each other” (Ferejohn and Kramer, 2002, page 962). They suggest that “these competing ideals are not goals in themselves, but rather are means to a more important end: a well-functioning system of adjudication and that either or both may be sacrificed in the pursuit of this overarching objective.” (Ferejohn and Kramer, 2002, page 962) They argue that the United States Constitution seeks to achieve this objective by giving individual judges an enormous amount of independence while placing them within an institution that is highly susceptible to political control. The resulting dynamic has made the supreme courts effective self-regulators. They therefore conclude that maintaining the judicial branch’s independence lies more in the judiciary’s own hands than in external political pressures.

2.9 Legislative and Executive Encroachments on Judicial Independence and Recurring Threats to the Independence of the Judiciary

Biden (1994) argued that the legislature’s involvement is necessary in order for judicial reform to take place and for the various procedural rules, methods and techniques to be effective. He examined how the American Civil Justice Reform Act of 1990 attempted to address perceived problems of excessive costs, congestion, and delays in the federal courts (Biden, 1994, page 1285). However, he warned that efficiency is not the only value, which the judiciary must strive for, but Court principles are equally important. It is suggested that the same can be said for the South African context.

In reviewing their evidence on judicial reform across countries, Botero *et al.* (2003) have suggested that those seeking to improve economic performance should not focus on judicial efficiency alone but also on independence. Their study found that the level of resources which at the disposal of the judiciary, and the accessibility of the judiciary had little impact on judicial performance. They argued that the problem of judicial stagnation stemmed primarily from inadequate incentives and overly complicated procedures. They argued that incentive-oriented reforms, which sought to increase accountability, competition, and choice, were most effective in tackling problems, but incentives alone would not correct systematic judicial failure (Botero *et al.*, 2003, page 61). It also holds true for the South African situation. Botero *et al.* (2003) also argue that in instances of chronic judicial stagnation, the procedures should be simplified and their flexibility increased (Botero *et al.*, 2003, page 61). It is submitted that this is the preferred approach, which the South African legislature and executive should adopt in their dealings with the judiciary.

Kriegler J (2006) confirmed that there had been continuity with the judiciary under the new dispensation. He states that the judiciary has transformed to a remarkable degree, both in terms of its composition and its mindset, despite the criticisms, which have been made about its progress. He further contends that the judiciary is committed to transformation (Kriegler J, 2006, cited in the General Council of the Bar Human Rights Commission's transcript on page 50). He also felt that the judiciary is representative of the South African demographics, as the majority of the Judge Presidents are now black. He questioned the bona fides or the common sense behind the executive's approach, as he is puzzled by the actions of the policy makers in charge of the proposed changes to the legislation (Judicial Bills). He is of the opinion that their actions are an indication that they do not trust the new judicial appointees to exercise judicial power and implement transformation (Kriegler J, 2006, cited in the General Council of the Bar Human Rights Commission's transcript on page 50).

In South Africa, the highly contentious and heavily debated Judiciary Bills, if passed, will, *inter alia*, introduce disciplinary procedures for judges; establish a training college for judges and a register of judges' financial interests. At the 2006 colloquium, judges also raised important concerns, about various rule-making, administrative and managerial features of the bills and the constitutional amendments. Seedat (2005) says that their key concern is that the proposals could transfer important powers from the judiciary to the executive branch of government. This concern is compounded by the notion that government has sought to introduce constitutional amendments

in order to implement some of the changes (Seedat, 2005, page 11). The executive has proposed the Judiciary Bills as a framework for the transformation of the judiciary. However, the researcher agrees with the view that their proposals are misleading and that the proposed Judicial Bills will attempt to encroach on judicial independence through the judicial structures, judicial personnel and judicial administration.

The Fourteenth Amendment Bill to the Constitution of the Republic of South Africa is part of a package of measures designed to rationalize the judiciary in terms of Schedule 6 of the Constitution, which has elicited strong public opposition to the Bill. At the heart of the public as well as the judiciary's criticisms of the Judicial Bills, is the concern that the Constitution Amendment Bill, together with the Superior Courts Bill prejudices and limits the independence of the judiciary and the constitutional doctrine of separation of powers (Albertyn, 2006, page 126). Albertyn (2006) highlights that it is unclear what government's justification for the Bills are what the detail of the judiciary's opposition is and what their preferred alternatives are. She blames this lack of clarity on the fact that the discussions on the Bills, between the judiciary and the three successive Ministers of Justice, had taken place over several years and largely behind closed doors, which in her opinion made it difficult for effective public comment.

What is significant, as pointed out by Albertyn (2006), is the fact that although it was the fourteenth amendment to the Constitution, it was the first time that a constitutional amendment had received such opposition from the legal and the justice sector. She said that the primary concerns were that the bill contained certain proposals, which related to, *inter alia*:

- the division of 'judicial' and 'administrative' functions;
- the prohibition of the courts on adjudicating on laws before they commence;
- the appointment of judges-president and of acting judicial leadership, which she felt displayed a development of a pattern of executive power encroaching upon the judiciary's role, judicial independence and the separation of powers, which is rather worrying (Albertyn, 2006, page 127).

Albertyn (2006) raised the concern that constitutional amendments are not ordinary legislative amendments and in support thereof she referred to Section 74 of the Constitution, which provides for special procedures and majorities. She felt that public participation is particularly important when amending the Constitution, especially in contemporary South Africa. She also argued that

the Constitution had been drafted in an inclusive and participatory process, in which civil society had been encouraged to make representations and therefore she felt that the same process should be adopted when any changes are made to the Constitution. This is especially important in light of the fact that, in her opinion, South Africa's democracy is still in the process of being established and consolidated. She therefore thought it premature to make substantial changes to the text at this stage, especially when it is believed that judicial independence is still evolving (S vs Van Rooyen 2002 (5) SA 246 (CC) paragraph 75). The researcher fully agrees with her that there is a growing concern that if constitutional amendments, which are not sensitive to the evolution of judicial independence in South Africa, are made, that the independence of the judiciary may be halted or reversed (Albertyn, 2006, page 127).

She is of the opinion that there are sound democratic reasons why constitutional amendments should be avoided (Albertyn, 2006). These include where the Constitution is positioned (as the supreme law of the land), the setting of rules, principles and standards of democracy, all of which stand above day-to-day politics and transient ruling elites. An important point she makes is that that too often constitutional amendments are used to serve the short-term interests of those in power to the detriment of society and longer-term democratic goals. She warns that even if the substance of an amendment is benign, amendments nevertheless remain a risk to democracy as they instil bad political habits (it is regarded as 'normal' to amend constitutions). This poses the danger of creating perceptions of manipulating constitutions to suit political ends (even though it was not originally intended or effected), and ultimately damaging the legitimacy of the Constitution and the strength of democracy. She argues that it is against that very notion that Section 74 sought to protect South Africa from, namely "against the political agendas of ordinary majorities" (Albertyn, 2006, page 128).

As previously, stated Albertyn (2006) is of the opinion that the South African Constitution envisaged an inclusive, participatory and accountable democracy. She therefore felt that in terms of the principle of necessity, constitutional amendments should be the last resort and should not be used for clarification or detail. She also believes that such matters should rather be dealt with in the legislation, where detail is possible and where they can be tested against existing constitutional standards. The researcher agrees with her. Albertyn (2006) has also argued that by limiting amendments to only those that are absolutely necessary, good governance and constitutional legitimacy is promoted and perceptions of manipulation of the Constitution are avoided. Albertyn (2006) therefore felt that the South African Government should only make justified amendments,

which enhance and do not limit the democratic vision of the Constitution (Albertyn, 2006, page 130), which once again the researcher fully agrees with. Consequently, Albertyn (2006) felt that government should be able to demonstrate whether the amendments were based on sound constitutional justifications, which promoted the independence of the judiciary, maintained the separation of powers whilst at the same time improving the efficacy of the justice system and the delivery of justice to all. In her opinion, it has failed to do.

Albertyn (2006) is also of the opinion that the Fourteenth Amendment Bill, if passed in its present form, will adversely affect the evolving concept of independence of the judiciary in several ways.

These include:

- the proposed system of administering the courts and the role of the Minister therein;
- the ‘ouster clause’ which will remove the jurisdiction of all courts to hear a matter or make an order about the suspension of the commencement of an Act of Parliament;
- the erosion of the authority of the Chief Justice in selecting acting Constitutional Court Judges; and
- the diminution of the authority of the Judicial Services Commission in selecting judges president.

She argues that if one reads across all the provisions, it appears that the Bills are suggesting a reversal of the trends which have developed over the past decade, and that a pattern of creeping executive power at the expense of the judiciary is developing.

Both locally and abroad, there is therefore a widespread belief that the proposed South African “Judicial Bills” interfere with the functional independence of the South African judiciary (Chaskalson J, 2006, cited in the General Council of the Bar Human Rights Commission’s transcript on page18). The executive has vehemently denied this, although, in her budget speech to Parliament, the then Minister of Justice Mbandla (2006) admitted that an important debate had taken place around the Superior Courts Bill and the Constitution 14th Amendment Bill. She felt that this debate has created an incorrect perception that the judiciary is under threat. She also defended the Judicial Bills in the media in 2005 on the grounds that the transformation of the judiciary had been under discussion for a number of years. She further claimed that the aim of the Bills was to maximise access to justice and to instil public confidence in the judiciary (Mabandla, 2005).

The former Chief Justice Chaskalson (2006) admits that the former Minister of Justice, Minister Omar, had given the Department of Justice instructions in 1998 to commence work on the rationalisation of the courts and that as a result thereof, in December 1998 a Superior Courts Bill was submitted to the judiciary for their comment. He said that Sections 7 and 8 of the draft Bill extended to all courts the functional independence given to the Constitutional Court. The parameters included participation in the appointment of staff and in the budgetary process. It was claimed that the drafters had used the same wording as in the Constitutional Court Complementary Act, which in effect meant that the higher judiciary would have an important say in their staffing and the settling of their budgets. Chaskalson J (2006) felt that had the Superior Courts Bill been passed in that form it would have been acceptable to the judiciary. However, he maintained that the Superior Courts Bill in that form was never passed because a few months after the 1998 Superior Courts Bill had been circulated for comment and before it could be passed, a general election took place and a new Minister of Justice was appointed. The new Minister of Justice, Maduna then decided that the legislation dealing with the rationalisation of courts needed to be more extensive and needed to address issues relating to the government's policy for a single judiciary (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 18).

Chaskalson J (2006) said that as a result of this decision, a colloquium was convened in October 2000 to discuss the issues relating to the establishment of a single judiciary. He said the issues raised and debated at that colloquium were:

- the transformation of the judiciary;
- the use of language in courts;
- the jurisdiction of courts, including that of the Constitutional Court;
- the structure and functioning of the Supreme Court of Appeal;
- the Labour Courts and other specialised courts;
- the position of Magistrates and Magistrates Courts in a single judiciary;
- the consolidation of the functions of the Judicial Service Commission and the Magistrates Commission; and
- the structure and control of rule making bodies (Chaskalson, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 18).

The aforementioned former Chief Justice also said that the significant difference between the 2003 Superior Courts Bill, and the prior 1998 Superior Courts Bill was the position of the Labour Court, which the executive had proposed, would be incorporated into the Supreme Court of Appeal. This gave rise to some controversy. He said that the Bill had been referred to the Parliamentary Committee via the normal channels where it had been held up for a long time. He said that it was during the course of the hearings, that the Chairman of the Portfolio Committee allegedly raised the issue of a single Apex Court. This had not been provided for either in the 2003 Bill or in the Constitutional Amendment Bill. He admitted that at some stage, the judiciary had been informed that the Portfolio Committee would make substantial changes to the Bills and that those changes would be referred to the judiciary for comment. However, that this had not happened prior to the bills being put before parliament (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 18).

Mabandla (2005) conceded that the rationale behind judicial independence was to guarantee judicial impartiality and the rule of law; and that a judge or magistrate should decide a case purely on the basis of the facts and the law. In other words, there should be no real or perceived pressure on a judge to decide a case in favour of one of the parties, even if one of the parties is the State (Mabandla, 2005). However, she disagreed with the view that the proposed bills undermined judicial independence. In fact, she felt that they had the opposite effect because they strengthened judicial independence and reinforced the principle of separation of powers. In support of this view, she argued that the Judicial Bills provided measures to deal with complaints against judicial officers. They also provided for an institution to deal with the continuing education of judges as well as the education and training of aspirant judges and that public interest and good governance demanded that they be enacted (Mabandla, 2005). However, the researcher fully agrees with Albertyn's (2006) perception of the South African government as 'a nanny state', which is stepping in to 'fix up' actual and perceived problems in the delivery of justice (Albertyn, 2006, page 132). The researcher also agrees with the Chaskalson J's (2006) opinion that when one looks at the four Bills and the Fourteenth Constitutional amendment together, they reveal the executive and the legislature's underlying intent to encroach upon and undermine the independence of the judiciary (Chaskalson J, 2006, page 18).

The former Minister of Justice has also justified the latest draft of the Superior Courts Bill on the grounds that the current Supreme Court Act, which was adopted in 1959, is out of date and needs to be brought into line with the present Constitution (Mabandla, 2005). She argued that the

judiciary supported the adoption of such measures and that it had in fact been in favour thereof for a number of years. However, she conceded that material changes had been made to the Bills after they had been agreed to by the judiciary and these changes had resulted in them being opposed by the judiciary and subsequently being withdrawn from Parliament. She also conceded that there were legitimate concerns about certain controversial provisions in the draft legislation, which were considered inconsistent with the doctrine of separation of powers and the independence of the judiciary as mandated by the Constitution. She nevertheless tried to justify the executive's actions by saying that the executive had agreed to hold further discussions with the judiciary. What is interesting to note is that she appears to be prepared to discuss the disputed issues only with the leadership of the judiciary and not the entire judiciary. It is felt that if this were to occur, it would be a departure from the inclusive and participatory process envisaged in the South African Constitution.

Chaskalson J, (2006) said that in his opinion, the overall effect of the judiciary Bills is to reduce the powers of the Chief Justice with regard to the appointment of staff, the budgetary process, the appointment of acting judges, and the making of the rules for the Constitutional Court. He said that these issues contradict the policy of the previous Minister of Justice Maduna's Bill and the previous Minister of Justice Omar's Bill. He says that it also reverses the policy of rule making in the interim Constitution, the Constitutional Court Complementary Act, and legislation dealing with the Land Claims Court, the Labour Court and possibly the Competition Court. He said that, in effect, what has happened is that the evolving process of judicial independence, which is essential to a constitutional state, had been stopped and is now being reversed. He felt that a great deal of control is now being placed in the hands of the Minister of Justice (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 33).

He defended the Judiciary, by re-emphasising that the Education Bill and the Complaints Bill were issues, which the judges had actually campaigned for themselves for longer than ten years (Chaskalson J, 2006). He said that they did not object to the principle of judicial education or to a more formal system for complaints, what they objected to was the manner in which they were being introduced. He said that the particular provisions which the judiciary objected to, had nothing to do with transformation. He alluded to the fact that what they objected to was the control, which the bills would give to the Minister. He warned that government's involvement as an interested party to litigation proceedings must not be lost sight of, as it is involved in most Constitutional Court cases, in all criminal cases, and often government is one of the major litigants

in civil cases. He said that the proposed steps, in effect allowing the Minister to exercise greater control over the functioning of the judiciary, could be very harmful. He therefore argues that it is essential and in the interests of all South Africans that the evolving process of judicial independence, which has occurred over the first ten years of the constitutional order, is not reversed, (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 33).

The former Chief Justice warned that it is the early intrusions into the check and balances, which historically have shown the way for later incursions to be made (Chaskalson J, 2006). He acknowledges that the future is uncertain, but warns that once it is accepted that protections can be eaten into and that fundamental principles of the Constitution can be eroded, it is only a matter of time before someone will take it further. He therefore felt that it is essential to object to any attempt at interference, no matter how small (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 34).

Chaskalson J (2006) said that if one looked at the judiciary bills package as a whole, as it was first introduced in 2004/2005, the impression that is created in the judge's minds is that the executive and the legislature will not interfere with the way judges decided cases. However, other aspects of their lives will be controlled such as:

- the judiciary's budget (what it will be, how it will be spent),
- what the court staff will do (the executive would control them and the judges will have no say or right to give them instructions),
- the judicial ethical code,
- the institution in which judges would be educated and
- the judges rules would be made for them (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 34).

He said that the Superior Courts Bill also contained provisions dealing with the micro-management of the courts (Chaskalson J, 2006). This involved the reporting of judges at particular hours, their having to obtain permission to leave the court, and a whole host of extraordinary provisions, which were subsequently deleted. He also warned that a very dangerous structure was being proposed for the court structure and the functioning of the courts. The President appoints the Chief Justice and the bills contained provisions, which extended the powers of the Chief Justice to control the entire

judiciary (these have also been removed). The Bills also provided for the President to appoint the heads of court. Chaskalson J (2006) warned that if the Chief Justice, and not a body of judges (as is currently the position), dealt with matters concerning the judiciary, there would be an undesirable concentration of powers in the Chief Justice, (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 34). He pointed out that over the past ten years, the practice has been for the heads of court to meet regularly with the Minister and that no decisions were taken on behalf of the judiciary without full consultation with all judges. He cautioned that if one judge (the Chief Justice) has the power to give instructions to all the other judges; and that if that judge, and the senior judges around that judge, are appointed by the President; then, in years to come, control over the judiciary could easily be secured by appointing a compliant Chief Justice, (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 34).

The current Chief Justice Langa (2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 65) correctly points out that the proposed legislation does not only concern the judiciary, the courts and the Department of Justice, but is an important matter for the whole legal community, and in fact, the whole of South Africa. He nevertheless confirmed that the transformation of the Judiciary is very close to his heart, as well as to that of all the heads of court, which they had made quite clear to the Minister in their written submissions. He said that they were not opposed to any attempt to facilitate transformation. What they objected to was the fact that the proposals had nothing to do with transformation. He said that South Africa is an evolving society and that the real question for him therefore is how the judiciary, as a court system, has evolved in the context of the doctrine of separation of powers. He therefore posed the following questions: should the judiciary evolve backwards or forwards; have South Africans entrenched those aspects, which made for a good, stable and exemplary democracy: do South Africans want to give the concepts of the independence of the judiciary and the separation of powers the narrowest of meanings? He concluded from his travels abroad, where he had met with judges from other jurisdictions that no jurisdiction appears to be moving backwards. He noticed that all the jurisdictions, which he admired and interacted with, were actually moving towards giving the concept of independence a wider meaning, as opposed to what the proposed Bills sought to do, (Langa CJ, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 65).

He said that when the Constitutional Court had been established as a new court, in 1994, the Constitutional Court Complementary Act was passed to deal with it (Langa CJ, 2006). He felt that the provisions contained therein indicated the direction in which the entire court system should move and in which it should evolve. He said that it involved various aspects of autonomy in running the Court. He said that one aspect related to the appointment of senior administrative personnel for the Constitutional Court, which was done in consultation with the Chief Justice. Another aspect related to matters of the Constitutional Court budget, in which the Chief Justice could not be bypassed. He acknowledged that there was a general perception amongst the judiciary that the Constitutional Court was more privileged than the other superior courts and that the Constitutional Court Complementary Act was, to a large degree, responsible for creating that impression. He said that as a result of this privileged position, the Constitutional Court had been able to establish a number of things, for example, the development of a first class library, which the other courts had been unable to do. A number of judges interviewed in this research agreed with these views. Langa CJ (2006) expressed his deep disappointment with the new proposed provisions, as contained in the draft Bills, which he said seemed to go in the opposite direction. In fact, it appeared to him that the new proposals sought to repeal the Constitutional Court Complementary Act. He felt that what Parliament had written into law in 1994, which had made perfect sense and had worked outstandingly well, was now being taken away without any justification. He was of the opinion that nothing in the Complementary Act interfered with the Court's ability to work. In fact, he believed that it was enhanced thereby (Langa CJ, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 66).

Nevertheless, Langa CJ (2006) felt that there were provisions in the Bills, which the judiciary agreed needed to be implemented with regard to transformation and rationalisation, that the heads of court were in favour thereof and that they should be accelerated. He summed up by saying that what the judiciary was concerned about was the number of worrying proposals for which no reasonable explanations had been given. Included in these were:

- the proposed change to diminish the role of the Judicial Service Commission in the appointment of Judge Presidents and Deputy Judge Presidents; and
- the appointment of acting Judges of the Constitutional Court as well as other senior Judges, where the concurrence of the Chief Justice would no longer be a pre-requisite (Langa CJ, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 66).

The Chief Justice also spoke on the proposed amendment to Section 165 of the Constitution, which he felt was a retrogressive step (Langa CJ, 2006). He said it halted the evolution of the South African court system and the natural development of the concepts of the independence of both the judiciary and the courts and the application of the doctrine of separation of powers. He thought that the existing Section 165 was a very complete section and that it should be retained as, it placed the judicial authority of the Republic where it belonged. He also emphasised that it stated that "all the other organs of state", including the Ministry of Justice, must assist and support the courts in achieving and exercising this independence (Langa CJ, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 67). The researcher fully agrees with the above judges and with Albertyn (2006) that an independent judiciary should have and has the power to establish its own norms and standards for governance and accountability.

It would appear that the South African legislature and executive have planned to encroach on judicial independence through its judicial structures, its judicial personnel and through judicial administration.

2.9.1 Structural interference

Structural interference is "the power of governmental bodies outside of the judiciary to create and modify judicial institutions" (Russell, 2001, page 13).

Epstein, Knight and Shvetsova (2000) contend that societies choose particular institutions of judicial selection and retention initially because of changes in the tide of history, wherein societies are "responding to popular ideas" (Glick and Vines, 1973, page 40 cited in Epstein, Knight and Shvetsova, 2000 on page 1), which they found conceptually thin and empirically wanting. They argue that the creation of and changes in the institutions used to select and retain judges serving on (constitutional) courts of last resort must be analyzed as a bargaining process among relevant political actors. Their decisions should reflect their relative influence, preferences and beliefs at the moment when the new institution is introduced, along with their level of uncertainty about future political circumstances. Their results revealed that as uncertainty increases, the probability of adopting (or changing to) institutions that lower the opportunity costs of judges also increases (Epstein, Knight and Shvetsova, 2000, page 1). It is submitted that that Epstein, Knight and Shvetsova's (2000) argument, along with their findings, is of particular relevance to the South

African context and that the South African drafters should take these into account when interfering with the structure of the South African judiciary, especially its two apex courts.

2.9.1.1 The Judicial Service Commission

The Judicial Service Commission was established in order to broaden the responsibility for the administration of justice and to advise the government on the judicial matters as set out in the Constitution, specifically with regards to the appointment and dismissal of judges (Seedat, 2005, page 2). She said that, in terms of Section 178 (1) of the Constitution of South Africa, 1996 the Judicial Service Commission consists of:

- the Chief Justice,
- the President of the Supreme Court of Appeal Court,
- a Judge President from a provincial division of the High Court,
- the Minister of Justice,
- two practising advocates,
- two practising attorneys,
- one teacher of law,
- six members of the National Assembly, at least three of whom are members of opposition parties,
- four members of the National Council of Provinces,
- four persons nominated by the President and,
- when considering a matter relating to a particular division of the High Court, the relevant Judge President.

However, the general consensus amongst the judges interviewed and surveyed, in Chapter Four of this dissertation, is that the Judicial Service Commission is too politicised and that there are too many non-judicial members on the panel. However, they also said that they are not opposed to the Judicial Service Commission being responsible for the selection and recommendation of the appointment of judges but they would like to see it only consisting of members of the judiciary or the legal profession, or at least that they form the overwhelming majority. They felt that the present approach of the Judicial Service Commission is a more transparent selection process than

the previous selection process conducted by the Minister of Justice under the previous constitutional dispensation.

2.9.1.2 Rationalization of the Courts

Seedat (2005) is in favour of the new Superior Court Bill, which she says, is aimed at rationalizing the courts and creating a single judiciary. She contended that the Bill dealt mostly with the arrangements for a new structure for the courts, including: the appointment of staff of the superior courts; establishing new seats for the High Court in order to increase access to the courts; merging the Labour Courts into the High Courts; creating ten general divisions for the High Court, and four special divisions including the Electoral and Land Claims Court; and consolidating the laws of the Constitutional Court, the Supreme Court of Appeal and High courts into a single piece of legislation. The Bill also proposed altering the procedure concerning appeals, which would no longer need to be heard by a full bench of the High Court, but instead would be lodged with the Supreme Court of Appeals. She argued that the Department of Justice felt that the amendments would address the backlog and lighten the workload of the High Courts. She mentioned that three circuit districts would be established to deal with the appeals instead. She said that the Bill also extinguished the Labour and Labour Appeal Courts and that a special panel of High Court judges would hear labour matters instead (Seedat, 2005, page 11). However, Seedat (2005) is of the opinion that very little has been done since 1994 to consolidate the courts and their laws.

Lewis JA (2008) also confirms that since 1994, with the advent of the new constitutional dispensation in South Africa, there has been very little change in the structure of the South African Courts, except for the addition of a second apex court, namely the Constitutional Court to deal with constitutional issues only (Lewis JA, 2008, page 1). She contends that the Constitutional Court was given specific jurisdiction in certain constitutional matters and that the divisions of the High Courts were also given constitutional jurisdiction to develop the law in a manner consistent with constitutional rights and values (Lewis JA, 2008, page 1). However, the Supreme Court of Appeal (previously the sole Apex Court) was not given any constitutional jurisdiction, as the concern at the time, according to Lewis JA (2008, page 1), was that the old order judges of the Appellate Division would not have the vision to transform the legal system and implement the new constitutional values. Hence, the creation of a separate Constitutional Court has resulted in South

Africa presently having two Apex Courts and the ongoing debate over the re-establishment of a single Apex Court.

2.9.1.2.1 A Single General Apex Court

Chaskalson J (2006) confirmed that the judiciary accepted in principle that there should be a single Apex Court with general jurisdiction, and a large Appeal Court to deal with appeals from the High Court, similar to the Court of Appeal in the United Kingdom. However, he said that the judiciary felt that the time was inappropriate for such a development and that the present structure should remain in place for the time being (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 23). The judges interviewed and surveyed in this research, have expressed similar views.

He said that the Minister of Justice had established a working group, consisting of representatives of the Heads of Courts and the Department of Justice, of which he had been the Chair, to deal with the various objections raised, and to consider a way forward (Chaskalson J, 2006). A number of meetings had taken place over a fairly long period, where after the Department of Justice had drafted a new Superior Courts Bill, which was circulated to the judiciary for their comment, but over which consensus could not be reached (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, page 23).

O' Regan J (2006), a Constitutional Court judge, felt that institutional change is necessary. However, she conceded that it is difficult to create new judicial institutions when an already functioning judiciary exists. She also cautioned against institutional design which is based on either existing personalities or existing sensibilities. (O'Regan J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, page 111) She suggested that one should rather look at the system and see what will work and that the South African policy makers should take cognisance of the fact that they are not dealing with a "green field situation" when dealing with change. That there are sets of cultures and institutions which exist and that they need to be realistic about how these will impact on any change introduced (O' Reagan J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, page 112). The researcher agrees with this sentiment.

O' Regan J (2006), agreed that it would be good for South Africa to have a court of general jurisdiction, which is situated at the apex of the South African legal system, as in her opinion there is a constitutional flavour in almost all matters. She also spoke on the issues surrounding the restructuring the Supreme Court of Appeal into an Apex Court, namely the merger of the Supreme Court of Appeal with the Constitutional Court. It is felt that mergers at the best of times are complicated. They fail more often than they succeed and therefore they should not be entered into lightly. For example, in the past five years, the executive has merged a number of tertiary institutions, in the name of rationalisation and transformation. These processes have been fraught with all sorts of difficulties because, *inter alia*, the soft issues were either not dealt with or not carefully planned and implemented. The researcher is of the opinion that it would be disastrous for South Africa if the two highest courts simply were to merge and the issues raised by Nugent J (2006) and O' Regan J (2006), were not properly considered and dealt with in the manner suggested by them. It is also submitted that it would be extremely short-sighted of the South African government to put the entire South African Constitution at risk for the sake of political expediency. It is therefore felt that an issue such as the merger of the two highest courts of the land should not be rushed into without proper consideration and without proper research being conducted into whether the merger will work and if so, how it should be done, and when it should be done.

She said that the issue of the desirability of an Apex Court with a general jurisdiction can be split into two questions (O' Regan J, 2006). Firstly, whether or not there should be an Apex Court with a general jurisdiction at all and secondly, what that the institution should be, when it should be created and what processes were needed to reach it. In answering the first question, she referred to the South African Constitution and said that the answer lay therein. She said that there are certain very specific characteristics about the South African Constitution, which is uncommon to many other jurisdictions. She felt that the previously mentioned characteristics had a determinative impact, not only on the South African legal system and South African broader socio-political reality, but also on the structure that the South African courts should take (O' Regan J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 112).

The aforementioned Constitutional Court judge was of the opinion that the current two-peak system has made it difficult to ensure that the South African Constitution really rooted itself in the broader South African legal system (O' Regan J, 2006). She therefore agrees entirely with Lewis JA (2008) that an Apex Court is needed in South Africa because the Constitution is intertwined

with the law throughout the South African court and legal system (O' Regan J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 113). She also said that the first issue that needed to be addressed was the size and nature of the institution and agreed completely with Lewis JA (2008) that the court had to be an *en banc* court, especially in light of South Africa's past and the way in which benches had previously been selected to deal with particular cases. She felt that the previous constitutional process had deeply undermined the legitimacy of the legal system, in that it had put a presiding judge in an impossible position. She further argued that in nearly all examples of successful Apex Courts around the world, they sat *en banc* (O' Regan J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 115).

O' Regan J (2006) considered the issues of personnel and of timing to be of particular importance. She felt that, it was important to draw from a wide range of skills within the profession if a general Apex Court was envisaged. She believes that the people, who are appointed, should have extensive Supreme Court of Appeal and Constitutional Court experience. She suggested that an appropriate time to create an Apex Court would be in 2009. A series of vacancies in the Constitutional Court would be created at that time, when the current tenure of four or five of the constitutional court judges simultaneously came to an end. She felt that it would be a good time to create an Apex Court and infuse four or five members from the Supreme Court of Appeal into the Constitutional Court. She said that there are currently six members of the Constitutional Court who had previously been High Court judges, (O' Regan J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 115). It would appear that what O' Regan J (2006) is in fact suggesting, is that the Constitutional Court should absorb the role of the Supreme Court of Appeal, and that the combined court be called the Apex Court. She said that it would be logical to combine the two apex courts but that it is extremely important that the manner in which it is done must be carefully considered. There must be proper and effective full consultation, meaningful participation and joint decision making by all affected parties, in deciding on what in the final model of the Apex Court will be (O' Regan, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 116).

The abovementioned Constitutional Court judge also dealt with the question of what the procedure should be for access to the new Apex Court (O' Regan J, 2006). She said that the test, proposed in the constitutional amendment, was "in the interest of justice", which she believed to be an excellent test, as it has been used by the Constitutional Court for the past 10 or 11 years. She

acknowledged however, that on the face of it, it remained a relatively empty normative provision, as it could be used as a set of guidelines in bringing an application for direct access. She said that the issue generally was not so much the “interest of justice” as “whether or not it is a constitutional matter”. She nevertheless felt that the test had worked reasonably well in the past, and she was convinced that it should work well under the new Amendment as well (O’ Regan J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 117).

O’ Regan J then is clearly in favour of a single Apex Court and is critical of members of the legal profession who have the mindset that the Constitution can be separated from the area of the law which they were focussing on. The aforementioned judge is of the opinion that this mindset has weakened the South African legal system as well as the entire South African Constitutional order. In her opinion, the two are intertwined. She also said that lawyers are generally fairly resistant to change, that change is not in the legal profession’s character and that the legal profession have all found it very difficult, to a larger or a lesser extent, to try to determine exactly just how far the foundational values of the Constitution has impacted upon the South African legal system. In her opinion, it will probably take another twenty to thirty years before the legal profession will really be in a position to answer that question with certainty (O’ Regan J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report 2006, page 113).

2.9.1.2.2 Fragmentation of the Supreme Court of Appeal

Chaskalson J (2006) said that after the 2000 Colloquium, the Department of Justice had made several proposals concerning the structure and functioning of the courts. These had been submitted to the judiciary, and included a proposal for the Supreme Court of Appeal to be divided into three divisions, to sit in different parts of the country, so that it would supposedly be more accessible to the public, and that full bench appeals would be discontinued. The former Chief Justice said that the department of justice had conceded that this would call for an increase in the numbers of the judges of the Supreme Court of Appeal (Chaskalson J, 2006). The change had been justified by saying that it would promote transformation, as well as make courts more accessible to the general public, since the Supreme Court of Appeal would sit closer to where the cases on appeal were decided (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 18).

He said that the judiciary were opposed to the fragmentation of the Supreme Court of Appeal, on two main grounds that it would: undermine the coherence of its jurisprudence; and the collegiality (shared power and authority vested among colleagues) of a single court (Chaskalson J, 2006). On the issue of accessibility, he said that the judiciary agreed that provision could be made for the Supreme Court of Appeal to hear cases in places other than Bloemfontein, but that it should be left to up the head of that court to decide, (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 18).

Nugent J (2006), a Supreme Court of Appeal judge, also spoke on the difficulty of restructuring the Supreme Court of Appeal. He said that the Supreme Court of Appeal is caught in the middle. At present, it is a relatively small, cohesive and collegial court, and the nature of its work means that its emphasis is on developing the law. He is of the opinion that it has been fairly successful, with a fair amount of coherence, and has operated in a very efficient administrative environment. However, he warned that a very different court would emerge, if the various proposals were implemented and the Supreme Court of Appeal was fragmented. He felt that it would be a much larger court and its emphasis would shift from developing the law to merely resolving questions of fact. He did not believe that this would be the right model for the new court. However, he said it all depended on what role South Africa wanted the Supreme Court of Appeal and the Constitutional Court to play within the court hierarchy (Nugent J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 119).

He was of the opinion that the roles of the two senior courts should be properly identified, rather than additional functions simply being allocated to the Supreme Court of Appeal (Nugent J, 2006). He believed that once the role of the Supreme Court of Appeal was properly identified, the manner in which it should function would follow. He nevertheless agreed that there could not be two final courts in a unitary system of law. Consequently, he was concerned about the timing and the structure that the final court would take and whether the 14th Constitutional Amendment was the right way to implement it (Nugent J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 119).

The abovementioned Supreme Court of Appeal judge also felt that, the timing and the form of the final court of appeal in all matters still needed to be properly debated (Nugent J, 2006). He said that it was ultimately a societal issue and that discussion should take place between the two affected courts on what each court perceived as an effective system. He suggested that the judges

of the two affected courts should discuss amongst themselves how they saw it working. He also agreed that the Constitutional Court must continue to sit *en banc*. However, he was not convinced that the Constitutional Court would be able to perform the present role of the Supreme Court of Appeal, in dealing with all appeal cases on for example insolvency, contract, insurance, etc. He felt that key cases should be chosen that would have wider social significance. He said that if that were what was envisaged then the role of the Supreme Court of Appeal has already started to be redesigned, that it would continue to develop the law generally. He felt that it would be then be unnecessary to shift its present emphasis to a court of factual appeal and create a larger and fragmented court (Nugent J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 119).

Nugent J (2006) was also concerned that the Supreme Court of Appeal would become extremely fragmented if three circuits were created through the incorporation of the Labour Appeal Court, which traditionally had sat at various centres across the country and at least twice a year. He warned that, if implemented, there could be two major consequences: the loss of collegiality; and the administrative difficulties brought about by a large and fragmented court. A number of the judges interviewed in this research, expressed similar views. Although, Nugent J (2006) acknowledged that he was not aware of any studies having been done on the administrative consequences of having courts scattered around the country, he warned that there would be innumerable problems with the proposed circuits. These potential problems should be investigated prior to any changes being made (Nugent J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 119).

He also warned that apart from the fragmentation of the Supreme Court of Appeal, if the proposals were introduced, its work would expand considerably and he therefore posed the question of what the future role of the Supreme Court of Appeal would be (Nugent J, 2006). He said that if the role was to continue to develop the law, then he cautioned against simply tagging on full bench appeals and introducing circuits. He also said that it was unrealistic to expect the Supreme Court of Appeal to do too many things at once. He foresaw numerous problems with the various proposals and questioned the executive's motives of trying to deal with them all at once (Nugent J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 119).

The aforementioned judge pointed out that courts and the law are in a constant process of evolutionary change (Nugent J, 2006). He felt that the problems should first be established; and then solutions should be found; and thereafter legislated for, in appropriate circumstances. He disapproved of a panel of judges being specially constituted to hear certain classes of appeals, for example labour appeals. He believed that judges should hear whatever appeals come before them in the ordinary manner. He also felt that it was unacceptable that certain appeals could only be entrusted to certain of the judges (Nugent J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 119).

2.9.1.2.3 A Single Judiciary

The judiciary is concerned about the South African government's policy to consolidate and form a single judiciary, that is, for the judiciary to absorb and include the magistrates (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 18). Their concern is that they do not believe that the Magistrates Courts in South Africa function independently of the South African Executive (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 18). Chaskalson J (2006) says that this concern was one of the objections to the certification of the Constitution as well as the Constitutional Court holding that it is crucial to the separation of powers and the independence of the judiciary. The judiciary (including the magistrate's courts) should enforce the law impartially and function independently of the legislature and the executive (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 18), which the researcher fully agrees with. Chaskalson J (2006) also mentioned that the Constitutional Court has also held that the legislation dealing with magistrates do not comply with the Constitution. In order to comply, steps need to be taken to change their conditions of service, and remove the control, which the Executive exercises over the functioning of Magistrates Courts. This situation was reiterated in the case of S versus Van Rooyen 2002 (5) SA 246 (CC) paragraph 75, wherein the Constitutional Court once again held that in certain respects the law had still failed to meet the requirements of the Constitution. This needed to be addressed before the magistrate's courts could be absorbed into the judiciary (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 19), which the researcher fully agrees with.

2.9.1.3 The Office of the Chief Justice

The Chief Justice, in South Africa, is already recognized in practice as the head of the South African judiciary and that the South African judiciary has already evolved into an informal model of collective leadership, whereby the heads of courts already meet on important issues (Albertyn, 2006, page 133). It is therefore an unnecessary interference by the executive and the legislature to introduce Sub-section (6) to Section 165 of the Constitution of South Africa, 1996. Albertyn (2006) also emphasizes that judicial authority of the Republic is vested in the courts, not in an individual. Consequently, judicial authority is held by each and every judge within his or her court and secured by the independence of the judge in his or her court (Albertyn, 2006, page 134). She argues that in terms of this system, an individual cannot be the head of the judicial authority, but can only be the figurehead of the institution of judges, which is the judiciary. The researcher agrees with her and is also of the opinion that it mirrors the South African constitutional model in which the South African State President is also merely a figurehead. He does not have the same executive powers, as for example, the American State President.

A further criticism of the proposed constitutional amendment to add Sub-section (6) to Section 165 of the Constitution, whereby the Chief Justice becomes the head of judicial authority, is that the Minister of Justice will be constitutionally responsible for the administration of justice and will exercise authority over the administration and budget of all courts (Albertyn, 2006, page 132). Although Seedat (2005) is in favour of the legislative changes, she concedes that there are legitimate concerns about the proposed amendments, especially in light of the fact that the 14th Constitutional Amendment Bill does not enumerate the roles and responsibilities of the office of Chief Justice. This might have the effect of vesting unchecked powers in the position of Chief Justice (Seedat, 2005, page 13). The judiciary is also deeply concerned about the centralization of power in the Chief Justice, especially if the executive is given a greater role to play in the appointment of a Chief Justice (Albertyn, 2006, page 132).

Nevertheless, Kriegler J (2006) is concerned about the impact of the role of transformation on judicial independence. He confirmed that the judiciary has acknowledged the need for real, substantial and fundamental transformation and stated that the judiciary, the judicial system and the administration of justice have been, and are currently being transformed. However, he disagrees with any suggestion that: "a little bit of judicial independence can be sacrificed here and there to address transformation" (Kriegler J, 2006, cited in The General Council of the Bar Human

Rights Committee Conference Report, 2006, page 48). He said that it was not the first time that he has heard the above suggestion to justify major social engineering policies and had been assured that compromise would not harm South Africa in any way. However, he warned against this kind of argument, saying that it was a slippery slope. He is adamant that judicial independence must not be endangered in the interests of transformation. He argued that, on the contrary, the rule of law is one of the fundamental value systems of transformation. His argument that, if one impaired the mechanism for the protection of the rule of law, one ultimately impaired the success rate of transformation (Kriegler J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 48), is worth taking note of.

2.9.2 Personnel interference

Personnel interference encompasses “the policies and procedures which apply to all aspects of judicial personnel, including the methods of appointing, remunerating and removing judges as well as security of tenure, promotions, transfers, professional evaluation, educating, training and discipline - short of removal”. (Russell, 2001, page 14).

Geyh (2003) in Part III of his article discusses how campaigns to control the American courts are easier for Congress to win in the appointments arena, where independence norms have not constrained Congressional behaviour as they have in other contexts. As the opportunities to control the courts via impeachment, defiance, court-packing, jurisdiction-stripping, and budget-slashing have diminished with the ascendance of customary independence, the appointments process has emerged as the one remaining avenue for Congress to exert control over American judicial decision-making. It is submitted that it is equally important in South Africa that the legislature and executive not be provided with opportunities to control the courts via these methods.

Owen (1983) feared that bureaucracy as a social structure made possible, facilitated, and possibly even caused thoughtless use of public power, which might occur in two ways:

- through the fragmentation and compartmentalization of tasks (as bureaucracy insulates those acting within it from critical educational experiences); and
- through the diffusion of responsibility.

His concern was that bureaucratisation, not only produced a dangerous insularity but that it also diluted an individual's sense of responsibility. (Owen 1983, page 1442) He was therefore concerned with the duty of supervision, which the researcher is equally concerned with in reference to South African judges.

Botero *et al.* (2003) suggested that those seeking to improve economic performance should not focus on judicial efficiency alone but also on independence. They were of the opinion that the problem of judicial stagnation stemmed primarily from inadequate incentives and overly complicated procedures. They argued that incentive-oriented reforms, which sought to increase accountability, competition, and choice, were most effective in tackling problems. Incentives alone however, would not correct systematic judicial failure. They argued that in instances of chronic judicial stagnation, procedures should be simplified and their flexibility increased (Botero *et al.*, 2003, page 63).

Seedat (2005) justifies the transformation of South African judiciary, in the form that it has taken, by saying that it is constitutionally prescribed, is necessary and is inevitable. She argues that the structure of the courts and the composition of the judiciary in South Africa were deeply rooted in the apartheid system and that the steps taken post-apartheid were to ensure that the transformation processes were effective, transparent and respected the independence of the judiciary. She argues that the blueprint envisaged for South Africa lay in the Constitution, which called for non-racialism, non-sexism and inclusiveness to permeate through every level of society, which she felt should also apply to the judiciary. She argued that a plurality of views was required in order for the process to reflect the state of transformation in the South African judiciary accurately, and what recommendations should be for the future (Seedat, 2005, page 1).

She confirmed that the current South African system contained a number of constitutional provisions aimed at promoting judicial independence, which, *inter alia*, include: protection from arbitrary removal of office, security of tenure and a guarantee against the reduction of salaries and allowances of judges (Seedat, 2005). She says that security of tenure and remuneration, which otherwise may be used to manipulate judicial officers, are specifically provided for in the Judges' Remuneration and Conditions of Employment Act. She says that other critical constitutional provisions ensuring independence are Section 165(2) and Section 165(3). However, she does not take into account that there is no provision for salaries and allowances to remain competitive, which the judges who agreed to be interviewed for this research say are being eroded by inflation.

They claim that this is not and not adequately catered for in their increases, especially in light of the fact that they have no promotional prospects (Seedat, 2005, page 5).

The aforementioned author said that, under the guise of transformation, dramatic changes are being made to the structure of the courts, and laws are being proposed which will introduce judicial accountability measures and judicial education (Seedat, 2005). However, she defends the Department of Justice by saying that draft legislation encompassing these measures had been contemplated for several years and is aimed at bringing the structure of the courts, and various other aspects of the judiciary, into line with the Constitution. She then went on to evaluate the draft legislation aimed at addressing the issue of transformation in the judiciary, assessing the potential impact of the Bills in light of the need to transform the bench and the potential effects for judicial independence and the separation of powers.

2.9.2.1 Racial and Gender Transformation of the Judiciary

Seedat (2005), in support of the judicial Bills, argued that the structure and membership of the courts, which existed prior to 1994, needed to be rationalized and reconstituted in order to align South Africa's judicial system with the principles of the Constitution. She said that the first step in the reform process had been the revision of the appointment procedures for members of the bench and the establishment of the Judicial Service Commission, whose main responsibility was to advise government on judicial appointments and dismissals.

In support of the judiciary Bills, she also argued that fundamental to the process of judicial reform was the constitution-driven initiative to ensure that the courts were more representative of the population. In her criticism of the racial and gender composition of the bench, she pointed out that initially in 1994, there had only been three black male and two white female judges, out of one hundred and sixty six judges who presided in the country's superior courts. However, she conceded that the percentages had changed dramatically in the ensuing years, but that in 2005 white male judges were still in the majority. She said that of the one hundred and ninety eight judges in the superior courts, there were one hundred and seventy male judges and only twenty-eight female judges. She said that ninety-six of the judges were white; fifty were African, eight were coloured and sixteen were Indian male judges. There were only twelve white, eight African, three coloured and five Indian female judges (Seedat, 2005, page 2).

Seedat (2005) stated that there are ongoing debates about the slow pace of transformation. Questions were being asked such as whether white candidates are being overlooked for appointments and whether adequate measures have been taken to facilitate the entry of black and female candidates (Seedat, 2005, page 4). She argued that there is a compelling need to comply with the constitutional directive and to remove racial and gender imbalances. In substantiation of her argument, she points out that white judges have remained in the majority in most courts and that the consideration and appointment of women of any colour has been low. She has suggested that racial and gender imbalances, in respect of particular appointments at a particular court, should constitute a powerful factor in the appointment process. She also posed a number of important questions, which should be addressed in this regard. Such as:

- what sort of access women have to the profession;
- why the level of female representation on the bench is so low;
- what possible incentives can be offered to successful black lawyers to make themselves available for positions on the bench;
- what contributions can be made to increase the pool of black candidates at law schools and as young entrants into the profession; and
- whether there is a need to support young black advocates who find start-up costs at the bar prohibitive.

Table 2.9.2.1.1 Race and Gender Statistics for the General Council of the Bar 2005

There are currently 1871 advocates in the country⁴. The race and gender statistics for the General Council Bar appear as follows:

	White Male	White Female	African Male	African Female	Coloured Male	Coloured Female	Indian Male	Indian Female	TOTAL
Silks	281	10	7	-	7	1	16	2	324
5 years and more	670	89	58	8	9	4	37	8	883
Under 5 years	215	69	115	27	15	11	33	28	513
Non-contributing	68	38	21	5	8	5	4	2	151
TOTAL	1234	206	201	40	39	21	90	40	1871

(Seedat, 2005, page 3)

Her demographic figures of the legal profession are skewed, as they only represent the Advocates (Seedat, 2005). The demographics of the attorney's profession in South Africa should also be taken into account. These are illustrated in Tables 2.9.2.1.2 and 2.9.2.1.3 (Pillay, 2008, page 15) as judges are now not only appointed from the Bar but also from the Side Bar as well as from magistrates and legal academics.

Table 2.9.2.1.2 2008 Race Distribution Statistics of Attorneys

Table 3-4 Population group distribution of professionals according to organisation size

Organisation size (number of attorneys)	African		Coloured		Indian		White		Total	
	N	%	N	%	N	%	N	%	N	%
50+	265	15.7	117	6.9	188	11.1	1 119	66.3	1 698	100.0
20 - 49	236	14.9	86	5.4	172	10.6	1 093	68.9	1 587	100.0
10 - 19	175	9.6	193	10.7	126	7.0	1 313	72.5	1 810	100.0
5 - 9	442	16.8	97	3.7	117	4.4	1 983	75.1	2 639	100.0
2 - 4	1 191	16.5	366	5.1	374	5.2	5 302	73.3	7 234	100.0
1	819	14.2	181	3.1	508	8.8	4 278	73.9	5 786	100.0
Total	3 131	15.1	1 040	5.0	1 484	7.2	15 038	72.7	20 743	100.0

(Pillay, 2008, cited as Table 3-4 on page 15)

Population and gender statistics should all be taken into account, when looking at race and gender transformation of the Judiciary. When these factors are measured, it becomes obvious that the attorney profession is still predominantly white and male.

Table 2.9.2.1.3 2008 Gender Distribution Statistics of Attorneys

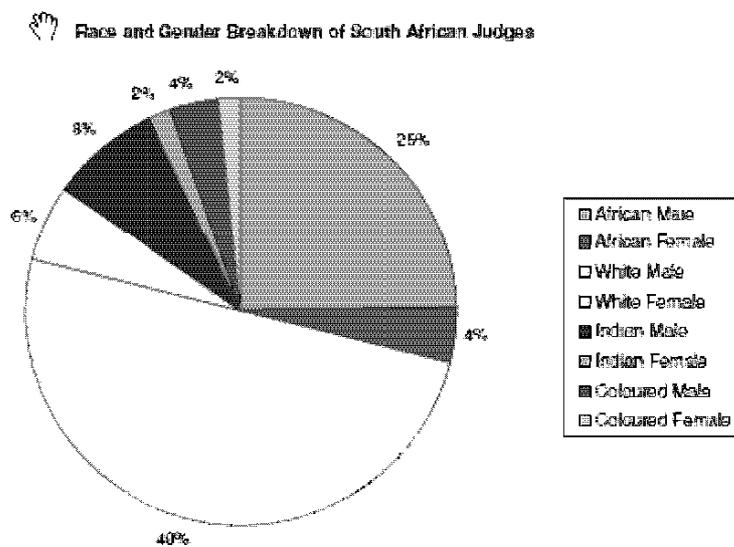
Table 3-5 Gender distribution of professionals according to occupation

Occupation	Female		Male		Total	
	N	%	N	%	N	%
Equity Partners	3 635	32.4	7 584	67.6	11 219	100.0
Salaried Partners	749	36.8	1 280	63.1	2 028	100.0
Senior Associates	723	52.8	646	47.2	1 369	100.0
Associates	1 204	54.2	1 017	45.8	2 221	100.0
Consultants	138	29.5	330	70.5	467	100.0
Candidate Attorneys	1 940	56.4	1 499	43.6	3 439	100.0
Total	3 388	40.4	12 356	59.6	20 743	100.0

(Pillay, 2008, cited as Table 3-5 on page 15)

A number of judges who were surveyed and interviewed disagree with Seedat's (2005) argument that transformation is too slow. The majority of them have said that the judiciary has transformed in terms of race and is still being transformed in terms of gender (Lewis JA, 2008, page 1). However, the judges are of the opinion that, when judicial appointments are made, race and gender should not be the overriding considerations. In other words, these factors should not be used as selection criteria over the perceived minimum requirements of qualifications and experience. In their opinions, it is in the best interests of all South Africans that legal staff are appointed on the basis of merit: the best qualified and experienced should be given the position.

Figure 2.9.2.1.1 Race and Gender Breakdown of South African Judges



(Seedat, 2005, page 4)

If one compares Seedat's (2005) figures of the race and gender composition of South African judges in 2005, as illustrated in Table 2.8.2.1.4 and Figure 2.8.2.1.1, with those Lewis JA's (2008) latest figures, as illustrated in Figure 2.8.2.1.2 (Lewis JA, 2008, page 1), it would appear that the judiciary has transformed to a great extent, in the past three years.

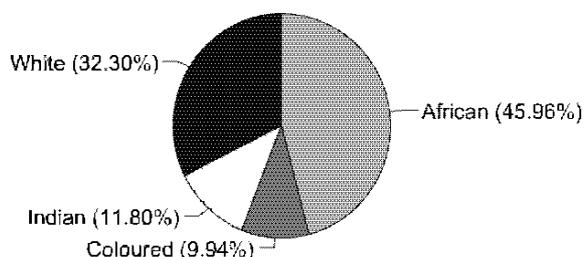
Table 2.9.2.1.4 Race and Gender Composition of South African Judges in 2005

COURT	African Male	African Female	White Male	White Female	Indian Male	Indian Female	Coloured Male	Coloured Female	Total
Constitutional Court	5	1	3	1	1				11
Supreme Court of Appeal	4	-	12	2	2	-	-	-	20
Northern Cape High Court	2	-	2	-	-	-	1	1	6
Eastern Cape High Court (Grahamstown)	2	-	9	-	-	-	-	-	11
(Port Elizabeth)	-	1	3	-	2	-	-	-	6
Cape of Good Hope High Court	3	-	14	2	4	-	2	1	26
Free State High Court	2	-	9	-	-	1	-	-	12
Transvaal High Court (Pretoria)	9	-	17	1	1	-	1	-	29
Johannesburg)	5	3	14	3	3	1	-	-	29
Natal High Court (Durban)	4	-	4	1	2	1	2	1	15
(Pietermaritzburg)	3	-	4	-	-	-	-	-	7
Bophuthatswana High Court)	2	2	1	-	-	-	1	-	6
Venda High Court	2	-	-	-	-	-	-	-	2
Ciskei High Court	2	-	1	-	1	-	-	-	4
Transkei High Court	2	1	2	1	-	-	-	-	6
Land Claims Court	2	-	1	-	-	1	-	-	4
Labour and Labour Appeal Court	1	-	-	1	-	1	1		4
TOTAL	50	8	96	12	16	5	8	3	198

(Seedat, 2005, page 3)

Figure 2.9.2.1.2 Demographic Composition of the South African Judiciary In 2008

**DEMOGRAPIC COMPOSITION
OF THE SOUTH AFRICAN JUDICIARY**



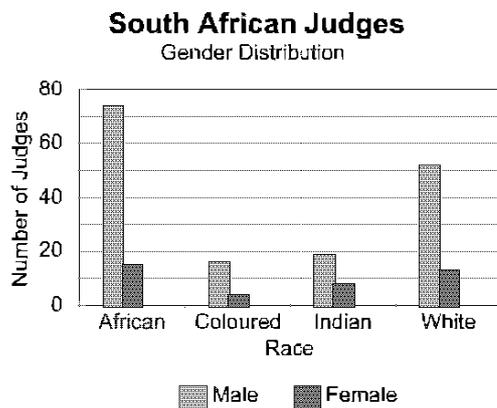
Lewis, JA (2008, page 1) said that of the two hundred and one permanently appointed judges in South Africa:

- ninety-nine judges are now black
- seventy-four of the judges are now African, of which fifteen are African women
- sixteen are Coloured judges, of whom four are women; and
- nineteen are Indian judges, of which eight are women
- the remaining one hundred and two are White, of whom thirteen are women (Lewis JA, 2008, page 1).

She also mentioned that in the Constitutional Court, eight of the eleven judges currently sitting are black, three of which are women and two of which are African. In addition, in the Supreme Court of Appeal there are now six African judges, three Indian judges and the remaining twelve judges are still white (Lewis JA, 2008, page 1).

Lewis JA (2008, page 1) also said that if the judiciary was divided into gender, the statistics are: one hundred and sixty one male judges and only forty female judges. Hence, the overwhelming majority of judges are still male.

Figure 2.9.2.1.3 South African Judges: Gender Distribution in 2008



Lewis JA (2008) is of the opinion that the appointment of lawyers with minimal high court experience has not done the public any good. She believes that in Gauteng (which according to her is the major commercial hub of the country) there are few judges left on the bench who have any legal commercial experience. She warned that commercial litigants are not the only ones who will suffer because of the number of high court judges who lack experience. She stated that the Constitution mandates the Judicial Service Commission to interview candidates for appointment to the Constitutional Court, the Supreme Court of Appeal and the high courts. Under the old constitutional dispensation, the Minister of Justice selected the judges for appointment by the President and often those appointments were politically based (Lewis JA, 2008, page 1).

However, Lewis JA (2008) has noticed that for the first time in years, senior members of the bar are accepting nominations to high courts and that white men have stood for positions in the Constitutional and Appeal courts. This is a positive sign for the future and could be indicative of the fact that the Judicial Service Commission's focus might be moving away from political loyalty and race, as their primary selection criteria, towards having a greater regard for merit, skill and experience.

2.9.2.2 Appointment or Election of judges

Malleson (1997, page 665) observed that judges are generally chosen from the ranks of practitioners rather than specifically being trained as judges. However, it would appear from the draft legislation that the South African Legislature and Executive want to train judges in the future, rather than simply choosing judges from the ranks of practitioners, as they have done in the past.

She expresses her concern with the erosion of individualism and is of the opinion that there is a connection between judicial independence and “outlook”, when appointments are made (Malleson, 1997, page 655). She feels that individualism is the cultural bedrock on which judicial independence ultimately rests. From the information gleaned from interviews conducted in this research, South African judges have expressed similar concerns and they appear to share her views. Hence, it was important to Malleson (1997), as well as to the South African judges who were interviewed, that the independence of minds amongst judges is maintained. She is also of the opinion that too much emphasis is being placed on consistency and standardization through the use of “Bench Books” when providing the judicial service. Malleson (1997) is also concerned with the fact that there is an alarming focus on increasing consistency and cultural change, which is taking place within the judiciary (Malleson, 1997, page 655). It is clear during the interviews conducted by this researcher with members of the South African judiciary that the same appears to be happening at present with the South African judiciary. Malleson (1997) has also observed that a strong culture of individualism and individual discretion exists within the judiciary and she is therefore of the opinion that the philosophy of collective judicial action (with its emphasis on consistency and standardization) is not readily reconcilable with the culture of autonomous decision-making, which has prevailed within the American judiciary. It would appear that the same would apply and can be said of the South African context.

In his examination of various models of judicial review and how to restructure the judiciary, Croley (1995, page 689) dealt with, *inter alia*, the issue of whether the Judiciary should be elected or appointed. He was of the opinion that if it is elected, the judiciary is accountable to the majority. However, he was concerned about the issue of the legitimacy of elective judiciaries and therefore examined three important factors:

- whether there should be periodical elections,
- how periodical elections could undermine the independence of the Judiciary and

- whether judges should be elected for life terms.

This differs from South Africa, where judges are appointed for life terms by the President, previously on the recommendation of the Minister of Justice (Carpenter, 1987, page 257) and presently on the recommendation of the Judicial Service Commission. Nevertheless, Croley (1995, page 689) also raised the question of public interest in the integrity and competence of the candidates. This factor is certainly of concern when making judicial appointments in South Africa.

2.9.2.3 Selection and Appointment of Judicial Leadership

There is great opposition to the proposed Section 9 of the Fourteenth Constitutional Amendment Bill [B 60 – 2003]. The reason being that the new provision to Section 174 of the Constitution of South Africa, 1996, if implemented, will change the practice, which presently exists, wherein the Judicial Services Commission chooses the Judges-President and the Deputy Judges President, to the Minister of Justice making the aforesaid choices in the future (Albertyn, 2006, page 139). Albertyn (2006), in support of her opposition to the previously mentioned proposed amendment, argues that South Africa has begun to consolidate a particular view of the judiciary with regard to the nature of its appointments, the role of the executive, the Judicial Service Commission and the Chief Justice. She claims that the constitutional practice, which has evolved over the past eleven years, has given the Judicial Service Commission its current role, and has allowed the Chief Justice, as chair of this body, to shape the judicial leadership (Albertyn, 2006, page 139). She also argues that the proposal will diminish the role of the Judicial Service Commission, which was specifically created to provide for the independent, depoliticised selection of judges, in an open, transparent and accountable process. She further contends that it will weaken the influence of the Chief Justice, in selecting the leadership of the judiciary, which he represents and for which efficiency he is accountable (Albertyn, 2006, page 140). It would therefore appear that the proposed amendments are an unnecessary interference by the executive and legislature with the judiciary.

Albertyn (2006) believes that the real issue, which needs attention, is where the balance of power in the appointments should be over the long term. In her opinion, one that is shared by the researcher as well as by the majority of judges surveyed and interviewed in this research, the current position is better for democracy. They also agree with Albertyn's argument that the

practice, which has evolved over the past decade and a half, of the selection of judicial leadership has been effective in transforming the judiciary. It has achieved a good balance between the roles of the President, the Chief Justice and Judicial Service Commission and as a result, it has prevented the abuse of power of any one institution or person (Albertyn, 2006, page 140).

Nevertheless, all acknowledge that there are shortcomings with the Judicial Service Commission's selection process, especially with regard to the appointment of women. Despite this, it is still better democratically to retain an open process and transparency. Advocacy by civil society and human rights organizations on this issue is the necessary check and balance to inadequate selection procedures (Albertyn, 2006, page 140) and the current process affirms democratic, transparent and accountable selections. Presidential decisions are, by their very nature, far less transparent; and shifting power to the executive, no matter how small, is never justified (Albertyn, 2006, page 140).

Also, in terms of the proposed amendment to Section 175 of the Constitution of South Africa, 1996, by Section 14 (1) of the Constitutional Court Complimentary Act [B 60 – 2003], the Minister of Justice will have the sole discretion to appoint acting judges to the Constitutional Court as well as in key positions such as that of the deputy Chief Justice, the deputy President of the Supreme Court of Appeal and the deputy Judge-Presidents of the different divisions of the High Courts. This will be done after consultation with various parties, including the Chief Justice (Mbandla, 2005 and Albertyn, 2006, page 141).

The researcher strongly disagrees with Mbandla's (2005) argument that by placing the proposed amendment in the Constitution, the separation of powers and the protection of the independence of the judiciary are entrenched. It can be argued that the judiciary and the legal fraternity do not share her views and that the change will have the opposite effect: that the proposed amendments will be a departure from the present system, in which the Judicial Service Commission is responsible for the selection and recommendation of all judicial appointments. The researcher as well as the majority of judges surveyed and interviewed, is in agreement with Albertyn's (2006) warning that in both instances (of appointing acting judges to the Constitutional Court as well as acting judges in key positions) power will shift to the executive.

All are in agreement with Albertyn (2006) that there is no reasonable justification why the Minister of Justice should be given sole discretion and that there are even sound arguments against it. In its defence, the role of the Constitutional Court, which is to hold government accountable, is

highlighted. This together with the fact that acting appointments are for defined and known periods, has led to a concern that it is possible that the court roll may be known, which in turn makes it undesirable for the Minister of Justice to have the final say. The reason for the concern is that it could lead to perceptions that the executive is able to interfere with the Court. This in turn will be further exacerbated by the increasing trend of the Constitutional Court to pronounce split decisions. The appointment of a single judge in such a manner could also have a material impact on the nature of Constitutional Court's decisions (Albertyn, 2006, page 141).

As correctly pointed out by Albertyn (2006), this is not the first time that the method of the appointing acting Constitutional Court judges is being challenged. It was previously challenged in the First Certification judgment, wherein it was argued that it impacted on the efficacy and direction of the court, as well as on succession issues. Albertyn (2006) argues that it is important that there should be a balance between the executive, the Chief Justice, Deputy Chief Justice and the head of the court concerned. A wider consultation and selection process is therefore needed and the proposed change in appointments are neither necessary nor justifiable (Albertyn, 2006, page 141). This is especially true in light of the fact that transformation has taken place - all the heads of court (the Chief Justice, the Deputy Chief Justice, and the President of the Supreme Court of Appeal as well as all the Judge Presidents of the various divisions of the High Courts) are now African. Figures 2.8.2.1.2 and 2.8.2.1.3 have been compiled from the statistics provided by Lewis JA (2008, page 1).

Chaskalson J (2006) also spoke on Section 175(i) of the proposed Constitutional Amendment, in terms of which Acting Judges of the Constitutional Court would be appointed on the recommendation of the Minister, after consulting the Chief Justice. He said that if implemented, it would reverse the present position, which requires the concurrence of the Chief Justice for any such appointments. He said that it is important that the Constitutional Court continue to sit *en banc*, and that the Minister has no control over how vacancies are to be filled by acting appointments. He said that, at present the existing provisions of the Constitution require that there be concurrence between the Minister and the Chief Justice, which he believes is an important safeguard against executive intrusion into the highest Court. He warns that the proposed amendment will change this and effectively the Minister would be able to decide on such appointments. (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 18)) This is very dangerous as the executive would be

able to manipulate the Constitutional Court and appoint acting judges to form a complacent judiciary in favour of the executive.

2.9.2.4 Judicial Education and Training

There has been a great deal of criticism about the competency and efficiency of the judiciary. This has resulted in an increased interest by the South African executive and the legislature to train members of the South African judiciary in the hope that the South African judiciary will become more efficient and effective.

Chaskalson J (2006) said that previously there had not been a formal system of judicial education for judges. He said that the judges, with the assistance of the Canada/South Africa linkage, undertook to conduct seminars for existing judges, new judges and aspirant judges. He said that those seminars had been entirely under the control of the judges, and that they had committees to deal with the issue. He said that the committee had continually pressed for a proper and well-funded education system, and the former Chief Justice Corbett, and later Justice Kriegler, had undertaken work in relation to the cause. He said that a committee had been appointed by the Minister to investigate judicial education systems all over the world. They had held extensive consultations and there had been delays on the Canadian side of it. Finally, in 2004 a report was presented in which it was stated that judges should conduct judicial education for fellow judges. Chaskalson J (2006) pointed out that at that stage neither the Minister of Justice nor the Department of Justice had suggested that the report was inconsistent with the overall vision of the evolving process of judicial independence (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 31).

Seedat (2005), in support of the South African National Justice Training College Draft Bill [B 4 – 2007] said that judicial training of newly appointed judges, and programmes for continued training, are common in many countries. However, she conceded that there was a significant variation in terms of curriculum and implementation. She said that skills training, conferences on judicial administration, continuing judicial education in substantive law, courses designed to keep judges abreast of the legal developments, social context programmes could all be carried out by the college, as is the case in various other countries. In addition, the college would need sufficient resources and skilled administrators in order to work effectively. However, she said that where the

concept of continuing legal education for judges was present, the debate concentrated on overseeing the programme and the design of the systems (Seedat, 2005, page 9). She conceded that judges should play an active role in designing training systems, but she was not entirely convinced that they should assume sole control. She felt that if the goal went beyond education in new laws and focussed on actively changing attitudes and exposing judges to new concepts and approaches, a certain degree of external management might be useful. She argued that Section 180 of the South African Constitution of 1996 envisaged the training of judicial officers and provides for training programmes to be regulated by national legislation.

Seedat (2005) said that one of the issues which have arisen is which institution should be responsible for such training (Seedat, 2005, page 9). She said that the South African executive's proposal is that judges should be trained at a state-managed institution. They prefer the Justice College based at University of South Africa in Pretoria, which presently conducts training of magistrates and prosecutors. She says that the College is presently managed by a Chief Directorate within the Department of Justice and is mandated to provide practical legal training primarily to Court Officials in the employ of the Department of Justice. The Justice College Draft Bill attempts both to 'reinforce' the current set-up, that is to retain the College administration under the control of the Department of Justice as well as to introduce a separate faculty in order to "provide for proper and appropriate education and training for judicial officers" (Seedat, 2005, page 10). However, the judges surveyed and interviewed herein are vehemently opposed to this suggestion, mainly because they are of the opinion that judges cannot be trained as judges academically, that the best form of training is through professional training and experience gained from practising and litigating in the high court. The researcher and the judges interviewed agree that a Judicial Training College should be established for the training of members of the judiciary. However, they are all of the opinion that it should be managed and controlled by the judiciary and that judges (preferably retired judges) should conduct the training courses for judges.

Chaskalson J (2006) said that at the end of 2004 beginning of 2005, a Bill emerged which had no relationship to the work, which had been conducted, and the proposals which had been made over the past seven years. He said that in effect, the Bills would vest judicial education in an institution, under the control of the Minister. He said that although there were provisions, which allowed the judiciary to deal with the curriculum, the institution itself would be under the control of the Minister of Justice (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 32).

Seedat (2005) said that the Director-General of the Department of Justice would be responsible for the financial management of the College, and that a separate faculty would be established within the present college to deal with judicial education. The faculty board would consist of six members:

- the Deputy Chief Justice as chairperson;
- the head of the faculty (described as a judge not currently performing service or a fit and proper person, appointed by the Chief Justice after consultation with the Minister);
- one judge and one magistrate (similarly appointed);
- one non judicial officer and a law professor (both appointed by the Minister in consultation with the Chief Justice) (Seedat, 2005, page 10).

The researcher is of the opinion that the judiciary would find this unacceptable and would be opposed to the executive controlling the financial management of the Judicial College. They would prefer the College to be managed and staffed by members of the judiciary, and would not include anyone who was not a judge.

There were two main but interrelated objections by members of the judiciary and opposition groups to the department of justice's proposals. Both objections were based on the fact that the executive would ultimately control it. The first objection related to the fact that the training should not occur at a government-administered institution. They also had a problem with the fact that the board would still fall under the Department of Justice and there was the danger that the judges would become the minority in the faculty members, as has happened with the Judicial Service Commission. The second objection was that the proposed legislation represented a sudden shift in policy, from that of the previous Ministers and those involved in the administration that were in the process of finalizing proposals including possible statutory mechanisms designed to secure the complete independence of the Judicial Training College. Seedat (2005) confirmed that the Chief Justice, Pius Langa had publicly stated that the previously mentioned College must be run and managed by judges, and that a state-controlled College would create the perception that the judiciary lacked independence (Seedat, 2005, page 10). She also made a valid point that if it is unacceptable to train judges at a state institution, then it is equally unacceptable to train magistrates (if not prosecutors) at such an institution.

The researcher as well as the judges surveyed and interviewed is in agreement with her that the magistrates should fall under the Judiciary and not the Department of Justice, thereby maintaining the independence of the entire judiciary, including both the lower and higher courts. Although, Seedat (2005) defended the draft bill by saying that it attempted to distinguish between the administration of the Justice College and the content of the judicial education. She nevertheless felt that there needed to be sufficient checks and balances in place, to ensure against the possibility of intrusion by the executive or other parties in the content of curriculum and in the provision of training. She therefore concluded that to be a truly successful and effective, the judges should control the justice college and the South African judiciary should feel that it owned the college, even if the department of justice carried out the administrative functions. It is felt that she should have gone even further to suggest that the office of the Chief Justice should rather carry out the administrative functions.

Mallesson (1997) points out that judges, whilst carrying out their judicial function, fulfil two separate roles simultaneously, namely a constitutional role and a social service role. In their constitutional role they counterbalance the interests of the executive and parliament, whilst at the same time, in their social service role they carry out their day-to-day court work. She felt that it was important to distinguish between these two roles of judicial function and to identify the requirements of judicial independence in each case. This would ensure that the threats to judicial independence from training and performance appraisals could be identified and threats from a Constitutional point of view, in terms of the doctrine of separation of powers and freedom from interference in individual decision-making could be minimized. The judiciary could maintain their freedom from external interference, through for example the security of tenure, the appointment and dismissal of judges (Mallesson, 1997, page 655). She also made an important point that judicial independence requires that members of the judiciary should not owe their office to a member of the executive. She said that these principles are intended to ensure that a judge will exercise his/her decision-making in individual cases without “fear or favour, affection or ill-will” (Mallesson, 1997, page 655). She therefore proposed that the solution to the problem of ensuring good judicial administration, whilst not undermining judicial independence, is one of “means rather than ends” to justice. (Mallesson, 1997, page 655)

She suggests that judicial training should be viewed as a process relating to the individual performance of judges, since it is concerned with the way in which legal services are provided to the public (Mallesson, 1997, page 656). However, she cautions that training and performance

appraisals are potentially more likely to bring pressure to bear on the decisions judges make in individual cases and could therefore interfere with his/her impartiality, as opposed to affecting the constitutional role of the judiciary as a body. Since the very purpose of both training and performance appraisals is to influence judges' practices in their day-to-day work, she suggests that, it very important to bear this in mind when designing training programmes. The researcher fully agrees with her that training should be designed to influence the way in which judges carry out their tasks, not the decisions themselves.

The researcher, as well as the majority of the judges interviewed, shares Malleeson's (1997) views that training should assist judges in the way that they handle procedures in court. All are in therefore agreement with her that the focus of training should be on the process, not the end result of the judge's work. Her concern that training could undermine, in some undefined way, judicial independence unless it is kept within the strict control of the judges, is a valid concern, as is her fear that judicial training could provide a backdoor for the executive to gain control over the judiciary. Interestingly the judges, interviewed in this research, were equally insistent that the Training Board or Education College in South Africa be run by and staffed by judges (the use of tutor judges), for judges (Malleeson, 1997, page 656).

Malleeson (1997, page 655) has also mentioned that the American Government considered replacing the American Judicial Studies Board with an Appointment and Training Commission made up of lawyers, academics, and lay people. She felt this would result in a move away from judicial control at policy level. It is felt that this would be preferred in South Africa, for example under the Judicial Service Commission, than the executive controlling judicial education as being proposed in the judicial bill on judicial education in South Africa.

2.9.2.5 Judicial Performance Appraisals

In her research, Malleeson (1997) also investigated the relationship between judicial independence and the use of training and performance appraisals in the judiciary. She analysed the principle of judicial independence and in her analysis she distinguished between external and internal interference in judicial functions. She also examined the argument that training and performance appraisals could undermine the independence of individual judges through a process of internal interference from other judges. Nevertheless, she felt that the introduction of processes to improve

and monitor standards of performance should be seen as part of wider structural and cultural changes within the judiciary. She observed that the creation of a career judiciary in America had arisen as a result of its expansion in size. This in turn had led to a process of formalization, which was designed to encourage greater consistency, standardization and collective decision-making, which appears to be what the South African executive would like to see happen with the South African judiciary, as well.

However, the judges interviewed in this research are opposed to the idea of a career judiciary in South Africa as that they are concerned about the impact that this will have on judicial independence. Their concern is supported by Malleson (1997) who is of the opinion that the changes could affect the principle of judicial independence far more in the long-term from within than through any outside interference (Malleson, 1997, page 655). Malleson (1997) is also concerned that the previously mentioned development in America might erode the culture of individualism, which had been a dominant characteristic of the American judiciary in the past, and which it is submitted is also a dominant characteristic of the South African judiciary at present. She also raised an important point that judges are chosen from the ranks of practitioners rather than being specifically trained as judges, which is the case in South Africa as well. Malleson (1997) also highlighted the difference between academic and professional training and qualifications, which would also be applicable to the South African context. It is therefore felt that a number of her findings and conclusions are relevant to the South African context.

As training has grown, the absence of any monitoring process for fulltime American judges has increasingly stood in contrast to other fields of business and professional life in America, where performance review is regarded as an integral feature of training (Malleson, 1997, page 655).

Malleson (1997) identified that there was a lack of methods for appraising judicial performance in America. She felt that, if appraisal existed, it could give American judges feedback on their performance. She also found that there were not any satisfactory monitoring arrangements in place, during the judge's routine work, to ensure that standards were maintained. She also observed that fulltime trial judges seldom, if ever, observed the trials conducted by their colleagues (Malleson, 1997, 655). The same can be said of South Africa and the South African judiciary, as emerged from the interviews conducted by the researcher with members of the South African judiciary.

Although, it is felt that performance appraisals of South African judges are undesirable as they will affect the independence of the judiciary. In any event, the judges interviewed, said that their colleagues do in fact informally appraise their performance. This happens when, for example their judgements are taken on Appeal and criticized as happened most recently in the Supreme Court of Appeal of National Director of Public Prosecutions vs Zuma (573/2008) [2009] ZASCA (12 January 2009) on page 8. The Supreme Court of Appeal criticized Judge Nicholson for having exceeded his judicial functions. In addition, South African judges' judgements, which form part of the Juta and Butterworths Law Reports, are subjected to ongoing scrutiny by the legal profession and form part of academic legal debate and judicial criticism in developing the law. These forms of informal peer reviews (performance appraisals) are deemed most appropriate for the judiciary, in protecting its judicial independence. Any other form of performance appraisal such as that commonly found in other fields of business and professional life in South Africa would be inappropriate and would interfere with the independence of the judiciary.

2.9.2.6 Judicial System Promotion

Malleson (1997, page 657) was also concerned about the issue of system promotion. She had observed that in America, a clear career path existed. She was, however, of the opinion that judges should be free from a career ladder, as she felt that the prospects of promotion could strongly influence an individual judge's decision and/or behaviour. Her opposition to a career ladder was also based on the reasoning that if a judge performed poorly in training or in performance appraisal, even though he or she may not be dismissed, the perception might be that he or she would not be promoted either (Malleson, 1997, page 657). The judges in South Africa share her views.

What is significant to note however, is that in South Africa there is presently a distinction between the Magistrates Courts and the Superior Courts. Presently, the magistrates are appointed by and their conditions of service fall under the control of the Executive (the Department of Justice), whereas the President appoints the Judges to the Superior Courts on the recommendation of the Judicial Service Commission and their conditions of service fall under the control of the Judiciary. However, the South African Legislature and Executive, in the draft legislation, appear to want to remove this distinction to form a unified judiciary and possibly create a career ladder between the two.

2.9.2.7 Performance Management by Culture

The South African government is questioning how management can induce judges to perform well in their professional roles, which can be answered by applying the proposal of performance management by culture to the South African judiciary. Schneider (2004) is of the opinion that performance management can be used to maintain and direct organizational culture. In his observations of the American and German judges, he found that they share work-related norms and values, they derive status from their standing within the professional community and they are susceptible to peer review (Schneider, 2004, page 19). The researcher has made similar observations and findings of the South African Judges.

Schneider (2004) has developed a model of performance management by culture as an alternative to the traditional models, which rely solely on professional ethics, or on exerting tight bureaucratic control. He said that the traditional models suggested that good performance could be secured either by tight bureaucratic control and supervision or by relying on professional ethics and morality. However, he is of the opinion that task complexity and professional autonomy implies that a Judge's job is hard to control (Schneider, 2004, page 19) and the researcher shares his view. He said that although bureaucratic control could alleviate problems associated with professional work, he nevertheless felt that professional ethics was still the only way in which good performance should be assessed (Schneider, 2004). This appears to be the common view of the judges interviewed by the researcher. Hence, it is submitted that the appropriate model for performance management of the South African Judiciary is Schneider's Performance Management by Culture model, in which he combines the elements of bureaucratic control with professional ethics and a strong organizational culture or "sense of mission" (Schneider, 2004, page 19).

The aforesaid author, made the observation that American and German judges share the same professional background, so judges needed to be seen and understood as a "professional community" (Schneider, 2004, page 19). The researcher has made a similar observation of the South African Judges interviewed herein. Schneider (2004) has argued that an organizational culture, which gains its strength from a homogeneous professional community of judges, in theory, allows for a type of performance management, which combines features of both bureaucratic control and professional ethics. However, the problem with applying this argument to the South African context is that under the previous dispensation, South African judges were appointed from the ranks of senior advocates. However, since 1994, because of transformation and the

establishment of the Judicial Service Commission, South African judges are now appointed from a much wider source pool, that is from members of the broader legal community and not only just legal professionals are being appointed to the judiciary. Despite this, it is submitted that if the professional ethics of the Bar and the Side Bar are combined to form one unified set of legal professional ethics for the entire legal community, a homogeneous professional community of judges can still exist in South Africa.

As stated above, Schneider (2004) argues that his proposed model shares certain features with the professional ethics model, in that it relies predominantly on self-management and rests on the “power of expertise” (Mintzberg, 1979, page 351 cited in Schneider, 2004, page 20). He argues that the culture would be maintained and directed by hiring members who fit into the culture. He suggests that the culture could shape the values and norms that judges hold with peer reviews and by appointing new judges with similar experience and culture. It is believed that the same principles can be applied in the South African context. Further, Schneider (2004) also felt that the use of benchmarking, although soft, could also be effective in performance management because it sharpened peer review (Schneider 2004, page 20), it is submitted that aforesaid benchmarking can also be used in South Africa.

2.9.2.8 Judicial Remuneration

In his research into the causal factors of judicial turnover of American judges, Yoon (2006) said that federal judges are guaranteed a non-decreasing salary and enjoy life-time tenure upon their appointment to the bench. To compensate for earning less than in the private sector, they receive a pension upon retirement from the bench. He said that their eligibility for a judicial pension is determined by their chronological age and years of active service (Yoon, 2006, page 1869). It would appear that the same principles apply to South African judges. Yoon (2006) also found that by contrast, political and institutional factors had little influence on turnover rates. His findings contradict much of the existing scholarship writings on judicial turnover. He also suggested that his alternatives for judicial reform were more viable.

Kominers (2008) wrote on the effects of judicial salary erosion on federal judicial resignation level. He used biographical data on federal judges and found that salary levels have a striking effect on judicial resignation levels. Kominers (2008) warned that salary erosion increases the rate

of judicial resignation and particularly increases the rate of resignation to return to private practice. From the interviews, conducted herein it would appear that the same holds true for the South African context.

2.9.2.9 Judicial Discipline

Kaufman (1980) has argued that legislation that vests independent entities, groups of judges, or private individuals with the authority to reward or punish judges based on their performance, are questionable. He said that the extent of the intrusion should be measured against the weight of the interest justifying executive action. He believed that the separation of powers framework maintained that members of the judiciary are accountable to both the law and litigants through the appellate review process, rather than through inquisitorial proceedings (Kaufman, 1980, page 671). The researcher as well as the majority of South African judges interviewed and surveyed herein, share Kaufman's arguments and opinions on this issue.

He also argued that the doctrine of separation of powers required careful constitutional scrutiny of the degree to which legislation interfered with the core judicial function of independent and impartial decision-making (Kaufman, 1980). He felt that if the Judicial Conduct and Disability Act of 1979, passed in America, gave the judge an irrelevant personal stake in the outcome of the case before him/her, the intrusion could only be counterbalanced by the weightiest governmental interests. He noted that although the constitutional text gave Congress the power to discipline its own members, the judiciary was not similarly vested with disciplinary authority (Kaufman, 1980, page 671). From the interviews conducted in this research, it would appear that the same can be said of the South African draft judiciary Bills on judicial conduct and proceedings in South Africa. One of the judges interviewed also made a very valid point: that the judiciary does not interfere with parliament nor with the executive in the disciplining or training their members, so why then should the legislature or the executive have the right to interfere with the judiciary in the disciplining or training of its members?

Kaufman (1980) felt that in essence, the American Judicial Conduct and Disability Act of 1979 forced American judges to adopt a procedure for reviewing their colleagues' actions other than that which had been established in the Constitution. It is submitted that, from the interviews conducted with the judges in this research, the same can be said of the South African draft judiciary Bills on

judicial conduct and proceedings in South Africa. Kaufman (1980) also argues that the Act transgressed the doctrine of separation of powers unless it was narrowly drawn to further weighty and legitimate countervailing interests (Kaufman, 1980, page 671). This situation is equally applicable to the South African context.

The aforementioned author was critical of legislative intervention (Kaufman, 1980). He argued that judicial disability is rare and that the extraordinary danger of the erosion of impartiality, which is the essence of the judicial role, outweighed the flimsy justification for the legislation. He was also concerned that judicial discipline would invite dissatisfied litigants to harass judges who rule against them. Hence, his concern that a Judge under investigation would be more likely to avoid rendering any potentially controversial decision while the complaint is pending. Kaufman (1980) felt that under such a regime, cases would inevitably arise in which even the most dispassionate judge, knowing that the litigants or his colleagues could “punish” him/her, would be unable to preserve an unwavering focus on the applicable facts and legal principles. He made the point that a nation could not afford the possibility that fears of the personal consequences of an “unpopular decision could take the upper hand and irreparably chill fearless and impartial adjudication” (Kaufman, 1980, page 671)

Kaufman (1980) felt that a disciplinary system, which allowed interested parties to strike out at judges, was too great an interference with judicial impartiality to be tolerated under the doctrine of separation of powers. He argued that just as legislators must be free to consider and enact legislation and the executive branch must be free to execute the laws, so too must each judge be free to adjudicate fairly and without fear of reprisal. He accordingly argued that, statutes like the Judicial Conduct and Disability Act that disturb a judge’s impartiality must, in the absence of a demonstrated necessity, be deemed an unconstitutional infringement upon judicial independence (Kaufman, 1980, page 671).

He therefore argued that due to the unique position of the judiciary as the principal guardian of the rights conferred by the Constitution, encroachments upon its protected sphere must be weighted with acute sensitivity (Kaufman, 1980). The researcher would go even further and argue that the encroachments are never justified and should not be allowed to take place. South African society must also remain true to the framers of the 1996 Constitution’s plan for government to be bound at all levels by the rule of law. They must also vehemently resist even well intentioned legislation, which could limit the capacity of the South African judge to render impartial justice. Hence,

Kaufman's statement that "judicial independence is not merely a cliché but that justice needs be rendered without fear or bias, and free of prejudice" (Kaufman, 1980, page 671), is an important statement worth taking note of and one which is shared by the majority of the judges interviewed by the researcher.

2.9.2.9.1 Judicial Code of Conduct

Seedat (2005), who is in favour of a formalised code of conduct with stated disciplinary procedure, believes that the benefits of such a document were numerous. She argues that once the judiciary has a set standard of conduct, public trust in the institution will improve or be maintained (Seedat, 2005, page 6). She is of the opinion that codified standards compel judges to behave in a disciplined way and to deal with a particular topic in a conscious manner. She argues that the public should be aware of the type of conduct, which can be expected from a judge and what is regarded as acceptable. It is submitted, both by the researcher as well as by some of the judges interviewed that the Advocates and Attorneys Professional Code of Ethics sufficiently codifies what is required of an officer of the court, namely to be a "fit and proper person", in terms of the Admission of Advocates Act No.74 of 1964 and in terms of the Attorneys Act No. 53 of 1979.

She said that a further advantage of having a formal code is that it can set specific sanctions for failing to comply (Seedat, 2005). She nevertheless concedes that, despite these advantages, critics have argued that instituting rules of conduct, as opposed to allowing judicial conduct to be governed by convention and common sense, would afford opponents of the judiciary new weapons with which to attack the independence of its members (Seedat, 2005, page 6). She nevertheless conceded that the Chief Justice had introduced an informal code of conduct for judges in 2000, but that they are simply guidelines and do not have any legal effect. However, what she fails to clarify and remains silent on is why the Department of Justice rejected the judiciary's informal code and what the Department of Justice's justifications were for the rejection thereof and the imposition of its own version on the judiciary through legislation.

The abovementioned author stated that in terms of the draft Bill the Judicial Conduct and Ethics Committee is responsible for compiling a Code of Conduct on Judicial Ethics and to advise judges on ethical issues, which if breached could be met with disciplinary procedures (Seedat, 2005). The Judicial Conduct and Ethics Committee will comprise:

- the Chief Justice,
- the Deputy Chief Justice,
- the President of the Supreme Court of Appeal,
- two people not ordinarily involved in the administration of justice appointed by the President,
- three judges including one woman, and
- two members of the Judicial Service Commission belonging to the legal profession or academia (Seedat, 2005, page 6).

Seedat's (2005) concern with the extent to which non-judicial or legal people and the public would have a say in the code of conduct is a legitimate concern and it is believed to be an unnecessary interference with the independence of judicial personnel. It is also felt that the judiciary would find this composition unacceptable as it would expose them to external political interference. Furthermore, from the research conducted herein, it is submitted that the judiciary already feels that the Judicial Service Commission is too politicised and they would probably feel the same way about the Judicial Conduct and Ethics Committee.

2.9.2.9.2 Conflict of Interests

"A conflict of interest arises when the private interest of a judge clashes or coincides with public interest" (Seedat, 2005, page 5). Seedat (2005) felt that such a conflict raises an ethical dilemma when the private interest is sufficient to influence or appear to influence the performance of the judge's official duties. She also felt that the current "honour-based" (Seedat, 2005, page 5) system required the individual judge to confidentially report to the Minister of Justice any potential conflicts of interest. However, without regular and public disclosure, the critics had argued that it is difficult, if not impossible, to determine whether the court's decisions are divorced from personal considerations (Seedat, 2005, page 5). Seedat (2005) argues that it is for this very reason that the executive has proposed a Judicial Code of Conduct and a Register of Financial Interests in the draft Judicial Service Commission Amendment Bill.

2.8.2.9.3 Register of Financial Interests

Another important feature of the Judicial Services Conduct Amendment Bill is the provision for the establishment of a register of judges' financial interests (Seedat, 2005, page 6). Seedat (2005) also said that the Minister of Justice would determine the actual details of the register of financial interests and the details will be enacted through regulations at a later stage. Once the Register is established, the Judicial Service Commission would be charged with maintaining it. It is submitted that this register would result in unnecessary political interference from both the executive and the judicial service commission. The details of the register of financial interests should be determined and controlled solely by the judiciary or through the office of the Chief Justice.

Seedat (2005) however, does concede that although there is general consensus in many countries, about the need for a register of financial interests, to safeguard the public interest through increased judicial accountability, a number of concerns have been raised about the details of the proposed system. For instance, what type of information should be disclosed and what should remain confidential? She said that this is also important when considering a judge's right to privacy, career and physical safety. Seedat (2005) also posed the question whether it would be necessary for judges to disclose all their assets, particularly if they were disqualified from involvement in a case. A number of other questions also need to be asked, such as "to whom would they be required to disclose to? Should the interests of their partners or spouses be disclosed? How frequently should they be required to disclose and what sanctions should be imposed if they failed to comply? (Seedat, 2005, page 7)

One opinion is that a parallel should be drawn with the executive and the legislature and that they should be asked similar questions, especially in light of the Travel gate and Arms Deal scandals. Do such registers of interests exist for the executive and for parliament? If so, who controls them? To whom are such disclosures made by members of the executive and parliament? Are their spouses or partners also required to make such disclosures and how frequently do these disclosures need to be made?

2.9.2.9.4 A Formal Complaints System

Chaskalson J (2006) also spoke on the proposed complaints system. He confirmed that the process had begun in 1996, when the judges serving on the Judicial Service Commission during the time of the Minister of Justice Omar, had initiated it. He said that even though, at the time none of the judges considered a formal system to be necessary, they had asked for a formal complaint system to be established, as they foresaw that it might become necessary in the future. The Department of Justice then prepared a draft for the Judicial Service Commission's consideration, and for consultation with the judiciary. The judiciary subsequently adopted its own informal Code of Ethics (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 31).

In support of the draft Judicial Services Commission Amendment Bill and the Judicial Conduct Tribunal Bill, Seedat (2005) argues that the Judicial Service Commission, through its bodies, is responsible, in terms of Section 177 of the Constitution of South Africa of 1996, for overseeing potential disciplinary action with regard to judges' behaviour. It is therefore appropriate for the aforesaid Bills to establish a formal complaints and disciplinary mechanism for judicial officers, through a sub-committee of the Judicial Service Commission (Seedat, 2005, page 7). Seedat (2005) also argues that the justification for the judicial conduct Bills lies in Section 180 of the Constitution, which grants Parliament the authority to adopt legislation to deal with complaints against judicial officers (Seedat, 2005, page 7). This Section also defends the Department of Justice by saying that draft legislation to address judicial accountability began to develop in 2000, long before the Cape High Court incident with Judge Hlope arose (Seedat, 2005, page 7).

Chaskalson J (2006) says that a draft complaint system was formulated by consensus within the judiciary, in which it was decided that the making of complaints and the exercise of disciplinary powers would be administered by the judges. He said that this situation is found in almost all comparable jurisdictions, although he conceded that some had provisions for lay representatives to be included on disciplinary panels in which judges were in the majority. He said that the draft document was submitted to the Judicial Service Commission in April 2000, where it was approved and the Department of Justice then drafted a Bill based thereon. However, the Portfolio Committee delayed the draft Bill in 2000, where it remained until the end of 2004 (beginning of 2005) when a new Bill emerged from the Portfolio Committee. This new Bill made provision for a very different complaint system from that which had been agreed to by the judiciary. Chaskalson J (2006) said

that the new Bill contained a number of controversial provisions, one of which was that a Committee consisting of judges and non-judges would adopt an ethical code for judges, which would be approved by Parliament. He said that there was also number of other objections dealing with the details of the complaints system (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 31).

Seedat (2005) in support of the draft Judicial Services Commission Amendment Bill and the Judicial Conduct Tribunal Bill, also argues that the Constitution has been the primary means of sanctioning judges for improper behaviour through the impeachment process, although no judge has been removed in this manner since 1897 (Seedat, 2005, page 7). According to Seedat (2005) apart from the drastic sanction of removal, there are no lesser means of discipline available. The researcher as well as the judges interviewed in this research, disagrees with her. Their view is that there is an informal internal judicial disciplinary process which has been implemented by the heads of court and through senior judges (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 31), which Seedat (2005) does not seem to be aware of.

She presented arguments both in favour of and against the aforesaid Bills. She says that, those who are in favour of the Bills have argued that the judiciary must become more accountable because judges are constitutionally empowered to overturn decisions of elected representatives (Seedat, 2005, page 7). Those in favour argue that the establishment of clear standards of conduct will assert this for the judges, that a disciplinary procedure will deter corruption and conflicts of interest. The Bills will also bolster the dignity of the courts and judges in the eyes of the public (Seedat, 2005, page 8). It can be argued that this argument shows very little respect for and trust in the judiciary. The criticisms, which are being levied against the Bills, are justified. Critics are primarily concerned because the proposed provisions will intrude on the individual judicial independence of judicial personnel and their impartiality, especially in terms of the threat of disciplinary action which will give government, politicians, or disgruntled litigants an opportunity to influence judicial decisions (Seedat, 2005, page 7). The researcher, as well as the majority of the judges, who were interviewed for this research, shares this criticism.

Another criticism of the aforesaid Bills is that the critics claim that existing features of the South African judiciary are sufficient to ensure judicial accountability. This is achieved through for example, “the requirement for open hearings and reasoned judgments ensure the proper discharge

of judicial discretion; appellate reviews provide a forum for correcting erroneous decisions; rigorous appointment procedures ensure judges are “without fear or favour”. The principle of recusal prevents a judge from hearing a matter in which he or she held a particular interest (Seedat, 2005, page 7). The researcher agrees with their views as do the majority of the judges surveyed and interviewed in this research. It is therefore submitted that the proposed legislative amendments are an unnecessary encroachment by the executive and legislature into the independence of the judiciary.

With regard to a formalised disciplinary procedure, the previously mentioned Bills propose a complaints procedure and a set of institutions for reviewing such complaints. There are five categories of conduct proposed by the Bills, which could be subject to potential disciplinary action, namely,

- “(a) Incapacity, gross incompetence, or gross misconduct;
- (b) a wilful or grossly negligent breach of the Code of Conduct on Judicial Ethics or of the regulations pertaining to a financial register for judge’s interests;
- (c) accepting, holding or performing any office of profit or receiving fees;
- (d) wilfully or negligently failing to comply with remedial steps given to correct improper judicial conduct; or
- (e) any wilful or grossly negligent conduct that is prejudicial to independence and impartiality of the judiciary in its dignity and efficiency” (Seedat, 2005, page 8).

Seedat (2005), in defence of the Bills says that the Bills specifically prohibit disciplinary bodies from entertaining complaints that “relate solely to the merits of a judgement, or are frivolous or hypothetical,” (Seedat, 2005, page 8) to preclude attempts to interfere with judicial independence. The researcher disagrees with her and submits that the aforesaid prohibition is an insufficient safeguard in itself. Seedat (2005) also argued that the Bills ensure against the use of the disciplinary procedures as a means for undermining either the sound application of legal principles or the proper use of judicial discretion. She argues that this is achieved through prohibiting the investigation of frivolous complaints assailing the merits of a judgement; and by using a subcommittee of the Judicial Service Commission to hear the complaints made against judges (Seedat, 2005, page 8). However, the researcher and the judges interviewed disagree with her. They are of the opinion that their (judges’) peers should discipline them and not a sub-committee of an already politicised judicial service commission, wherein the judges could also become the minority of the sub-committee tribunal members. However, they believe that they should be

allowed to have their own internal disciplinary mechanism. Some of them have suggested that it should be similar to that which exists for the advocates and the attorneys in the legal profession. The judges, in their interviews with the researcher, also suggested an alternative to the disciplinary procedure proposed in the Bills, that the judiciary should have its own disciplinary panel, established within the judiciary, managed by the Chief Justice, the Heads of Court and senior judges.

In terms of the Bills, the subcommittee will comprise the Deputy Chief Justice and three judges, one of whom will be a woman, designated by the Chief Justice in consultation with the Minister (Seedat, 2005, page 8). It is submitted that there no logical and reasonable justification for the Chief Justice consulting with the Minister and this seems simply to be another unnecessary interference with the independence of the judiciary. Seedat (2005) says that the subcommittee itself will investigate non-impeachable complaints, convene a hearing and recommend disciplinary steps to the Judicial Service Commission. Appropriate steps could include an apology, a reprimand, a written warning, appropriate counselling, attendance of a specific training course, or any other corrective measures (Seedat, 2005, page 8). However, it is submitted that the subcommittee is an unnecessary political interference with the judiciary and that the previous informal practice in the judiciary, whereby the heads of courts and senior judges investigated non-impeachable complaints, convened hearings and imposed appropriate sanctions is preferable and would ensure the independence of the judiciary and its impartiality.

In terms of the proposed Bills, if the complaint relates to an impeachable offence, the judicial service subcommittee is obliged to request the Judicial Service Commission to appoint a Tribunal to investigate the matter (Seedat, 2005, page 8). The researcher feels that this process should be used as the last resort, after the Judiciary has made its finding, in terms of its informal internal disciplinary proceedings, and only if the complaint is serious enough to warrant the sanction of impeachment, as envisaged in terms of Section 177 of the Constitution of South Africa, 1996. The aforesaid Tribunal, in terms of the proposed Bill, will comprise two judges and one non-judicial person. One member must be a woman and the Chief Justice, in consultation with the Minister of Justice will appoint a non-judicial officer. It is respectfully submitted that once again there is no reasonable explanation given for the Chief Justice to make the appointment in consultation with the Minister of Justice and simply seems to be yet another unnecessary interference by the executive with the independence of the judiciary.

Seedat (2005) reaffirmed the general understanding that judges are not accountable to government or popular opinion but to Constitutional principles and certain standards of ethical behaviour. She nevertheless argued that insofar as the Bills were designed to regulate conduct that fell below the standards through investigative and disciplinary procedures, they should not be regarded as threats to judicial independence. However, the researcher disagrees with her and instead poses the following question: “Why should the judiciary to be treated differently from the rest of South Africa, with regard to misconduct and incapacity dismissals?” It is submitted that the parallel standards of fairness as found in Section 188, and the relevant code of good practice, of the Labour Relations Act of 1995, should apply to judges who have been charged with misconduct or poor work performance even though judges are technically not employees. It is submitted that if they are to be subjected to discipline, then surely the same standards must apply.

Nevertheless, Seedat (2005) has acknowledged that there are two additional issues, which need to be considered to protect judicial independence. Firstly, that a clear set of standards of conduct be established and that the definition of “conduct that is prejudicial to independence and impartiality of the judiciary” (Seedat, 2005, page 8), be elaborated upon by the Judicial Service Commission so that clear guidelines are provided for judicial behaviour. However, the researcher disagrees with her and submits that this is once again an unnecessary infringement by the executive and the legislature on judicial independence and judicial impartiality. It is more appropriate for the judiciary, and possibly the legal fraternity, to determine what conduct is prejudicial to the independence and impartiality of the judiciary.

The researcher agrees with Seedat (2005) in her comment that a judge’s accountability cannot extend to them having to account to another institution for their judgments nor should their privacy or dignity be violated in the process. Additionally, the procedural aspects of the investigations and the disciplinary proceedings should be designed to address the complaint practically and effectively, whilst at the same time protecting the dignity and privacy rights of the judge (Seedat, 2005, page 8).

Seedat (2005) said that although the Bills made provision for hearings to be held in private, with only the judge, complainants and their legal representatives present, by vesting the authority in the hands of the Judicial Service Commission to investigate and hold hearings, through its subcommittee and tribunals, the provisions contained in the Bills were a departure from past practice. Seedat (2005) was concerned that it might be argued that, by entrusting the investigative

and disciplinary proceedings to bodies consisting primarily of other judges, the Bills do not sufficiently promote accountability. Some were concerned that, by having judges rule on the conduct of other judges, there would be insufficient scrutiny. In opposition thereto, others argued that only a judge has the skills and knowledge to adjudicate cases of discipline. Seedat (2005) conceded that the judiciary had proposed that a Judicial Council of five judges be established to assess complaints regarding their own members. The researcher submits that the judiciary's proposal is the more plausible option. In addition, Seedat (2005) concedes that some argue that the possible inclusion of members of the legislature or executive on the Tribunal (or committee) and their role in the appointment process, is an interference with the separation of powers principle and the independence of the judiciary (Seedat, 2005, page 8). The researcher and the majority of the judges surveyed and interviewed in the research agree with this argument of interference.

2.9.3 Interference with Court Administration

Court administration encompasses the management of courts and the judges' work. Judges and courts provide a public service and there should be some public accountability for how well that service is provided and how public funds are spent. There are at least three aspects of court administration related to court proceedings which Russell (2001) says must be under the control of the judiciary, namely "the assignment of judges to cases and courtrooms, the sittings of courts, court lists and court budgeting" (Russell, 2001, page 20).

Biden (1994) examined how the American Civil Justice Reform Act of 1990 had attempted to address perceived problems of excessive cost, congestion, and delay in the federal courts as he was of the opinion that legislative involvement is necessary for judicial reform to take place and for the various procedural rules, methods and techniques to be effective. However, he found that efficiency is not the only value, which the judiciary must serve, but also the court principles (Biden, 1994, page 1825).

Resnick (1982) is also sceptical of the notion that judicial management increases productivity and reduces costs. She consequently explored the side-effects of managerial judging on the nature of adjudication as she was of the opinion that it is unwise to elevate speed over deliberation, impartiality and fairness (Resnick, 1982, page 374). She is also opposed to the idea of transforming a judge from adjudicator to manager, as she felt that it substantially expanded the

opportunities for American judges to use or abuse their power. She warned that judicial management could become a fertile ground for the growth of bias.

Owen (1983) is also of the opinion that the judge's legal and managerial duties should be separated because he believes that public criticism strengthens judicial accountability. He argues that American judges remain responsible for both their legal and their managerial judgments, but once separated, each type of judgment will stand on its own. He said that each would have to meet separate and distinct criteria. However, an important point to bear in mind when applying these principles to the South African context is that the judges in South Africa are appointed (Carpenter, 1987, page 257), whereas American judges are elected, so it is submitted that Resnick and Owen's arguments may not be applicable to the South African context. However, some South African judges were in agreement with separating their legal and managerial functions so that they could focus their energies on adjudicating cases.

2.9.3.1 The Division of 'Judicial' and 'Administrative' Functions

Albertyn (2006) has expressed concern about the proposed constitutional amendment of Section 165 (6) of the Constitution of South Africa 1996, which seeks to separate the judicial function from the administration of justice. This will mean that the judicial function will remain with the judiciary, but that the administration of the courts will be the responsibility of the Department of Justice. The executive's justification therefore is to maintain and entrench the commonwealth model of the separation of powers between the executive and judiciary. The former Chief Justice Chaskalson (2006, page 18) found this reasoning rather strange, especially in light of the fact that the present South African Constitution is not based on the commonwealth model. The researcher submits that it is inappropriate to adopt a commonwealth model in South Africa, where the Constitution and not the Legislature is supreme.

In addition, Craig (2004) is of the opinion that the English common law model is defective. Because of parliamentary sovereignty in England, there is no real separation of powers between the three organs of state. (Craig, 2004, page 237). Also Albertyn (2006) states that in practice, the Commonwealth countries have different models of managing the courts but that in general, the contemporary trend appears to be for less, rather than more, executive control over the administration of courts (Albertyn, 2006, page 132). It is therefore felt that the correct model for South Africa would be for the executive to have less control over the administration of courts.

Albertyn (2006) says that the proposed amendments to entrench a constitutional distinction between the role of the Chief Justice (with regards to the judiciary) and the Minister of Justice (with regards to the administration of justice), has attracted strong criticism as it will affect the independence of the judiciary and the doctrine of the separation of powers. She is concerned that the independence of the judiciary might be under threat unless a clear line of distinction is drawn between the adjudicative and administrative functions in the administration of justice and unless the executive exercises authority over the administration of the courts and their finances. She argues that comparative systems show a variety of practices, but that the developing trend is towards an 'arm's length' relationship with government. She acknowledges the role that the Department of Justice has played in the past administration of courts in South Africa, but she argues that this practice has started to change with the new dispensation. The Constitutional Court has a greater degree of autonomy over its administration and its budget and this, in her opinion; this should be extended to the other Superior Courts. (Albertyn, 2006, page 132). The researcher, as well as the majority of judges interviewed in this research, shares her view.

She is assessed to be correct in her opposition to the executive controlling the administration of the courts, in particular with regard to the administrative functions (Albertyn, 2006). She says these issues are bound up with the adjudicative function, over which she says the judiciary should exercise control. These functions include the office of the registrar, the libraries, the court officials, translators, and so on because government is a party to so many of the cases. The researcher also agrees with her that the amendments seek to claw back the partial autonomy, which the Constitutional Court had gained in relation to its administration and finances through the Constitutional Court Complementary Act 13 of 1995 (Albertyn, 2006, page 132). Albertyn (2006) feels that the central problem with the amendment is that it does not recognize either the evolving model of judicial independence (which envisaged at least partial, if not full, judicial autonomy) in line with the South African Constitution, or the international trends. The international trends are moving away from a system of close executive control over judicial finances and judicial administration.

Albertyn (2006) therefore believes that a constitutional amendment which confers authority on the Minister alone for 'the administration and budget of all courts', without qualification, is a regressive and an unconstitutional move. It retards and erodes the substance of the constitutionally approved concepts of judicial independence and separation of powers and that; it is by small strokes that the line, which separates the powers, is being redrawn. Subtly, yet fundamentally, this

is threatening South African judicial independence (Albertyn, 2006, page 132). The researcher, as well as the majority of judges interviewed in this research, shares her views.

2.9.3.2 Court Budgeting

The researcher also agrees with Carpenter (1987) that inadequate funding of the Judiciary poses a potentially grave threat to the independence of the judiciary and to the private law rights of individual citizens. However, the researcher concedes that constitutional power on spending lies with the legislature and the veto power with the executive. The concern is the impact of spending power and financial support on the independence of the judiciary. Carpenter (1987) warns that dependence on the legislature for the means of operation, could threaten the independence of the courts, the inherent power of the judiciary and overall judicial power.

Mabandla, (2006) also acknowledged the above threats, albeit indirectly. She confirmed that it is necessary for the Department of Justice to consult with the judiciary on matters affecting the proper functioning of each court. She concedes that, although the court manager of the South African Constitutional Court is an employee of the Department of Justice, he or she nevertheless plays a vital role in the preparation of the budget and in assisting the Chief Justice to ensure that the Department of Justice properly considers the needs of the Constitutional Court. He or she also assists the Director General in accounting for the Constitutional Court's expenditure. Mabandla, (2006) argues in justification thereof that the previously mentioned management approach is practical and contributes to the department's ability to properly manage government's resources and states that this approach has been extended, as the department of justice engages with the various different court managers and consults with the judicial officers in each court, when their budgets were prepared. The researcher disagrees with her and submits that the Department of Justice does not manage all of government's resources. The researcher is of the opinion that the judiciary should have control over its own financial management and budgetary independence, to strengthen its independence.

Chaskalson J (2006) said that Sections 7 and 8 of the draft Superior Courts Bill 52 of 2003, which was introduced into Parliament in August 2003, dealt with the appointment of staff and the budget process in exactly the same way as the previous Bill had done. He says that at that stage, the drafters still contemplated that the courts would have a material part to play in staff appointments

and in the budgetary process. However, with the subsequent changes to these Sections, it would appear that this is no longer the sentiment, especially in light of the executive's subsequent proposed changes (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 24).

Seedat (2005, page 12) says that Clause 8 of the Bill, which deals with finances and accountability, will give the Minister of Justice the power to allocate the courts budgets, subject to the Public Finance Management Act. This is an unnecessary interference with the judiciary and it is felt that the powers should be given directly to the judiciary. Further, Seedat (2005, page 12) says that the Department of Justice's argument for placing the administration of the courts under the Department of Justice is to provide judges with more time to perform their core work, and that, in any event, the budget is currently administered by the department. It can be said that this is not a valid justification and is simply a clever disguise to hide the executive's intent to control the judiciary through its finances and resources. The researcher agrees with Seedat's (2005) suggestion that in the consultations between the judiciary and the Department of Justice, on the proposed Judicial Bills, the practical, political and legal implications of judicial administration should be considered carefully. Although she concedes that budgetary independence is ideal, Seedat (2005) admits that in other countries, there is no uniform practice. The researcher submits that it is essential for judicial independence that the judiciary controls its own budget.

She argues that the recent international trend has moved away from executive having control over the judiciary's budget and the administration of the courts (Seedat, 2005). She says that this trend demonstrates a growing concern that executive power over the budget and administration of the courts, especially when coupled with executive control over appointments, promotions and discipline, could allow room for inappropriate influence by the executive. She says that those judicial leaders in several of the Commonwealth countries, such as Britain and Canada, also assert that administrative policy and budgetary functions should belong to the judiciary rather than to the executive.

Chaskalson J (2006) made the same observation that some of the most respected and largest courts in the Commonwealth countries are vested with substantial powers to control their own administration (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 26). In support thereof, he referred to comparative legislation in Australia, dealing with the Federal Court of Australia. In this case, the Federal Court

is responsible for the management, the administrative affairs of the court and is empowered to do all that is necessary or convenient, such as enter into contracts, and acquire or dispose of personal property. The Governor-General appoints the Court Registrar on the nomination of the Chief Justice (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 26).

He also referred to Section 22 of the Canadian Court Administration Services Act of 2002 (Chaskalson J, 2006). In terms of this Act, the Court Administration Service was established to enhance judicial independence by placing administrative services at arms length from the Government of Canada, and by affirming the roles of the Chief Justice and Judges in the management of the courts. He said that the detailed provisions enables the heads of the courts to give instructions to court staff and places an obligation upon the court staff to carry out those instructions. He also referred to the website of the Supreme Court of Canada, where it states that the Registrar and the Deputy-Registrar take their instructions from the Chief Justice and are directly responsible to the Chief Justice (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 26). In South Africa, these bodies fall under the authority of the Minister of Justice. Chaskalson J (2006) also referred to Section 125.4 of the Ghana Constitution, which provides that the Chief Justice, subject to the Constitution, is the head of the judiciary and is responsible for the administration and supervision of the judiciary. He also referred to the Pakistan Supreme Court which, with the approval of the President, makes rules for the appointment of its staff and determines their terms and conditions of service. Chaskalson J (2006) argued that such rules empower the Chief Justice to exercise the same power in respect of officers and servants of the court, as the President exercises on central government employees.

In addition, he made reference to the Indian Constitution, which provides for the appointment of officers of staff and their conditions of service to be under the control of the Chief Justice (Chaskalson J, 2006). He said that even in the Ugandan Constitution, the judiciary is self-accounting and deals directly with the Ministry responsible for finance in relation to its finances (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 27).

This is in stark contrast with what is happening in South Africa, where the opposite is proposed. Under the proposed amendments, the administration of the courts and their finances would fall under the Executive, namely the Minister of Justice. Also, Seedat (2005) says that Spain, Italy and France have gone even further to create independent judicial structures to take over the management functions of the judicial system from government, so as to reinforce the separation of powers (Seedat, 2005, page 12). It is believed that South Africa should create a similar independent judicial structure to take over the management functions of the South African judiciary or at least transfer the administrative oversight to either judicial councils or the highest courts (Seedat, 2005, page 13). In such an instance, it would be appropriate for the management of the judiciary to fall under the Office of the Chief Justice, created specifically to deal with these aspects.

As Seedat (2005) points out, an important consequence of executive control over judicial administration is that, if the department of justice takes final decisions about budget allocation and administration, judges will have less capacity to make decisions about expenditure priorities and needs. This could be counter-productive (Seedat, 2005, page 13) and is therefore a compelling argument for the complete independence of judicial administration in South Africa. She nevertheless feels that the imperatives of rationalization, transformation and the role that the executive in these processes needs to be recognized and evaluated. However, the researcher submits that drafters must also be mindful not to sacrifice the South African Constitution and its nation for the sake of rationalization and transformation.

Provine and Seron (1991, page 319) raised an interesting question on whether judicial services should be privatised, as a result of the changes in the organization and delivery of public services, such as the court system, which had been brought about, through, inter alia, a lack of resources and the use of private modes of dispute resolution and had resulted in a movement in America towards less visible and accountable modes of court disposition (Provine and Seron, 1991, page 319). It is submitted that privatisation of the South African judiciary is impractical and would in any event it would be unconstitutional as the judiciary is the third arm of government. South Africa should rather create a similar independent judicial structure to take over the management functions of the South African judiciary, as is found in the Commonwealth countries such as Australia, Canada, Ghana, Pakistan and Uganda. Alternatively, the administrative oversight could be transferred to either judicial councils or the highest courts, as has happened in most Latin American countries

(Seedat, 2005, page 13). The Office of the Chief Justice could be created to deal specifically with management of the judiciary.

Albertyn (2006) acknowledges that there are problems within the judiciary and with the administration of justice. She nevertheless felt that both the executive and the judiciary are to blame. She argues that, in some instances, the executive is at fault whilst in other instances, the judiciary is responsible. She also felt that the solution did not lie in transferring power to the executive, but rather that the executive and the legislature should ensure that, the judiciary had the capacity and the resources to ensure that it functioned efficiently, for example, with its rule making power. The researcher supports her view that the solution is to build democratic institutions, not to limit them (Albertyn, 2006, page 141).

2.9.3.3 Court Rule-Making Power

Seedat (2005) said that the judges had emphasized that Section 173 of the Constitution gave the judiciary the inherent power to “protect and regulate their own process”. Judges have argued that their rule-making powers will be curtailed by proposed amendments in the Superior Courts Bill, and that they argue that executive and/or legislature should not have a role in making rules for the courts. She said that the Department of Justice, on the other hand, argued that there was a constitutional provision that rules should be articulated in national legislation (Seedat, 2005, page 13). Seedat (2005) however, conceded that the precise changes envisaged by the Department of Justice in this regard seemed to be unclear. However, she is of the opinion, that rule-making should remain within the sphere of the courts, as judges are best suited to make such rules. The researcher as well as the judges interviewed in this research agrees with her on this point and with her argument that, to have confidence in the judiciary as an institution, judges must feel they are in control of the processes regulating their courts.

Chaskalson J (2006) also emphasized that it is important to note that the drafters had placed the making of rules for the Constitutional Court in the hands of the heads of the Constitutional Court and the Supreme Court of Appeal. This would ensure that the Legislature and the Executive, whose legislation and conduct would be subject to constitutional review, would not have any control over the way in which the Constitutional Court functioned. He said that it remains an important consideration, because the Legislature and the Executive are likely to be involved in

most of the cases that come before the Constitutional Court and, in many of the cases, which come before the Superior Courts. He argued that it is essential, in a constitutional state, that the Executive have no control over the way in which the court functions (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 27).

He said that the drafters of the Interim Constitution had provided for the functioning of the Constitutional Court as a new court because no legislation had existed prior to then which dealt with it (Chaskalson J, 2006). He also pointed out the anomaly, which exists between the Rules Board for Courts of Law Act, which applies to existing Courts but not to the Constitutional Court (as is has not been placed under the Rules Board). Instead, the Constitutional Court's proceedings are regulated by rules prescribed by the President of the Constitutional Court in consultation with the Chief Justice (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 20).

Chaskalson J (2006) said that it was also important that the provisions of the Interim Constitution dealing with the functioning of the Constitutional Court, which later was supplemented in the Constitutional Court Complementary Act, retained most of the provisions that enhanced the power of the Constitutional Court. He said that Sections 14 and 15 are particularly significant as they gave the Constitutional Court an important say in the appointment of its staff, and in matters relevant to the budgetary process (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 20). It is proposed that the same approach to rule making adopted in the Constitutional Court should apply to the superior courts in South Africa. Chaskalson J (2006) acknowledged however, those budgets were adopted by Parliament, and that all bodies, which derive their funding from the state, are bound by its decisions.

In addition, he noted that the 1996 Constitution, which replaced the Interim Constitution, contained two general provisions concerning the regulation and practice of courts (Chaskalson J, 2006). The first provision is a general provision, to the effect that Superior Courts have the inherent power to regulate their own practice and procedure. The second provision is a specific provision, to the effect that all courts function in terms of national legislation and that their rules and procedures must be provided for in terms of the national legislation. Chaskalson J (2006) said that the national legislation is subject to constitutional scrutiny and as such, it has to be consistent with the Constitution as was stated in the case of S versus Van Rooyen 2002 (5) SA 246 (CC)

paragraph 75. Nevertheless, he was concerned that although the rules of the Constitutional Court had been kept in place, there were no specific provisions in the Constitution for the making of new rules for the Constitutional Court (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 21).

Chaskalson J (2006) pointed out that the previous Minister of Justice Omar's Bill had provided for the rules of the Constitutional Court to continue to be made by the President of the Supreme Court of Appeal and the Chief Justice. In terms of Section 173 of the Constitution, rules of the other superior courts are made in accordance with the Rules Board of Courts of Law Act no. 107 of 1985. He said that Act had set up a Rules Board. The majority of the eight members of the Board are from the legal profession. It would be chaired by a judge, and would consist of judicial officers, legal practitioners and academics), one representative from the Department of Justice, and not more than three other persons appointed by the Minister. The power to make the rules is vested in the Board, and is subject to the approval of the Minister of Justice. He says that all the Minister of Justice is allowed to do at present is to comment and withhold approval to the rules to which she or he objects but that she or he did not have the power make any rules. Chaskalson J (2006) said that wanted to change this provision. The Executive wants to take the rule making power away from the judiciary and the legal profession and to put it in the hands of the Minister of Justice (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 28).

He felt that the Constitutional Court Complementary Act had created a special position for the Constitutional Court (Chaskalson J, 2006). He said that under the previous draft bills prepared by the previous Ministers of Justice, Maduna and Omar, the head of the Constitutional Court had the same powers with regard to the making of rules as it had enjoyed under the interim Constitution and in terms of the Constitutional Court Complementary Act. He emphasised that in the previous draft of the Superior Courts Bill prepared by the previous Minister of Justice Maduna, the Supreme Court of Appeal had also been given the power to make its own rules. Although, he felt that it was appropriate that the Rules Board continued making the High Court rules. He said this was logical because there needed to be uniformity, and one particular court could not be empowered to make rules for all of them (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 29).

The former Chief Justice said that he had tried to find out what the practice in the other Commonwealth countries was and that he had established that the overwhelming practice seemed to be that the rules were made either by the courts or by a Rules Committee, which consisted largely of judges and practitioners. He did however; concede that in some instances, rules were made with the concurrence of the Executive. Nevertheless, he said that the model in the Rules Board for Courts of Law Act was very similar to the English model. In the English model, a Rules Committee consisting almost entirely of judges and members of the legal profession make the rules, which are approved by the Lord Chancellor (Chaskalson J, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 29). As previously stated, the commonwealth model is inappropriate for South Africa and it is felt that the rules for the superior courts in South Africa should be made in the same way as they are made for the Constitutional Court of South Africa.

2.9.4 Direct Interference

Direct interference is for example, attempts at bribery or threats to personal safety of the judge or the judge's family (Russell, 2001, page 21).

2.10 Judicial Criticism

Seedat (2005) has criticized the public debate that has occurred in South Africa. She feels that it has not been very constructive in creating a change in the way that justice is dispensed and the way in which citizens experience justice. She accuses the ruling party, the opposition and the judiciary of being reckless in dealing with this issue. She believes that the debate is more complex than simplistic assertions that the judiciary is being completely undermined or that the country needs more black judges (Seedat, 2005, page 14). She further argues that it is the carelessness of words on the part of politicians and law practitioners, and not the act of transformation itself, which threatens to undermine the confidence that ordinary citizens have in the judiciary and the system as a whole. She warns that while there should be open and truthful conversation, the cause of transformation will not be assisted by accusations and counter-accusations in the media by lawyers and judges or politicians (Seedat, 2005, page 14).

She argues that the judiciary in South Africa has an essential role to play in defining and promoting human rights and good governance. In order to exercise their review function over the other divisions of government effectively, the judiciary must be able to act independently (Seedat, 2005, page 14). She warns that it is crucial that whatever mechanisms are proposed, they must be implemented transparently and examined carefully to see that they do not intrude upon the judicial independence. She said that the legislative process was still underway and that that it was important that the various concerns raised in the Bills are addressed by parliament in a thorough and open manner. She argues that this critical principle is provided for in Section 165 of the Constitution of South Africa (Seedat, 2005, page 14). Judicial criticism could be said to undermine public confidence in the judiciary and fuel the ongoing debate between Judicial Independence and Judicial Accountability. What is required is that mutual respect, restraint and understanding to exist between the three arms of government in order to maintain equilibrium (The American Bar Association Commission's Report, 1997, on Separation of Powers and Judicial Independence, pages i - ii) in the South African government system.

The American Bar Association Commission in 1997 found that at the time when their report was compiled, there was a new cycle of intense judicial scrutiny and criticism focussed on them. Their elected officials, the press and the public, had criticized a number of the American judges, at times severely, for their decisions in particular cases. The American public's confidence in their judiciary was being undermined by judicial criticism (The American Bar Association Commission's Report, 1997, on Separation of Powers and Judicial Independence, pages i - ii).

It would appear that in recent years a similar scenario is happening in South Africa. Kriegler J (2006) spoke about what he perceived to be major attempts, especially in Johannesburg, to undermine and influence the judiciary, especially with regard to criminal matters. He used as an example, the major criticism, which had been levelled against the Judge presiding over a case, which involved the former Deputy President. He felt that unrestrained things were said about the Judge who had presided over the matter, and whom he felt had been singled out, as no criticism was levied against the assessor who had presided with him over the same case. Kriegler J (2006) said he was disappointed in both the executive and the legislature for not having protected and defended the judiciary in that instance (Kriegler J, 2006, cited in the General Council of the Bar Human Rights Commission's transcript on page 51). Kriegler J felt offended by the Director General of the Department's public criticism of another Judge. He said the Judge had complained about the support services and who was told to confine himself to writing judgments and not to get

involved in such matters (Kriegler J, 2006, cited in the General Council of the Bar Human Rights Commission's transcript on page 51). The researcher fully agrees with Kriegler J that such judicial criticism undermines the judiciary and she is also of the opinion that judicial criticism is one of the primary justifications given by the South African executive and the legislature for their increased interference with the internal management and operational efficiencies of the South African judiciary. Another possible reason for their interference is that since 1994, and its transformation policies, the South African judiciary has grown in terms of its personnel, its resources, the administrative services necessary to support the judicial system and the budgetary support. The legislature now has an interest in understanding how these additional appropriations are being spent and in exploring ways in which justice can be administered more effectively and efficiently, (Kriegler J, 2006, cited in the General Council of the Bar Human Rights Commission's transcript on page 46). The researcher however, agrees with the judges' view, that the South African government policy makers need to restrain themselves, be conscious of, respect and support the judiciary and its independence, in order to ensure that local and foreign investor confidence is retained in the South African judiciary and the South African economy.

It has been alleged that, under the previous dispensation, the relationship between the executive and the judiciary over budgetary and administrative matters, was generally harmonious and that the judiciary welcomed the oversight it received from the Department of Justice. However, in recent years there appears to be a new scepticism of the judiciary. This new scepticism has caused some members of the judiciary to fear that the legislature and the executive are seeking to over-regulate the courts in ways that are not in keeping with a truly independent judiciary (Kriegler J, 2006, cited in the General Council of the Bar Human Rights Commission's transcript on page 50).

Consequently, it is submitted that an assessment (similar to the one which was conducted by the American Bar Association in 1996 on the American cycle affecting its Judiciary) of the events that are shaping the present cycle in South Africa and those that may follow, needs to be conducted to see whether they may constitute a threat to judicial independence. The success of this assessment will depend on:

- similar considerations of the South African political branches (as of the American political branches in 1996)
- understanding the constitutional role of the South African judicial branch;

- the respect which each of the South African branches of government have for each others powers; and
- the recognition that each branch is simultaneously separate yet interdependent on each other; and
- a spirit of cooperation and comity from each other.

It is therefore submitted that it is equally important in South Africa that “mutual respect, restraint and understanding” (as stated by the American Bar Association, 1997, page v) be present to maintain equilibrium in the South African government system. The researcher is also in agreement with the American Bar Association Commission, that “constitutional protections of judicial independence should be cherished and not challenged” (Ervin 1970 cited in ABA report 1997, page iii); and that judicial independence “is the most essential characteristic of a free society” (Ervin 1970 cited in ABA report 1997, page iii).

2.10 Chapter Summary

In conclusion, it would appear from all the literature surveyed both locally and internationally that the South African executive and the legislature have interfered with the judiciary mainly through the actions of the Judicial Service Commission. However, there are problems resulting from the overrepresentation of politicians and non-judicial members and the outnumbering of the members of the judiciary on the Judicial Service Commission.

In addition, the inherent flaws in the Judicial Service Commission’s recruitment and selection processes, compounded by the executive’s control of the judicial budget and court administration has had a negative impact on the efficiency and effectiveness of the judiciary. This has resulted in the executive and the legislature trying to interfere with judicial structures, judicial personnel and court functioning and administration through the proposed Judicial Bills. These further encroach on and undermine judicial independence through its judicial structures such as:

- the judicial service commission,
- rationalization and restructuring of the courts,
- the proposed fragmentation of the Supreme Court of Appeal,

- the proposed Office of the Chief Justice and the proposed Apex court),
- its judicial personnel (through judicial appointments, judicial acting appointments and appointments of judicial leadership positions as well as in judicial education and training and the implementation of a formal complaints system through the Judicial Service Commission) and
- through judicial administration (by transferring control thereof to the executive, namely the Department of Justice and diminishing the powers of the Chief Justice).

All of these factors will make very serious inroads into the independence of the judiciary and the doctrine of separation of powers and this has the potential to result in local and international investor confidence in South Africa and its Constitution being undermined.

The knowledge contained herein will be used in the following chapter to develop the survey questionnaire and the schedule of interview questions. The next chapter also discusses also the literature surrounding the research design, questionnaire development, data collection, and data analysis methods used in conducting the study.

CHAPTER THREE

RESEARCH METHODOLOGY

3.1 Introduction

The primary objective of this chapter is to provide a sound scientific methodology for this study, so the methods, techniques and procedures utilized in carrying out this research will be discussed. As a social researcher, the researcher is not only concerned with what is observed but also with how it is observed or measured. (Babbie *et al.*, 2007, pg xxii) Hence, the choice of respondents, the data collection methods used and the manner in which the data was analysed were all extremely important. The researcher had to be sure that the population selected, namely the Judges of the Superior Courts in South Africa could and would offer relevant points of view on the research topic.

The interpretation of the data is equally important in discovering meaningful patterns and rules governing the ways in which judges interact with each other within the judiciary, the judiciary with other arms of government and the judiciary with members of society and with the relationships among the variables identified. (Babbie *et al.*, 2006, pg xxiii) Due to a lack of prior and empirical research having been conducted on this research topic, it necessary to conduct interviews and administer questionnaires.

The research conducted was approached from primarily an interpretivist social constructionist perspective. This indicates that there are multiple realities, which needed to be understood, and which all impact on the overall independence of the judiciary. Through the identification and understanding of the relationships between the multiple realities of political interference with the independence of the judiciary, the “underlying patterns and order of the social world” were revealed. Saunders, Lewis and Thornhill (2007, p115) state that the deductive approach is concerned with testing a theory whereas the inductive approach is concerned with building a theory. They also highlight that time, risk and audience play a role in determining which approach is best to use. Their reasoning is that deductive research is completed more quickly, is less risky and is perceived as being more scientific. Consequently, it has a tendency to be preferred over inductive research, which is perceived to be more risky, could take longer to complete, become drawn-out and no useful data patterns or theory might emerge. Despite the above factors, they

argue that the two approaches are not mutually exclusive and that a combination of both can be used (Saunders, Lewis and Thornhill, 2007, p121).

In the present situation, due to the exploratory and descriptive nature of this research, it was felt that a combination of both was more appropriate to generate data, analyse, and reflect thereon and to determine what theoretical themes the data suggested. In addition, the research topic chosen is new, likely to excite a lot of debate and little literature exists on the topic.

It was felt that the constructivist perspective, which is an integrated perspective, was probably the most appropriate, since it used mixed methods, such as case studies to create a rich in-depth account. Despite the fact that some argue that quantitative research techniques are more objective, more mathematical and more scientific, the argument may not necessarily be true, if the only justification is that qualitative techniques are harder to use. The main difference in the two approaches is that the quantitative technique seeks an objective explanation, whereas the qualitative approach seeks to understand the event or behaviour from the “actors” perspective. (Saunders, Lewis and Thornhill, 2007, p121)

Yin (2003) identified a number of research strategies, which can be used for exploratory, descriptive and explanatory research, amongst them, are case studies. Ghauri and Grønhaug (2002, page 172) quote Eisenhardt saying that case studies are best suited in areas where new research is being conducted or in areas where existing theory appears to be inadequate. Schramm (1971, as cited by Yin, 1994, page 12) also says that the essence of case studies is that “they try to highlight a decision or series of decisions: why they were taken, how they were implemented and with what result.” Yin (2003, Vol.34, page xi) says that case study research is an appropriate method when the research topic is defined, covering contextual or complex multivariate conditions and relies on multiple sources of evidence. In those circumstances is also an appropriate strategy considering that it is made up of an all-encompassing method (Yin, 1994, page 13)

He does acknowledge that in some instances certain strategies are more appropriate to use than others, depending on issues such as the research being conducted and the availability of time and resources. He also argues that despite case studies being stereotyped as weak in comparison to other research strategies, they are nevertheless widely used, despite their strengths and weaknesses being misunderstood. Yin (1994, page xiii) He goes on to say that case study research strategies are preferred when “how” or “why” questions have to be answered so that operational links can be

studied over time, or where the researcher has little control over events and the focus is on a contemporary phenomenon within a real-life context as opposed to historical events. This is the case with this research study; where there is a distinctive desire to understand complex social phenomena. Yin (1994, page 1) He says that the case study allows the investigation to retain the holistic and meaningful characteristics of the real-life events. (Yin, 1994, page 3)

Saunders, Lewis and Thornhill (2007, page 135) argue that research strategies are not mutually exclusive and that it is possible for a particular strategy to be used as part of another strategy, such as the survey strategy forming part of the case study strategy. They warn that although the experimental strategy can be used to draw comparisons, in exploratory and explanatory research, it was usually conducted in a laboratory setting, which might not be appropriate for the particular circumstances. (Saunders, Lewis and Thornhill, 2007, page 137) They also noted that the survey strategy is commonly used with the deductive approach in exploratory and descriptive research.

They felt that the survey strategy's popularity stemmed from it being an economical way of collecting large amounts of data, standardising data, making easy comparisons and being perceived as authoritative. The other distinct advantage is that descriptive and inferential statistical data can be easily analysed by using software programs. Nevertheless they conceded that the number of questions, which could be asked, is not infinite (Saunders, Lewis and Thornhill, 2007, page 138). In contrast, they argued that the case study strategy was the complete opposite to the experimental strategy.

Saunders, Lewis and Thornhill (2007, page 139) also pointed out that "the boundaries between the phenomenon being studied and the context in which it is being studied is not clearly evident" and that it differed from the survey strategy, which limited the number of variables for data collection. (Saunders, Lewis and Thornhill, 2007, page 139) They argued that a combination of data collection techniques could be used to triangulate questionnaire data, such as semi-structured interviews. They state that mixed method research is useful as it provides better opportunities to answer research questions and allows better evaluations and more trustworthy research findings from which inferences can be drawn. (Tashakkori and Teddlie, 2003 cited in Saunders, Lewis and Thornhill, 2007, page 146) Saunders, Lewis and Thornhill (2007, page 146) say that there are two main advantages for using multiple methods in the same research project, namely that diverse methods can be utilized for diverse purposes in the study which makes triangulation possible. In

addition, the use of different techniques helps to eliminate the “method effect”. (Saunders, Lewis and Thornhill, 2007, page 147)

In this research, a cross-sectional single case study was done on the judiciary (unit of analysis) to measure what impact the proposed “judicial Bills” would have on the independence of the judiciary, if they were implemented. The purpose of the study, the resources available, time constraints and the audience of this mini-dissertation determined the method chosen. Whilst it is acknowledged that different research styles are appropriate for different problems, it is believed that in this instance, the most appropriate style for this particular research problem is the mixed method approach (Stone and Harris 1984, pages 6-7). The main qualitative approach used was questioning, which was done directly through interviews and indirectly through self-completed survey questionnaires. In choosing the preferred techniques, the overall strategy, namely a case study, was taken into account.

Case studies are used to explore issues, to gain a holistic understanding and to provide a frame of reference for more quantitative analysis. The survey technique, using a postal questionnaire, was used to obtain and present quantifiable data, which the audience would expect, without compromising the quality of the research. The semi-structured interview guide approach was also used to gain a more in-depth of understanding of the issues identified from the respondent’s perspective. The approach was suitable to study the broad areas to the problems. The interviews were held within available resources, the research was completed in a short space of time and within the researcher’s competence, to produce the kind of data needed. (Stone and Harris, 1984, page 10)

Despite the fact that case study research is subjected to a great deal of criticism, it nevertheless is widely used. This is especially the case when evaluative applications are required where quantitative techniques could obscure important information, which needs to be uncovered. In addition, there are some instances when case studies might be the only feasible substitute to experimental or quasi-experimental research, which may be too inflexible for the research study in question.

Also, the appeal of case studies is that there is no need for a minimum number of cases or for cases to be randomly selected. They can be single or multiple-case designs and they follow replication rather than sampling logic. Furthermore, generalization of results is made to a theory and not to the

population. Another advantage is that case study evaluations cover both process and outcomes, as both quantitative and qualitative data are included (Tellis, 1997).

A common criticism of case studies is that they are incapable of providing a conclusion, which can be generalised. Another criticism is that case studies take too long and result in massive unreadable documents (Yin, 1989, page 3). Nevertheless, it has been successfully argued that even a single case can be considered acceptable, provided it meets the established objective and that relative size of the sample is therefore unimportant (Tellis, 1997).

Either single or multiple-case studies can be used, as a general approach to design case studies, which can be exploratory, explanatory or descriptive. Explanatory cases are suitable for conducting causal studies. Nevertheless, the selection of cases can be a difficult process and only willing subjects are used. Additionally, pattern-matching techniques, such as effects patterns and comparing rival patterns, can be used to analyse very complex and multivariate cases. In descriptive cases, the researcher begins with a descriptive theory and then forms hypotheses of cause-effect relationships, covering the depth and scope of the case study (Tellis, 1997). Case studies are used largely in research where various disciplines are interrelated and where issues are thought of in terms of wider problems and solutions and critical thinking is developed. A vital component of case studies is that they endeavour to reach a comprehensive understanding of the cultural systems of action (Feagin, Orum, & Sjoberg, 1990, cited in Tellis, 1997), wherein participants in a social situation engage in sets of interrelated activities (Tellis, W, 1997).

A common criticism of case study methodology is that it is incapable of providing a conclusion, which can be generalised because it is dependent on a single case. However, the relative size of the sample should not be important. The goal of the study should be what counts as it establishes the parameters to which all research is applied. Even a single case could be considered acceptable, provided it has met the established objective (Tellis, 1997). The case selected in this research was the judiciary. This was done to maximize what could be learnt in the time available to conduct the study. The unit of analysis is the attitudes and opinions of the superior court judges of the system towards the proposed draft legislation aimed at administratively controlling the judiciary. Triangulation, which is the use of multiple sources of evidence (a major strength of case study data collection as it allows the researcher to address a broader range of historical, attitudinal and behavioural issues), was used to ensure accuracy and validity of the processes. (Yin, 1994, page 92)

3.2. Aim and Objectives of the Study

The common types of research objectives are exploration, description and explanation. Babbie *et al.* (2006, page xxvi) define exploration as “attempt to develop an initial rough understanding of a phenomenon”. They also define description as “the precise measurement and reporting of the characteristics of the population or phenomenon under study.” They define explanation as “the discovery and reporting of relationships among different aspects of the phenomenon under study.” The aim of this study was to conduct an exploratory, descriptive and explanatory study to measure the attitudes and opinions of members of the judiciary, on the issue of political interference by the legislature and or executive with the judiciary. *Inter alia*, they were asked whether the Judicial Service Commission, the Department of Justice and whether the proposed draft legislation (loosely termed the judicial Bills) will interfere and what impact all these have had and proposed legislative interventions and changes will have on the independence of the judiciary. The researcher was prompted to consider, investigate and conduct research on this research problem by the negative judicial criticism, which is taking place in the press and in the general media as well as in various forums.

The executive alleges that the public have lost faith in the judiciary, that there is an increased public demand for greater judicial transparency and accountability. The executive’s allegation has led to increased debate in judicial, legal and government circles as to effect that these proposals will have on the Constitution and on judicial independence. Consequently the purpose of the study was to explore and contribute to the understanding of whether the measures in place were adequate to ensure judicial transparency, efficiency and accountability or whether the proposed measures for legislative and or executive intervention were necessary to increase these characteristics and what impact such proposed legislative and or executive interference would have on the independence of the judiciary. A further purpose of this study was to investigate whether the crucial balance between judicial independence and judicial accountability could be maintained if the judicial administrative processes were interfered with by legislation and controlled by the executive.

Consequently, the objectives of this study were to:

1. Identify if a crucial balance exists in South Africa between judicial independence and judicial accountability; and

2. Evaluate whether this crucial balance can be maintained, if there is interference by the legislature and/or the executive to control the functioning of the courts (through, inter alia, the judicial human resource processes of selection, training and disciplining; and through restructuring and administration of the courts); and
3. Evaluate the impact, if any, that the implementation of judicial transformation has had on the efficiency and effectiveness of the South African judiciary; and
4. Determine if South African judges have a code of conduct to regulate their conduct; and
5. Establish whether a judicial disciplinary body exists in South Africa (or if not, whether one should exist) to enforce the South African Judicial Code of Conduct (if one exists); and
6. Evaluate whether the judicial disciplinary body should be situated internally or externally (within the judiciary or outside of it); and
7. Measure to what extent judicial disciplinary action has been effective in dealing with complaints against members of the judiciary; and
8. Measure to what extent there has been political interference (if any) with the functioning of the judiciary, either through the Judicial Service Commission or some other body; and
9. Critically evaluate the role of the Judicial Service Commission in comparison with the role of a judicial ombudsman.
10. Recommend appropriate legislative interventions, where necessary, to remove political interference with the judiciary and to improve the judiciary's control over its functioning, so that judicial efficiency and effectiveness within the judiciary is improved.

It is submitted that these objectives are realistic, objective and quantifiable.

The Research questions of this study are:

1. Should judges be managed and controlled?
2. Who should control and manage judges?
3. How are judges recruited, selected and appointed?
4. Where are judges recruited, selected and appointed from?
5. What are the minimum education and training requirements, which have to be met in order for someone to be selected and appointed as a judge?
6. To what extent and how precisely are the government's affirmative action policies being implemented with judicial personnel?

7. How and to what extent, if any, is the job applicant's past participation in the African National Congress's armed struggle recognized, when a judicial nominee is being considered for a judicial appointment?
8. Do judges need training?
9. If the answer to question 8 above is in the affirmative, to what extent do they require additional training? Precisely what additional training do they require?
10. Should the training be conducted within the judiciary or outside of the judiciary?
11. Who should train judges?
12. Should judges be subjected to discipline? If the answer to the aforesaid question is in the affirmative, by whom?
13. To whom are judges accountable? To whom should judges be accountable?
14. What is judicial independence? Does it still matter today?
15. What are the contemporary threats to judicial independence?
16. What effect will the management and control of judges have on the constitutional principle of judicial independence?
17. How can the need for judicial control and accountability be balanced with the need for Judicial Independence?
18. What are the alternative models for judicial control and accountability?

A literature search was conducted, both nationally and internationally, to find out whether any other researchers have tackled this problem and how they have done so. It was found that, although there has been a great deal of debate on certain aspects of the research topic and some research has been conducted which overlapped with certain areas of the topic, there was no prior research, which dealt specifically with all the aspects of this particular research topic. In addition, the researcher has only recently discovered that the International Bar Association was conducting similar research at the same time. Their report forms part of the literature surveyed in Chapter Two.

3.3. Data Collection Strategies

The four main methods of data collection strategies are: observation; questionnaires; interviews and diary.

Stone and Harris (1984, (b), page 2) states that the participant observation technique involves watching and listening to what people say and do to others and recording phenomena as they occur. In this type of data collection, the researcher or observer can be a participant or non-participant. They say that observation can be carried out with or without the knowledge and consent of the subjects observed, giving rise to ethical considerations. The observation technique can be used initially to get a sense of the problem studied or it can be used as the main data collection tool. Stone and Harris (1984, (b), page 5) comment that observation is often used together with other data collecting techniques such as interviews or questionnaires during the exploratory stage of the research. This method is generally used to investigate a social situation with which the researcher is unfamiliar. Stone and Harris (1984, (b), page 5) state that the advantage of observation is that it provides a means of recording behaviour as it happens.

Saunders, Lewis and Thornhill (2007, page 293) elaborate on this by saying that observations are a good way to explain what is taking place in a particular social context. At the same time, they enhance the researcher's appreciation of important social processes and are especially beneficial for researchers conducting research within their own institutions, in some instances enabling the researcher to appreciate the subjects' mental state. Stone and Harris (1984, (b), page 5) also say that other advantages are that the observed situation is not reliant on people's memories or their judgements. Information is gathered about their behaviour, which they would be unable to answer questions about and the observations are independent of their enthusiasm to account correctly and on their capability to do so. A trained observer would notice certain things that participants take for granted and may be unaware of. Observations can also be carried out cost effectively, often the data collection can be combined with the analysis and essentially all data collected can be used (Saunders, Lewis and Thornhill, 2007, page 293).

However, observations do have disadvantages. One is that they can only be used to record current events, are not suitable for identifying people's attitudes and opinions, and can be very time consuming. Observations may also pose difficult ethical dilemmas for the researcher and there may be problems with observer bias, and it is often difficult to record data and obtain access to institutions to do so. Participants may also not act naturally if they are conscious of being observed and the observation technique cannot be used for large numbers (Saunders, Lewis and Thornhill, 2007, page 293). Observation can also be used after data has been collected from surveys and interviews to see whether the conclusions are valid in the field. (Stone and Harris, 1984, (b), page 6) Saunders, Lewis and Thornhill (2007, page 302) state that the main threats to reliability and

validity are subject error, time error and observer effects. However, the researcher did not consider this technique appropriate to collect data for this research.

Another data-collecting device, which could be used, is a diary, in which the respondents record their own activity over a period, which may be long or short. Respondents would be asked to record each a certain activity each time they perform it, or they may be asked to record everything they do in a given time span. The advantage of this collection device is that it provides a useful starting point for semi-structured interviews. The diary material could provide the researcher with a useful checklist of topics, which could then be covered in the interview. Diaries can also be used to record activities which may be difficult to observe and where the detail of the activity could be lost if the respondent is later questioned about it. Diaries are also useful to record random events. The disadvantages of diaries are that the effort involved in completing them could distort the recorded pattern of activities. Diary users may not continue being motivated to complete them and it is also difficult to verify how accurate the recordings are. This diary technique was not chosen as the researcher and the respondents had limited time in which to participate in and complete the research (Stone and Harris, (b), 1984, pages 8-10).

A further data collection technique is the questionnaire, which could be a self-administered questionnaire posted to the respondents who returned them by post after completion (Saunders Lewis and Thornhill, 2007, page 356). The researcher felt that this was an appropriate method to obtain information and opinions from the respondents. It is a written form of questioning which is decided upon and drafted in advance, based on what the researcher has read whilst researching the literature. The data obtained from the questionnaire can be used for large-scale surveys, when insufficient resources are available for interviews and a large number of people can be contacted at a comparatively low cost. (Stone and Harris, 1984, (b), page 12) A distinct advantage of self-administered questionnaires is that interviewer bias can be avoided and in some instances it might be a better means to obtain sensitive information than for example through an interview. Anonymity and the privacy of responses are assured. Another advantage is that respondents are unlikely to give answers just to please the researcher. However, the danger is that they can discuss their answers with others, which could contaminate their responses. The type of questionnaire chosen can also affect the response rate and the choice is affected by availability of resources. The length of time needed for data collection also increases with postal services.

The interview is a common method used to collect data. It involves the direct questioning of the individual or groups of individuals. Stone and Harris (1984, (b), page 6) say that it is a useful technique if time and resources are limited. Most interviews are conducted with one respondent at a time. Interviewing styles vary from conversation to interrogation. They say that the researcher initiates and controls the interchange, which has a specific purpose. There are three types of interviews, which a researcher could use: structured, semi-structured and unstructured. Saunders, Lewis and Thornhill (2007, page 313) state that each type of interview serves a particular purpose. In-depth interviews and semi-structured interviews are useful when conducting exploratory research to gain new insights and to find out what it is taking place. They may form part of a case study strategy and can be used to explore and explain themes that have emerged from the answers to the survey questionnaire and also as a means to validate findings from the survey questionnaire (Wass and Wells, 1994, cited in Saunders, Lewis and Thornhill 2007, page 314).

Structured interviews are used to gather data and useful for descriptive research to identify general patterns, forming part of a survey strategy. Stone and Harris (1984, (b), page 6) state that the structure of the interview is dependent upon the researcher's ability to determine the questions needed in order to shed light on a particular problem or question in issue. They state that interviewers require different skills for conducting the different types of interviews and hence some are preferred over others. Stone and Harris, 1984, (b), page 6) states that the advantage of the more structured the interview is that it is easier to analyse and the responses are more comparable, but the disadvantage is that the data collected is more limited. Other advantages are, *inter alia*, that the responses can be compared and aggregated. Data analysis is simple. Some of the disadvantages are that the questions and responses are not capable of being adapted if they are inappropriate. Information, which does not fit into the predetermined categories, could be lost, the interviewees may distort their real views and the interview schedule may be complicated by detailed instructions. (Stone and Harris, 1984, (b), page 7) Although structured interviewing relieves the interviewer of the responsibility of being responsive to the interviewee, it does demand considerable attention to detail.

Stone and Harris (1984, (b), page 8) state that unstructured interviews are the closest in resemblance to natural conversation. The advantage is that respondents can freely express themselves, in the manner most suitable to them, and they can expand on what they are thinking. In addition, highly relevant questions may emerge which might not previously have been anticipated. The disadvantages are that the respondents may go off the topic. Other interesting

matters may not arise and the analysis of the responses could be difficult. Whereas a semi structured interview guide approach in which there is a checklist of topics to be covered, gives the interviewer the freedom to ask questions on the topics in an ordered, appropriate and suitable fashion. It also strikes a balance between the structured and unstructured interview. The advantage is that the respondents will answer the same questions thereby increasing the comparability of responses and through standardisation of the responses assist with the analysis of data, over which the interviewer will not need to exercise too much discretion. The disadvantage however, is that the standardized wording of the questions could limit the relevance of the questions and answers; also open-ended responses are more difficult to analyse. Nevertheless, Stone and Harris (1984, (b), page 10) state that the interview is a flexible instrument, which should reflect the degree of structure required, it involves verbal questioning of the interviewees, which can be conducted fact-to-face or by telephone.

Saunders, Lewis and Thornhill (2007, page 315) say that qualitative interviews are necessary when the researcher wants to understand the reasons for the interviewees' attitudes and opinions, especially semi-structured and in-depth interviews which enable one to ask the interviewees to explain or elaborate on their answers. In addition, the use of non-standardised telephonic interviews has the added potential advantages of easier access especially when presented with the problem of long distance, speed of data collection and lower cost (Saunders, Lewis and Thornhill, 2007, page 318). Nevertheless, Saunders, Lewis and Thornhill (2007, page 318) warn that the lack of standardisation may lead to worries about reliability and whether subsequent researchers would come up with similar findings (Easterby-Smith *et al.*, 2002; Healey and Rawlinson, 1994, cited in Saunders, Lewis and Thornhill, 2007, page 318).

Other reliability concerns noted are interviewer bias and interviewee response bias, especially with in-depth and semi-structured interviews where the researcher's aim is to explore events or seek explanations for the interviewees' responses. (Saunders, Lewis and Thornhill, 2007, page 319) A further concern is the question of generalizability of the findings, which could impact on their validity, although the concern may be less significant if one is able to establish the relationship with existing theory (Marshall and Rossman, 1999 cited in Saunders, Lewis and Thornhill, 2007, page 328). Another distinct disadvantage is that with non-standardized telephonic interviews, the opportunity to observe non-verbal communication is lost. Although internet interviews could have significant advantages in instances when interviewees are geographically dispersed, this method

requires participants to have software loaded onto their computers. This could lead to problems and was therefore not considered appropriate for this research.

Having reviewed the literature carefully, and discussing the ideas with colleagues and her supervisor and co-supervisor, the researcher decided that self-administered questionnaires on their own would be inadequate and she consequently decided to use a combined strategy of self-completed survey questionnaires and semi-structured interviews to collect data. Because interviews can provide important insights into the situation, they were open-ended in nature. This enabled the researcher to ask key respondents for facts, opinions and proposals of their own insights into a situation, which could form the basis of further enquiry.

3.4 Research Design and Methods

The research design is described by Babbie *et al.* (2006) as “the plan or structured framework of how you intend conducting the research process in order to solve the research problem”. (Babbie *et al.*, 2006, page xxvi). The researcher has decided to conduct an empirical study using primary data analysis, classified into numeric and textual data.

3.4.1 Description and Purpose

The researcher was conscious of the fact that an exploratory and explanatory study was being conducted, and because of this, it was decided that a mixed method approach for data collection would be used, namely survey questionnaires and semi-structured interviews. It was envisaged that this would increase the response rate, add depth to the research and make probing and clarification possible. The survey questionnaire and the interview questions were drafted from information obtained from reviewing national and international literature on various aspects of the research topic. Ethical Clearance was obtained in early December 2007, when the Courts were about to go into the December recess. The fieldwork took approximately eight months to complete, from the time that the questionnaires were first sent out at the end of January 2008 until the last judge was interviewed on the 22 September 2008. The First, Second and Third Court Terms of 2008 were covered.

The Court Terms, Court Recesses (judicial vacations, writing and reading times) and Court Rolls were some of the major factors, which affected the fieldwork timing. They affected the accessibility of the judges as well as their availability. Another factor, which affected the fieldwork was that, the judges, due to their high office, were not easily accessible and the researcher had to rely on the judges' secretaries and the judges' clerks to give them messages or for them to respond on the judges' behalf. In addition, some of the judges were only available during the Court Terms, whilst, due to their extreme workloads and work pressures, other judges were only available during court recesses. Although, some judges became aware of the research immediately, other Judges only became aware of the research when the reminder was sent in May 2008. This was because some of them had been on long leave; others had retired or had been serving in other Divisions or on other Superior Court benches such as on the Supreme Court of Appeal, Constitutional Court, Labour Court or Labour Appeal Court.

Every attempt was made to gain the co-operation of the respondents by giving them clear information of the purpose of the study in the covering letter and assuring them of the confidentiality of their response. The survey was planned in such a way that no unnecessary effort was demanded of them. The proper channels of communication in the Judiciary were used. Attempts were made to obtain approval from the heads of court in writing. Attempts were also made to try to contact the Respondents and to increase the response rate through intermediaries, such as colleagues, friends and acquaintances. Despite the previously mentioned steps, the researcher still experienced great difficulty in gaining access to the respondents, which undoubtedly affected their co-operation. The researcher adhered to ethical considerations such that the respondents were not obliged to participate in the study and if they refused, their refusal was respected. They were not asked anything that could harm them or anyone else and their anonymity and confidentiality was protected. Depending on the availability of the judges, some interviews were conducted during working hours whilst others were conducted after hours.

Documents such as the disciplinary code drafted by judge Harms was obtained from one of the Judges during the course of his interview and copies of the draft legislation in question were obtained from various government internet websites. Triangulation was used to ensure accuracy and the validity of the processes.

The case study approach was used to provide theoretical or policy insights. A multi-method design was used in which key constructs and processes were traced using semi structured interviews and surveys. The aim was to develop and test a model of hypothesized relationships, which could be replicated in future by a subsequent case researcher to either replicate the study or use it to develop a new model (Garson, 2008).

3.4.1.1 Construction of the Instrument

As the study conducted was exploratory in nature the researcher decided to use a semi-structured interview guide approach, as it appeared to be the most flexible one to follow. A survey questionnaire and the interview question schedule were drafted from information obtained from the literature survey. It was also feared that the judge's motivation to complete the questionnaire might be low due to their busy heavy workloads and pressures, and consequently their lack of spare time. A possible pitfall was that the questionnaire might appear to be too long and off-putting. A further fear was that the questionnaire was to be mailed and it could consequently arrive at a time when it would be inconvenient for the respondent to deal with. In such a case, the questionnaire might be put aside and in some instances even forgotten about. Some respondents felt that the interview might be more effective than the self-completed questionnaire, especially in instances where clarification of concepts, questions or instructions might be needed. It was also felt that the interview approach would be more flexible because there would be a greater opportunity to explain the purpose of the research and to gain the respondent's confidence and interest. It would also give the opportunity to schedule a convenient time to deal with the research. The benefits of using interviews outweighed the disadvantages. It was also decided that the interviews would be semi-structured, although the questions were drawn up in advance, they would be open-ended. In a few instances, the interview guide approach had to be used, especially where there was little time available in which to interview the judge.

The design of the questionnaire was a complex process. It was decided that the questionnaire would be semi-structured. Both types of questions were asked, those that sought to obtain facts, and those, which sought to obtain opinions, attitudes, preferences and evaluations. Topics were listed which were relevant for the purpose of the research, and questions were formulated from these topics. The questions were asked in a logical order. They ranged from the general to the specifics so that they would appear sensible to the respondents. Cognisance was taken of the fact

that the length of the questionnaire could affect the purpose of the study and the resources available, but it was decided that the questionnaire could not be shortened, as it would have compromised the aims of the study. Bearing in mind these considerations, the questionnaire was constructed to keep the effort required by the respondent at the lowest level. The response categories were chosen in advance and characterised in several ways. A number of the questions were single choice responses, which were ordered using the Likert scale. There were some questions, which deliberately had to be left open-ended. A space was also left at the end for additional comments.

3.4.1.2 Recruitment of Study Participants

The population studied was the Superior Court Judges of the South African Judiciary. It was intended to include everyone in the population, as the judiciary is a small population. Consequently, an invitation was extended to all judges of the Superior Courts of the South African judiciary. There were 213 judges (including acting and retired judges) at the time, who was invited to participate. The greatest level of participation was from the Natal Provincial Division, the Transvaal Provincial Division and the Free State Division. There was very little and in some instances no participation by the various Cape Divisions. Two judges of the Supreme Court of Appeal also participated in the research. However, no judges from the Constitutional Court participated in the research. Some of the judges who refused to participate, provided reasons for their refusal in writing, others verbally or telephonically and others by email.

Letters were written to each of the heads of court of each of the various High Court divisions, the Labour Court, the Labour Appcal Court, the Supreme Court of Appeal and the Constitutional Court, to obtain their permission to conduct research on the judiciary. Their assistance was sought in inviting each individual member of the judiciary, which formed part of their division to participate therein. The heads of court wrote back and either granted permission, or said that they were unable to give permission, and that the researcher should correspond with each of the judges individually and request their permission and obtain their consent individually to participate in the research. Only Judge President Tshabalala of the Natal Provincial Division provided the researcher with a list of the names and contact numbers of willing participants, making it much easier for the researcher to contact the willing respondents. The letters addressed to the various heads of court, their responses and the letter addressed to the individual judges requesting their permission and

inviting them to participate in the research, together with the draft survey questionnaire and the draft interview schedule of questions were submitted for ethical clearance in November 2007. Once ethical clearance was obtained in December 2007, the survey questionnaire and the interview questionnaire were duplicated; covering letters were written, and posted to the judges at their respective divisions, at the end of January 2008. The names of the judges and the divisions of the superior courts in which they practiced, were obtained from various judicial websites found on the internet, as well as from the 2008 Hortors Legal Diary. There were 213 judges spread across South Africa. All of the South African judges identified, were afforded an equal opportunity to participate in the research. A covering letter was sent to each one of them, enclosing a copy of the survey questionnaire and a copy of the interview schedule as well as a self-addressed postage paid envelope in which they could post their completed questionnaires.

3.4.2 Pre-testing and Validation

No pilot testing was done prior to the research being conducted. It was difficult to select one or more individuals who would not be in the main study to interview before finalising any checklist or schedule, as the population was too small and it was feared that it might negatively impact on and reduce the response rate of the main research. It was therefore decided not to test the survey questionnaire beforehand. Nevertheless, a draft of the survey questionnaire was distributed amongst colleagues in the legal field who read and commented on it. It was also submitted to a colleague, Mr Deepak Singh who is a statistician, for his perusal and comment to further refine the questionnaire before submitting it for ethical clearance. The concern that there might be a low response rate appeared to have been well founded, as the subsequent response rate was low in any event.

3.4.3 Administration of the Questionnaire

A number of strategies were used to try to improve the response rate. Follow up letters were sent to each of the judges in May 2008. The researcher pleaded with them to agree to participate in the research, if they had not already done so. Some of the Judges responded to the letters sent in January by completing the survey or returning it saying that they were unwilling to participate. Others responded after they had received the reminders in May, some responded telephonically,

whilst others responded by email or got their secretaries or clerks to communicate with the researcher. Some of the judges informed the researcher that they were unwilling or unable to participate in the research. Others said they had not been aware of the first letter sent in January 2008 as they had been on leave or had been presiding in other superior courts elsewhere in the country at the time. Consequently, they only responded when they received the follow up letter in May 2008. Some Judges responded positively by mail, others by email and others telephonically, expressing their interest and agreeing to participate in the research. Those who were willing to participate in the interviews revealed their identities and gave further contact details where they could be reached more easily. This information was subsequently followed up mainly telephonically, by emails and in some instances by mail. Individual appointments were then made, either telephonically or in person with each of the judges who had agreed to be interviewed, at times and on dates, which suited them.

In an attempt to increase the response rates further the researcher also contacted the individual judges' secretaries and or the judge's clerks telephonically as well as the Court Registrars' offices of the various divisions. However, this did not increase the response rate despite several calls and emails. A reminder, incorporating a plea, was sent out to all judges in May 2008. This increased the response rate of the judges who, for whatever reason, had either not received the mail in January 2008 or who had set the research letter aside for them to look at a later date when they were not so busy. Despite all of these strategies, only just more than ten percent of the judges participated in the research.

The researcher was unable to control the data collection environment and consequently had to rely on the responses of the judges who were willing to and who participated. Some of the judges, including some of the female judges who had originally expressed an interest and a willingness to participate, unfortunately eventually did not participate. Some of the reasons given were that they were unable to set the necessary time aside to complete the questionnaires or to be interviewed. The sensitivity of the topic researched was also an issue. Some of the judges found the topic far too controversial and did not feel that it was appropriate for them to participate in the research. This was especially true in the case of the judges of the Constitutional Court who were concerned that the issues raised in the research topic might come before them in the Constitutional Court and they did not want to prejudge the issues. The judiciary had also been exposed to a great deal of negative criticism and adverse publicity at the time when the research was being conducted. In

their defence, all of the judges are extremely busy and overburdened and obviously their workload took preference over the research questionnaires.

3.4.4 Interviews Conducted

The face-to-face interviews were conducted during working hours and on average lasted an hour or two. The telephonic interviews tended to be longer as the judges were less bound by time constraints. These took place over teatime, during lunch hours, early in the morning or late in the afternoon, so that they did not interfere with the judges' workloads, during working hours. The researcher decided that the survey and interview techniques discussed above were appropriate to understand the needs and behaviour of the judiciary. The interview questions, although open-ended, were structured. The sequence of interview questions was followed with each of the respondents who agreed to be interviewed. The researcher tried to limit the information gleaned to the questions but in a few instances, the judges who had limited time to spare, read the questions beforehand and then spoke freely on the topics covered therein. It was then up to the researcher to categorise the data under the various question headings. In some instances, this resulted in the judges not answering all the questions or focussing their comments on certain topics more than on others. Due to the sensitivity of the respondents and their need to remain anonymous, the researcher chose not to tape record their responses, in the hope that they would relax and speak more openly on the sensitive issues. The researcher made copious notes of what was said. Some information might have been lost, however, as some judges spoke quickly and this made it difficult to record everything that they said.

3.4.5 Costs

The total costs associated with the research project were difficult to estimate upfront. It was estimated that the costs would be much higher because the respondents were spread across large geographical areas, across South Africa. However, the respondents were sensitive to the cost issue. Those interviewed outside of Durban and Pietermaritzburg agreed to be interviewed telephonically, instead of the researcher having to travel to them and interview them in person. This reduced the cost of the interviews substantially. The postal survey costs lay primarily in duplicating the survey questionnaires and interview schedules and included stationary and postage.

There were additional costs associated with emails, telephone calls and the statistical analysis of the survey responses. The interview costs were limited primarily to the researcher's time, motor vehicle travel costs, fuel and parking. Fortunately, there were no accommodation or flight costs. It was very time-consuming, as far as the researcher's time was concerned, as the face-to-face and telephonic interviews were conducted personally, and the researcher typed all the interview responses as well as encoding the responses onto NVIVO.

3.5 Analysis of the Data

Triangulation was used in the analysis of data, which Ghauri and Grønhaug (2002, page 182) state will provide a more complete, holistic and contextual portrayal of what is being studied.

3.5.1 Qualitative Analysis

A general analytic strategy was adopted, because the ultimate goal was to treat the evidence fairly, to produce compelling analytic conclusions and to rule out alternative interpretations. (Yin, 1994, page 103) There are two types of general strategies, which could be used: either relying on theoretical propositions or developing a case description. The first type is the most preferred, as it is concerned with following the theoretical propositions which led to the case study. Whereas the second strategy is concerned with developing a descriptive framework for organising the study and its analysis and is used when theoretical propositions are absent. (Yin, 1994, page 104) The descriptive approach can be used to identify the type of event to be quantified and overall pattern of complexity that can ultimately be used in a causal sense to explain why implementation would fail. (Yin, 1994, page 105)

An analysis of the case study evidence was done, using various analytic techniques, such as:

- Information was put into different arrays
- A Matrix of categories was made and the evidence was placed within such categories
- Data displays were created, such as flowcharts, etc for examining data
- The frequency of different events were tabulated
- The Complexity of such tabulations and their relationships were examined – through the calculations of means and variances

- Information was arranged in a chronological order / temporal scheme

Ghuri, and Grønhaug (2002, page 180) state that one of the ways of analysing data collected from case studies is to look for commonalities and differences and answers can be found in comparing different cases. In some instances, worst and best comparisons are most suitable. They also say that cases that display contrasts or extreme situations (performance or failure) are good for analysing or drawing conclusions. Campbell (1975) and Yin (1984) and cited by Ghuri and Grønhaug (2002, page 180) all state that pattern matching can be used to relate information from several cases to a priori assumptions. Ghuri and Grønhaug (2002, page 181) argue that statistical testing is not necessary before drawing conclusions, if systematic patterns can be found which accept or confirm the researcher's assumptions or propositions.

3.5.1.1 Pattern-Matching

Yin (1994) says that pattern matching logic "compares an empirically based pattern with a predicted one (or with several alternative predictions)". He states further that if the patterns coincide, the results help strengthen the case study's internal validity. (Yin, 1994, page 106)

3.5.1.2 Explanation-Building

Yin (1994) says that explanation building is a special type of pattern matching in which the goal is to analyze the case study data by building an explanation about the case, to develop ideas for further study (Yin, 1994, page 110)

3.5.1.3 Time-series Analysis

Yin (1994) says this method is appropriate for a study concerned with a course of events, but Becker (1963, cited in Yin 1994, page 110) believes that there should be at least three conditions. He says that time-series analysis is concerned with the match between a trend of data points compared with a theoretically significant trend specified before the onset of the investigation, versus some rival trend also specified earlier, versus any trend based on some artefact or threat to internal validity (Yin, 1994, page 110).

3.5.1.4 Program Logic Models

Yin (1994) says that program logic models are a combination of pattern matching and time series analysis (Yin 1994, page 118).

3.5.2 Quantitative Analysis

Both Descriptive and Inferential Statistical analysis were used in this research. Descriptive statistics describes the organizing and summarizing of quantitative data. Univariate and bivariate analysis is most appropriate for descriptive statistics. Univariate analysis is concerned with measures of central tendency and measures of dispersion. The most appropriate measure of central tendency for interval data is the mean and the most appropriate measure of dispersion for interval data is the standard deviation. Bivariate analysis concerns the measurement of two variables at a time. Linear correlation is an associated degree of measure between two interval variables. The level and the direction of any relationship between the perception and expectation variables are therefore described by the correlation coefficient calculated by correlating the two means of the variables.

Inferential statistical analysis is concerned with the testing of a hypothesis. The independent t-test is the most appropriate parametric test for interval measurement. This tests any significant difference between the two variables, as well as the perception and expectation of service quality. Primary data was collated and analyzed and comments and concluding discussions are thereafter based on the results obtained.

3.5.2.1 Chi-Square Test

The Pearson's chi-square (χ^2) test is the most widely accepted of all the chi-square test statistical procedures, whose results are evaluated by reference to the chi-square distribution. Karl Pearson first investigated its properties in the 1900s (Lind, Marchal, and Wathen, 2005, page 431). It is used in contexts where it is important to make a distinction between the test statistic and its distribution; names similar to Pearson X-squared test or statistic are used. It tests a null hypothesis that the frequency distribution of certain events observed is consistent with a particular theoretical

distribution. The events considered must be mutually exclusive and have total probability 1. A common case for this is where the events each cover an outcome of a categorical variable.

3.5.2.2 Graphs

Bar charts were used to present the data. (Lind, and Wathen, 2005, page 41) These were used to allow for ease of comparison between groups.

3.5.2.3 Cross Tabulations

Cross-tabulation is a combination of two (or more) frequency tables arranged in such a way that each cell in the resulting table represents a unique combination of specific values of cross-tabulated variables. Thus, cross tabulation allows for the examination of observations that belong to specific categories on more than one variable. By examining these frequencies, relations can be identified between cross-tabulated variables. Only categorical (nominal) variables or variables with a relatively small number of different meaningful values should be cross-tabulated.

3.5.2.4 Statistical Software

The analysis was performed using SPSS (version 15), Statgraphics Centurion and QSR NVIVO 7 statistical software packages.

3.6 Chapter Summary

This chapter has provided an overview of the research methodology and outlined the qualitative case study research methods used in this study. It also elaborated on the collection and analysis of the data. The statistical analysis of the interviews and questionnaires revealed that the legislature and the executive have interfered with the judiciary, primarily through the Judicial Service Commission selecting judicial appointments and through the executive controlling the judiciary's finances and court administration. If enacted, the proposed judiciary Bills will further interfere with and impact on the independence of the judiciary. The following chapter presents and provides a detailed discussion of the case study data and its findings.

CHAPTER FOUR

RESULTS

4.1 Introduction

Having outlined the methodology used in this study in Chapter Three, this chapter presents of the results of the data collected from the survey questionnaires which were completed, and the interviews conducted with the judges who participated in this research. Not all of the judges participated in both the questionnaires and interviews. The approach used to measure the judges' responses was a survey questionnaire and an open-ended interview questionnaire, both developed by the researcher. The eighty one-item survey questionnaire covered ten dimensions, namely:

- judicial independence,
- institutional dialogue,
- organizational structure,
- judicial self-governance,
- transformation and restructuring of the judiciary,
- executive and legislative interference,
- selection and appointment,
- education and training,
- judicial discipline and code of conduct,
- management of the judges and
- the judicial Bills.

The survey questionnaire comprised twelve parts. The first part dealt with the personal particulars and biographical data of the judges surveyed. The second part dealt with the organizational structure of the judiciary. In this section, ten questions were asked and the respondents were required to indicate their perceptions of the topics on a five-point scale. The third part dealt with the judges' opinions of whether there should be legislative or executive interference with the functioning of the judiciary. The fourth part dealt with the judicial code of conduct and judicial accountability. The fifth part dealt with judicial education, training and performance. The sixth part dealt with judicial independence and the impact of transformation on judicial independence. The seventh part dealt with judicial authority and self-governance. The eighth part of the

questionnaire dealt with whether the judicial Bills are necessary, and what their impact or effect would be on the administration of the courts and on the functional independence of the judiciary. The first section of part nine, dealt with whether judges should be managed and controlled and the second section of the part nine, dealt with judges opinions on how judges are selected and appointed. The tenth part of the questionnaire dealt with questions about institutional dialogue. Part eleven dealt with questions on transformation and the restructuring of the judiciary. Part twelve provided the judges with an opportunity to comment further on any of the questions asked. Both descriptive statistics and inferential statistics are used to present the data. Frequency or descriptive statistics are presented as Figures, Tables and narrative text, using a variety of figures, bars, lines, and pie graphs. The inferential statistics are presented as correlations, regressions, analysis of variance presented as tables and formulae.

4.2 Data Collection

4.2.1 The Population Size

As stated in Chapter Three, two hundred and thirteen survey questionnaires were prepared and posted to all the Judges. Only twenty-two of the questionnaires were completed and returned. Nineteen judges were also interviewed, either in person or telephonically using an interview questionnaire. The survey responses and the interview responses were deemed sufficient for analysis.

4.3 Statement of Results

Initially the study describes the various descriptive demographic statistics that make up the population group. This data is summarised at the end of the graphics displayed below.

4.3.1 Descriptive Statistics

The following descriptive statistical methods were used in this study:

- Descriptive frequency statistics
- Comparison of descriptive statistics such as age, race, qualifications and years of experience as Judge.

The descriptive statistics provide insight into the perceptions and composition of the population studied. The statistical methods mentioned above were applied to the survey questionnaire.

4.3.1.1 Descriptive Frequency Statistics

The population size was two hundred and thirteen at the time that the study was conducted. It was made up of current judges, retired judges and acting judges. Their names were obtained from the Hortors Legal Diary 2008 as well as from recent Butterworths Law Reports. Two hundred and thirteen survey questionnaires were posted in January 2008 to all the current, retired and acting judges in South Africa. Only twenty-two of the questionnaires were completed and returned. A further twenty-one judges responded by either returning the questionnaire unanswered or advising that they were unable to participate in the research for various reasons.

These reasons included their time constraints, their heavy workload, their being unavailable, their being on long leave, their illness or that they had retired. A few of the judges had died and one had emigrated. Some advised that they were experiencing difficulties with answering the survey questionnaire and therefore were not willing to participate. Others felt that the issues raised were too complex and could not be adequately addressed through the survey questionnaire. Some said that they had already made their views known to the executive while others said that their views had received enough media coverage. Some of the Constitutional Court judges were concerned that they may have to preside over constitutional matters raised in the questionnaire and did not want to comment beforehand. In total, there was a twenty percent response rate. Despite the low response rate, it is nevertheless submitted that the results are still valid, as can be seen from the statistics presented below and from the literature surveyed in Chapter Two of this research.

4.4 Presentation of Results of Part 1: Demographic and General Profile of the Respondents

Questions one to eleven of part one of the survey questionnaires captured the general particulars of the survey population studied. The questions defined the population in terms of age, gender, status, areas in which they grew up, race, highest academic qualification, highest professional qualification, whether they were appointed before or after 1994, and the number of years they had presided on the bench, in which court and of which division. These same general questions were also asked of the interviewees (most of who had participated in the survey as well).

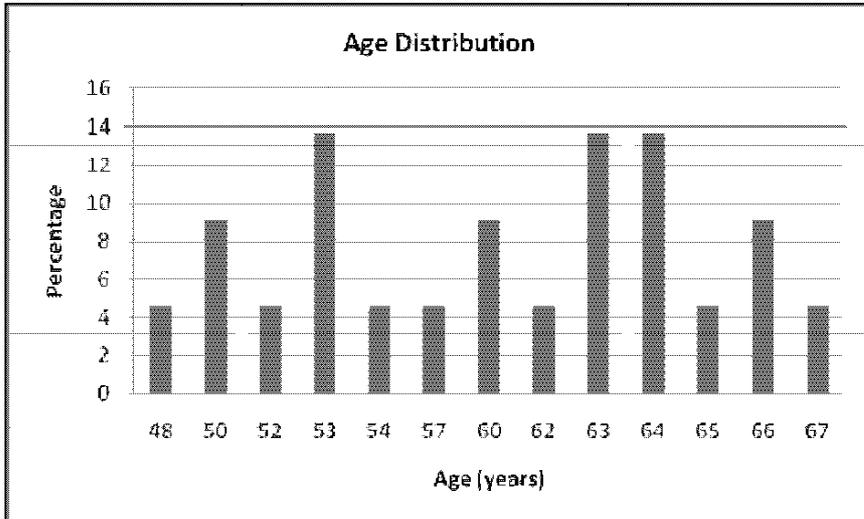
4.4.1 Age of Respondents

Table 4.4.1 Age of Respondents

		Age			
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	48	1	4.5	4.5	4.5
	50	2	9.1	9.1	13.6
	52	1	4.5	4.5	18.2
	53	3	13.6	13.6	31.8
	54	1	4.5	4.5	36.4
	57	1	4.5	4.5	40.9
	60	2	9.1	9.1	50.0
	62	1	4.5	4.5	54.5
	63	3	13.6	13.6	68.2
	64	3	13.6	13.6	81.8
	65	1	4.5	4.5	86.4
	66	2	9.1	9.1	95.5
	67	1	4.5	4.5	100.0
	Total	22	100.0	100.0	

The table above (Table 4.4.1) gives the biographical data distribution of the age of the population surveyed in this research.

Figure 4.4.1 Age Distribution



The data in both Figure 4.4.1 and Table 4.4.1 show that ninety-five percent of the judges surveyed are older than fifty years of age and that half of all of the judges surveyed were older than sixty years. This seniority indicates older judges with more experience and maturity than their younger counterparts. This is also verified when considering the number of years of experience that judges have.

4.4.2 Gender Dispersion of Respondents

Table 4.4.2 Gender Dispersion of Respondents

Gender					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Female	1	4.5	4.5	4.5
	Male	21	95.5	95.5	100.0
	Total	22	100.0	100.0	

Of the twenty-two completed survey responses received, only one response was from a female judge (Table 4.4.2). The majority of respondents, namely ninety-five percent, were male and only five percent was female, which indicates that the female judges for reasons unknown to the researcher were reluctant to participate in the research. It is proposed that a possible reason could be that women form part of the affirmative action category and they might feel sensitive or

defensive about this issue. Despite numerous attempts and several requests to increase the response rate, the female judges continued to decline to participate in the surveys and declined to participate in the interviews as well. Some of the reasons given by them were time constraints, heavy workloads, unavailability, being on long leave and illness. Another possible explanation for the low response rate is possible defensiveness or sensitivity about the questions asked. Despite the previously mentioned reasons, the responses received appear to be consistent with what has been said by the judges, including female judges and black judges who participated in various forums opposing the judicial Bills as mentioned in the literature surveyed in Chapter Two.

4.4.3 Geographic Dispersion of Respondents

Table 4.4.3 Geographic Dispersion of Respondents

Currently a judge of __ Court / Division

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Natal Provincial Division & Durban Coast Local Division	8	36.4	36.4	36.4
	Transvaal Provincial Division	5	22.7	22.7	59.1
	Supreme Court of Appeal	2	9.1	9.1	68.2
	Orange Free State Division	3	13.6	13.6	81.8
	Witwatersand Local Division	2	9.1	9.1	90.9
	Eastern Cape Division	1	4.5	4.5	95.5
	Cape High Court	1	4.5	4.5	100.0
	Total	22	100.0	100.0	

The table above shows the geographic dispersion of the judges who participated in the survey. The data show that thirty-six percent of the judges surveyed were from the Natal Provincial division, and thirty three percent were from the Transvaal Provincial Division and Witwatersrand Local Division combined, fourteen percent were from the Free State Provincial Division, nine percent were from the Supreme Court of Appeal and only four percent from the Eastern Cape Division and four percent from the Cape High Court Division. None of the judges from the Northern Cape Division or the Constitutional Court participated in the research.

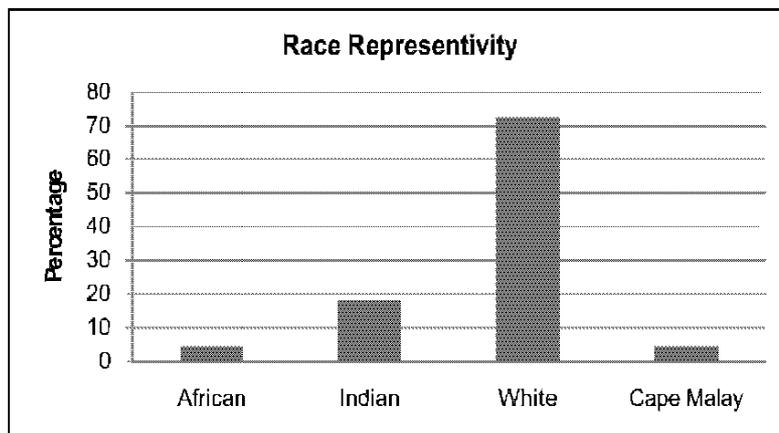
4.4.4 Race Representativity of Respondents

Table 4.4.4 Race Representativity of Respondents

		Race			
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	African	1	4.5	4.5	4.5
	Indian	4	18.2	18.2	22.7
	White	16	72.7	72.7	95.5
	Cape Malay	1	4.5	4.5	100.0
	Total	22	100.0	100.0	

The majority of the judges who responded were white, namely seventy-three percent and there was a very low response rate from other races, namely eighteen percent Indian, four percent Cape Malay, and four percent African (Table 4.4.4 and Figure 4.4.4). The low response rate from other races could, in some instances, be attributed to possible defensiveness or sensitivity about certain issues covered in the research topic, especially with regard to judicial transformation. Nevertheless, there appears to be consistency in what the judges surveyed and interviewed have said and what other judges have said who participated in forums reported in literature, which form part of the literature surveyed in Chapter Two.

Figure 4.4.4 Race Representivity of the Respondents



4.4.5 Highest Academic Qualification

Table 4.4.5 Academic Qualification & Highest Professional Qualification

		Highest Academic Qualification			
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	LLB	16	72.7	72.7	72.7
	LLM	5	22.7	22.7	95.5
	PG Dip Tax	1	4.5	4.5	100.0
	Total	22	100.0	100.0	

It is noted that seventy-three percent of the judges surveyed have LLB as their highest academic qualification, whilst only twenty-three percent of the judges surveyed have an LLM as their highest academic qualification (Table 4.4.5).

4.4.6 Respondents Highest Professional Qualification

Table 4.4.6 Highest Professional Qualification

		Highest Professional Qualification			
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Advocate	8	36.4	44.4	44.4
	Judge	2	9.1	11.1	55.6
	Senior Counsel	6	27.3	33.3	88.9
	Attorney	1	4.5	5.6	94.4
	International Arbitration	1	4.5	5.6	100.0
	Total	18	81.8	100.0	
Missing	System	4	18.2		
Total		22	100.0		

Two-thirds of the judges surveyed and interviewed had practiced as advocates prior to their appointment to the bench. Twenty-seven percent of the advocates were Senior Counsel. This might be important if considering cultural bias in instances where opinions differ over the importance of professional qualifications over academic qualifications especially in determining suitability of judicial appointees based on professional or academic qualifications.

4.4.7 Cross Tabulation of Highest Academic Qualification & Highest Professional Qualification

Table 4.4.7 Cross Tabulation of Highest Academic Qualification & Highest Professional Qualification

Highest Professional Qualification * Highest Academic Qualification Crosstabulation

			Highest Academic Qualification			Total
			LLB	LLM	PG Dip Tax	
Highest Professional Qualification	Advocate	Count	5	3	0	8
		% of Total	27.8%	16.7%	.0%	44.4%
	Judge	Count	1	0	1	2
		% of Total	5.6%	.0%	5.6%	11.1%
	Senior Counsel	Count	6	0	0	6
		% of Total	33.3%	.0%	.0%	33.3%
	Attorney	Count	0	1	0	1
		% of Total	.0%	5.6%	.0%	5.6%
	International Arbitration	Count	0	1	0	1
		% of Total	.0%	5.6%	.0%	5.6%
	Total	Count	12	5	1	18
		% of Total	66.7%	27.8%	5.6%	100.0%

What is interesting to note in Table 4.4.7 is that only sixteen percent of the judges (who were previously advocates) and five percent of the judges (who were previously attorneys) have an LLM as their highest academic qualification. None of the senior advocates who participated in the study had an LLM as their highest academic qualification. Also, of interest is that the majority of the judges who had LLM as their highest academic qualification were black. In addition, eighty-three percent of the Judges surveyed and interviewed, had practiced as Advocates prior to their appointment to the bench. Forty-eight percent of these were Senior Counsel. This could be indicative of cultural bias and a difference of opinions between races and professions about the importance of professional qualifications and practical experience over academic qualifications.

4.4.8 Frequency of Judges Appointed After 1994 who Participated in the Research

Table 4.4.8 Frequency of Judges Appointed after 1994 who Participated in the Research

Appointed as a Judge

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Pre- 1994	7	31.8	31.8	31.8
	Post- 1994	15	68.2	68.2	100.0
	Total	22	100.0	100.0	

It is interesting to note that two-thirds of the judges who responded and participated in the research were appointed after the first democratic elections of 1994 and that seventy-two percent of them grew up in urban areas in South Africa (Table 4.4.8), reflecting the current views of the judiciary post 1994. One of the black judges interviewed said that it might be significant to establish whether a prospective judge has practiced in a rural area before being appointed to the bench. He felt that this may give a judge more varied experience (as there is a tendency to be a general practitioner) than someone who has practiced in a metropolitan area, where the tendency is to specialize in certain areas of law, especially if the candidate is an attorney who has been working for a large firm. Unfortunately, this question was not asked in the survey questionnaire as part of the biographical data and, if asked, could have yielded some interesting results if a cross correlation had been done. This question should be included in any future research on the topic.

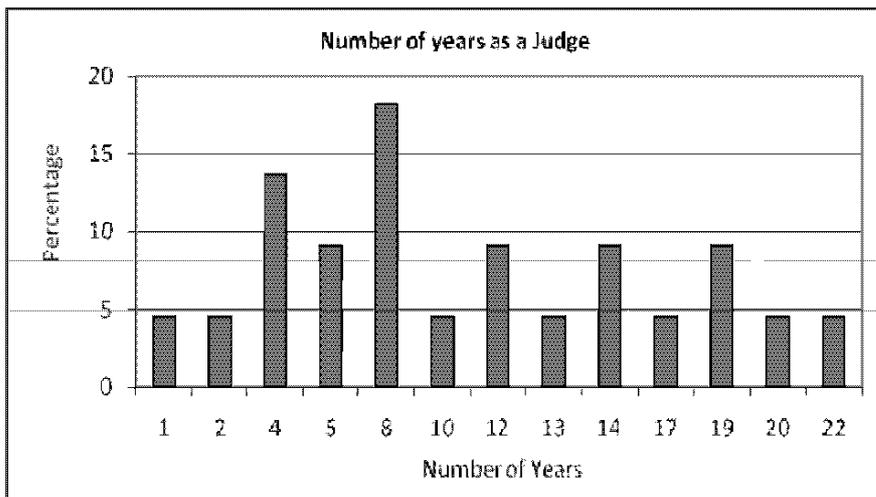
4.4.9 Number of Years of Experience as a Judge

Table 4.4.9 Number of Years Experience as a Judge

Number of years as a Judge					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1	1	4.5	4.5	4.5
	2	1	4.5	4.5	9.1
	4	3	13.6	13.6	22.7
	5	2	9.1	9.1	31.8
	8	4	18.2	18.2	50.0
	10	1	4.5	4.5	54.5
	12	2	9.1	9.1	63.6
	13	1	4.5	4.5	68.2
	14	2	9.1	9.1	77.3
	17	1	4.5	4.5	81.8
	19	2	9.1	9.1	90.9
	20	1	4.5	4.5	95.5
	22	1	4.5	4.5	100.0
	Total	22	100.0	100.0	

As can be seen in Table 4.4.9 and Figure 4.4.9, more than half of the judges who responded and participated in the research had been on the bench for less than ten years and only twenty-five percent of the judges had been on the bench in excess of fifteen years. It would appear that there is a trend to appoint younger, less experienced people to the bench. This could be due to the implementation of affirmative action policies to address past injustices and imbalances in the race and gender representativity of the judiciary.

Figure 4.4.9 Respondent's Number of Years as a Judge



As previously stated, little more than half of the judges (fifty-four coma five percent) have less than ten years judicial experience. This is significant in light of the fact that the older judges surveyed and interviewed said that previous professional practice experience and previous acting judicial appointments experience are amongst the important criteria which need to be considered when considering whether an aspirant judge is suitable for a permanent judicial appointment.

Some of the judges, interviewed, are of the opinion that the essence of a judge is the experience that he or she has and feel that his or her experience as a practitioner is very important. The majority of the judges interviewed felt that a candidate should have a minimum number of years court practice experience before appointment as a judge. The aspirant judges should have a number of years court practice experience, after they have been admitted to practice as practitioners and completed their postgraduate LLB law degree. The judges varied in their opinions on the minimum number of years court practice experience needed to be considered suitable. Some said that it should be ten to fifteen years, others were of the opinion that it should be in excess of twenty to twenty five years and some even felt that it should be in excess of thirty years experience. The majority were of the opinion that academic qualifications alone were inadequate and that practical court experience was essential.

The judges are of the opinion that although legal principles can be taught in lectures and training sessions, the application of legal principles cannot. They are of the opinion that the application of legal principles can only be learnt through experience gained in court practice. They are therefore

concerned that there are inherent dangers in appointing an inexperienced person to the bench. One of the dangers they mentioned is in cases involving more than one judge where a majority decision has to be made. Their concern is that a more experienced colleague could influence an inexperienced or weak judge, who may lack background or day-to-day knowledge on how a case is decided, and so would follow the lead of the more experienced colleague, thereby swinging the decision. The consensus amongst the judges interviewed is that advocates, especially senior counsel (who has been made Silk) are more suited for judicial appointments than other members of the legal professions. Some of them have conceded there are certain academics, attorneys and magistrates who have been good judicial appointments. Nevertheless, they are of the opinion that the Bar tends to bring a greater richness and breadth of experience to the bench than the other professions, as advocates primarily appear in court.

As previously stated here, the judges, conceded in their interviews, that there are attorneys and magistrates who are equally competent and qualified (as advocates), but they differed in their opinions about academics being appointed as judges, especially if they had no practical court experience. These Judges are of the opinion that attorneys, magistrates and academics will require more training than advocates will, although they conceded that this will apply to some more than others, depending on their court experience. The judges conceded in their interviews that magistrates with twenty years experience could be suitable, if they had presided over civil and criminal matters in the lower courts. Nevertheless, they were concerned that, in their opinion, most magistrates had been trained and had dealt mainly with criminal work; especially if they had practiced as prosecutors before serving as magistrates and that they had received little or no training in civil work. They were also concerned that magistrates are mainly experienced in magistrates' court procedure and may lack experience and need training in high court procedure.

Some of the judges stated in their interviews that the reason for their concerns was the fact that, in their opinion, eighty percent of high court work as well as the more difficult work done in the high court was civil, for which the magistrates in their opinion may have little or no court practice experience. The judges therefore felt that if magistrates were appointed to the bench, there would be a greater need to train magistrates than advocates and possibly even attorneys who became judges. Advocates and attorneys who had right of appearance in the high court and had practiced in high court matters so they had relevant court experience. One of the judges interviewed said that the type of experience that an attorney gained while he or she practised whether that experience had been gained in a city or rural town or in a large firm or in a small firm, was important in

determining their suitability for a judicial appointment. He felt that these were important considerations because if an attorney had practiced in a city, city law firms tended to specialize in certain areas and engaged in a large volume of a particular type of work for example criminal or civil, such as motor vehicle accidents, family law, etc. This was in contrast to attorneys who practiced in rural areas, where in his opinion, law firms tended to be more general as they dealt with maintenance, civil and criminal matters all in one day. He was therefore of the opinion that practitioners were more likely to amass a wide range of experience in rural areas in a shorter period than a practitioner who practiced in urban areas. The same judge was of the opinion that an attorney would need at least fifteen years practice experience to accommodate the spectrum of experience he felt that the attorney required to be a judge, before he or she should be considered as suitable for an appointment to the bench.

4.4.10 Area where Respondents Grew up

Table 4.4.10 Area where Respondents Grew up

Grew up in an area that was:

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Rural	5	22.7	22.7	22.7
	Urban	17	77.3	77.3	100.0
	Total	22	100.0	100.0	

The majority of the judges grew up in urban areas, with only twenty-three percent coming from rural areas (Table 4.4.10).

4.4.11 Countries where Respondents Grew Up

Table 4.4.11 Countries in which Respondents Grew up in

Grew up in the following country:

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	South Africa	21	95.5	95.5	95.5
	Namibia	1	4.5	4.5	100.0
	Total	22	100.0	100.0	

Ninety-five percent of the judges grew up in South Africa (Table 4.4.11).

In summary, the population studied included:-

- Ninety-five percent of the judges who responded are older than fifty; and half of them are older than sixty.
- Seventy seven percent of judges grew up in urban areas.
- Ninety five percent of the respondents were male and grew up in South Africa;
- Most respondents had been either advocates or senior advocates, before being appointed as a judge

4.5 Presentation of Results of Parts 2 – 12

The results of the next 10 questions will be presented below. These questions dealt with issues such as the effect that legislation and executive interference had on the independence of the judiciary.

4.5.1 Part 2: Judicial Organizational Structure

Table 4.5.1.1 Bureaucratization of the Judiciary is necessary

Bureaucratization of the Judiciary is necessary					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	7	31.8	31.8	31.8
	Disagree	12	54.5	54.5	86.4
	Unsure	1	4.5	4.5	90.9
	Agree	1	4.5	4.5	95.5
	Strongly Agree	1	4.5	4.5	100.0
	Total	22	100.0	100.0	

Judges have strong opinions on the bureaucratization of the judiciary. Eighty-six percent of the judges disagreed that bureaucratization of the judiciary is necessary (Table 4.5.1.1) while thirty-two percent strongly disagreed with the statement.

Table 4.5.1.2 Bureaucratization of the Judiciary Threatens the Foundations of the Judicial Process

Bureaucratization of the Judiciary threatens the foundations of the judicial process

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	2	9.1	9.5	9.5
	Disagree	3	13.6	14.3	23.8
	Unsure	1	4.5	4.8	28.6
	Agree	8	36.4	38.1	66.7
	Strongly Agree	7	31.8	33.3	100.0
	Total	21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

Two thirds of the Judges surveyed also agreed that bureaucratization of the judiciary threatened the functional independence of the judiciary (Table 4.5.1.2) while thirty-two percent of them strongly agreed with the statement.

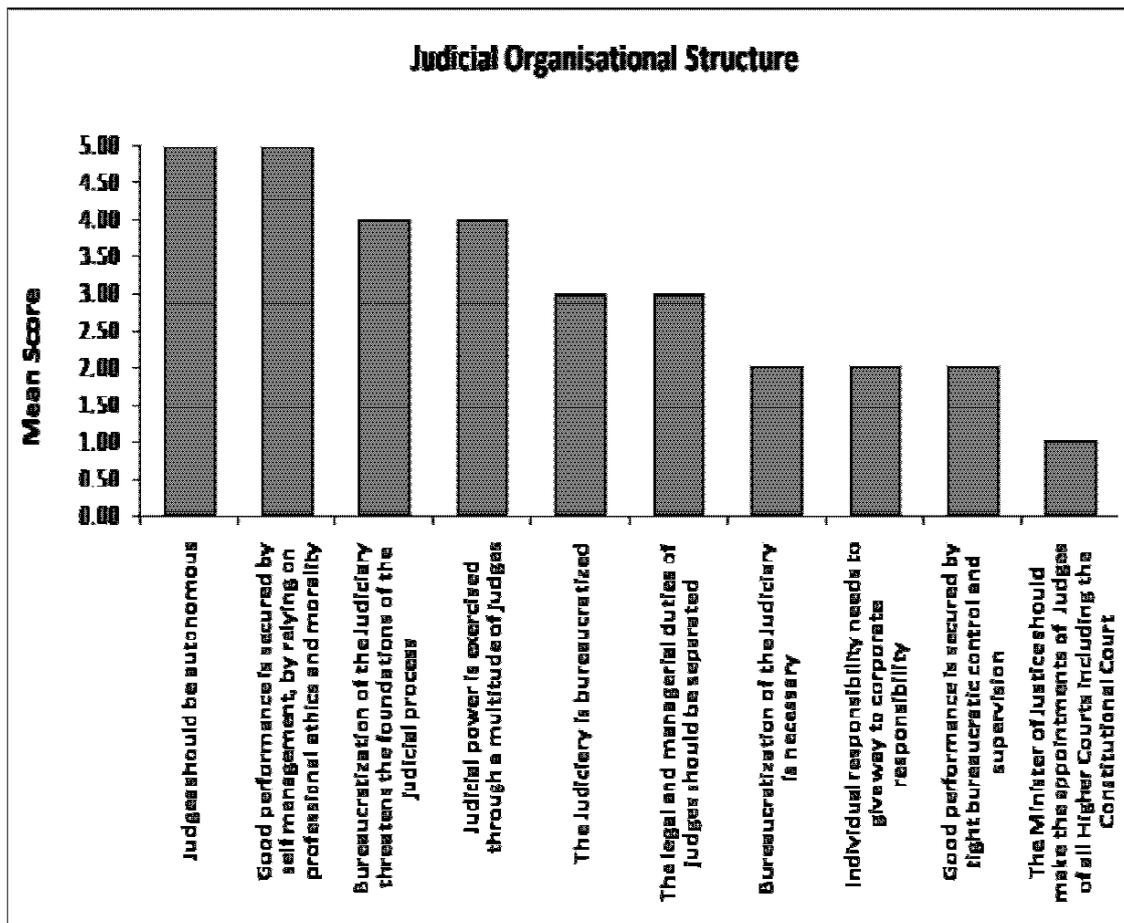
Table 4.5.1.3 Good Performance is Secured by Self Management, by Relying on Professional Ethics and Morality

Good performance is secured by self management, by relying on professional ethics and morality

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Agree	5	22.7	22.7	22.7
	Strongly Agree	17	77.3	77.3	100.0
	Total	22	100.0	100.0	

There was complete agreement amongst the judges surveyed with the statement that good performance is secured by self-management, relying on professional ethics and morality (Table 4.5.1.3).

Figure 4.5.1 Judicial Organisational Structure



There is complete agreement with the first four factors (Figure 4.5.1), which deal with the judicial autonomy and judicial power, namely that judges should be autonomous, that they should self manage themselves, that the judges exercise judicial power and that bureaucratisation threatens the functional independence of the judiciary. The judges have also, equally strongly disagreed with the idea that the Minister of Justice should be responsible for the appointment of judges, as this would interfere with and undermine the independence of the judiciary and increase the executive’s power over the judiciary. There is also a fair degree of disagreement amongst them with the remaining three factors, which deal with the necessity to govern the judiciary (Figure 4.5.1). The judges are of the opinion that they are each responsible for, and should be held accountable for, their individual actions, that the judiciary is not a company and that they therefore do not believe that corporate responsibility applies to them. The judges are opposed to tight bureaucratic control and supervision, which in their opinion they felt would have the opposite effect to what was desired,

namely it would hinder, impede their work and undermine the independence of the judiciary. The judges are also opposed to the Minister of Justice making the appointments of the judges of the superior courts and the Constitutional Court, as in their opinion it would be contrary to Section 174 and 175 of the Constitution of South Africa, 1996, as amended.

4.5.2 Part 3: Executive and Legislative Interference with the Judiciary

Table 4.5.2.1 The Judiciary Bills Hand over Judicial Control to the Minister of Justice

The Judiciary Bills hand over Judicial Control to the Minister of Justice

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	4	18.2	18.2	18.2
	Disagree	2	9.1	9.1	27.3
	Unsure	1	4.5	4.5	31.8
	Agree	11	50.0	50.0	81.8
	Strongly Agree	4	18.2	18.2	100.0
	Total	22	100.0	100.0	

The majority of the judges, namely sixty-eight percent of the judges were in agreement that the Judiciary Bills handed over judicial control to the Minister of Justice (Table 4.5.2.1).

Table 4.5.2.2 The Executive Should Not Have Control Over the Way the Functioning of the Courts

The Executive should have control over the way the Court functions

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	16	72.7	72.7	72.7
	Disagree	3	13.6	13.6	86.4
	Unsure	1	4.5	4.5	90.9
	Strongly Agree	2	9.1	9.1	100.0
	Total	22	100.0	100.0	

Eighty-six percent of the judges disagreed with this statement and of these, seventy-three percent strongly disagreed that the executive should have control over the way that the court functioned. They are of the opinion that, if the Bills are passed giving the executive control, it will undermine the functional independence of the judiciary (Table 4.5.2.2).

Table 4.5.2.3 The Executive Should Have a Say But Not Control Over the Way that the Court Functions

The Executive should have a say but not control over the way the Court functions

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	9	40.9	40.9	40.9
	Disagree	4	18.2	18.2	59.1
	Agree	7	31.8	31.8	90.9
	Strongly Agree	2	9.1	9.1	100.0
	Total	22	100.0	100.0	

Fifty-nine percent of the judges disagreed with this statement. Of these, eighteen percent strongly disagreed that the executive should be given a say over the way that the court functions. They are of the opinion that, if the Bills are passed allowing for the executive to have a say, this would still be a threat to the functional independence of the judiciary (Table 4.5.2.3).

Table 4.5.2.4 The Rules of Court Should Not be made by the Minister of Justice

The Rules of Court should be made by the Minister of Justice

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	13	59.1	59.1	59.1
	Disagree	4	18.2	18.2	77.3
	Agree	1	4.5	4.5	81.8
	Strongly Agree	4	18.2	18.2	100.0
	Total	22	100.0	100.0	

Seventy-seven percent of the judges disagreed with this statement, and of those, fifty-nine percent strongly disagreed that the Minister of Justice should make the rules of court. They are of the opinion that, if the Bills are passed giving the Minister of Justice the power to make the rules of court, that this would undermine the functional independence of the judiciary (Table 4.5.2.4).

Table 4.5.2.5 Judicial Education should be placed under the control of the Minister of Justice

Judicial Education should be placed under the control of the Minister of Justice

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	11	50.0	50.0	50.0
	Disagree	8	36.4	36.4	86.4
	Unsure	1	4.5	4.5	90.9
	Strongly Agree	2	9.1	9.1	100.0
	Total	22	100.0	100.0	

Eighty-six percent of the judges disagreed with this statement and of these fifty percent strongly disagreed that judicial education should be placed under the control of the Minister of Justice. They are of the opinion

Table 4.5.2.6 The Minister of Justice should make the appointments of Acting Judges of all Higher Courts including the Constitutional Court

The Minister of Justice should make the appointments of Acting Judges of all Higher Courts including the Constitutional Court

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	11	50.0	50.0	50.0
	Disagree	7	31.8	31.8	81.8
	Agree	3	13.6	13.6	95.5
	Strongly Agree	1	4.5	4.5	100.0
	Total	22	100.0	100.0	

Eighty-one percent of the judges disagreed with this statement and of these thirty-one percent strongly disagreed that the Minister of Justice should make the appointments of Acting Judges of all the Superior Courts, including the Constitutional Court. They are of the opinion that this would threaten the personal and functional independence of the judiciary (Table 4.5.2.6).

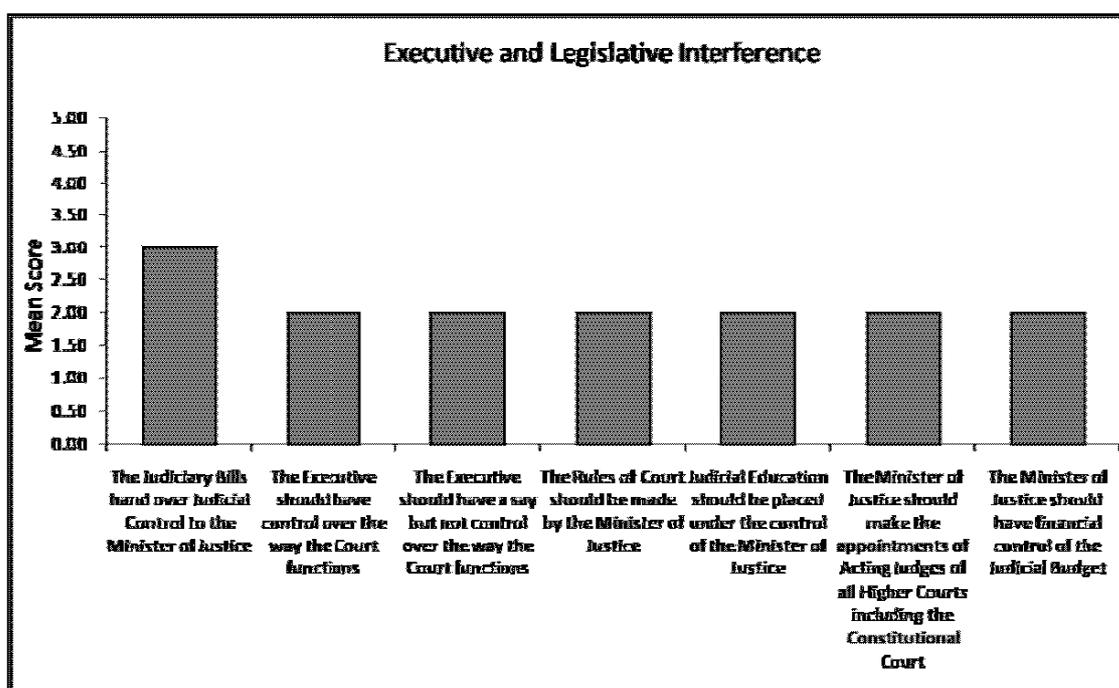
Sixty-four percent of the judges disagreed with this statement and of these; forty-five percent strongly disagreed that the Minister of Justice should have financial control of the judicial budget. They are of the opinion this would undermine the personal, functional and structural independence of the judiciary (Table 4.5.2.7).

Table 4.5.2.7 The Minister of Justice Should Not have Financial Control over the Judicial Budget

The Minister of Justice should have financial control of the Judicial Budget

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	10	45.5	45.5	45.5
	Disagree	4	18.2	18.2	63.6
	Unsure	3	13.6	13.6	77.3
	Agree	4	18.2	18.2	95.5
	Strongly Agree	1	4.5	4.5	100.0
	Total	22	100.0	100.0	

Figure 4.5.2 Executive and Legislative Interference



Save for the first statement (in Figure 4.5.2) that the Judicial Bills handed over judicial control to the Minister of Justice, which averaged 3.0 (Figure 4.5.2 and Table 4.5.2.1), the judges are opposed to the remaining statements (Table 4.5.2.2, Table 4.5.2.3, Table 4.5.2.4, Table 4.5.2.6 and Table 4.5.2.7). This means that for the first statement there were an equal number of judges who agreed and disagreed with the statement. One of the possible reasons for this is that some of the

judges who participated in the survey admitted that they had not studied the judicial Bills in detail and were therefore unable to comment on them. For the remaining statements (in Figure 4.5.2), the judges are opposed to them, averaged a disagreement score of two (Figure 4.5.2). They disagreed that the executive should interfere with the functioning of the courts, the making of the court rules, appointing acting judges for the superior courts and constitutional court and having financial control of the budget, as this would undermine the independence of the judiciary and the efficiency and effectiveness of the courts.

4.5.3 Part 4: Judicial Code of Conduct & Judicial Discipline

Table 4.5.3.1 There should be a Judicial Code of Conduct

There should be a Judicial Code of Conduct

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	2	9.1	9.1	9.1
	Unsure	1	4.5	4.5	13.6
	Agree	10	45.5	45.5	59.1
	Strongly Agree	9	40.9	40.9	100.0
	Total	22	100.0	100.0	

Ninety-six percent of the judges agreed with this statement, of which forty percent strongly agreed, that there should be a Judicial Code of Conduct (Table 4.5.3.1).

Table 4.5.3.2 There is a Judicial Code of Conduct

There is a Judicial Code of Conduct

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	1	4.5	4.5	4.5
	Disagree	3	13.6	13.6	18.2
	Unsure	4	18.2	18.2	36.4
	Agree	10	45.5	45.5	81.8
	Strongly Agree	4	18.2	18.2	100.0
	Total	22	100.0	100.0	

However, only seventy-four percent of the judges agreed that there is presently a judicial code of conduct in place (Table 4.5.3.2).

Table 4.5.3.3 The Judiciary Holds Its Members Accountable to the Law and Litigants through the Appeal and Review Proceedings

The judiciary should hold its members accountable to the law and litigants through appellate review

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	1	4.5	4.8	4.8
	Disagree	2	9.1	9.5	14.3
	Unsure	2	9.1	9.5	23.8
	Agree	8	36.4	38.1	61.9
	Strongly Agree	8	36.4	38.1	100.0
	Total	21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

Seventy three percent of the judges agreed with this statement, that the judiciary should hold its members accountable through the appeal process (Table 4.5.3.3). However, in contrast the judges did not have the same opinion about the review process (Table 4.5.3.4).

Table 4.5.3.4 The Judiciary are subjected to Discipline; Judicial Review Proceedings do Not Hold Judges Sufficiently Accountable

Judges should not be subjected to discipline, judicial review already holds judges sufficiently accountable.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	6	27.3	30.0	30.0
	Disagree	9	40.9	45.0	75.0
	Unsure	1	4.5	5.0	80.0
	Agree	2	9.1	10.0	90.0
	Strongly Agree	2	9.1	10.0	100.0
	Total	20	90.9	100.0	
Missing	System	2	9.1		
Total		22	100.0		

A possible explanation for the difference of opinion is that in the appeal process, new decision makers retry the facts and either confirm the correctness of the decision or come to a new judgement. The review process is more limited as it is only concerned with procedural aspects of

the case and the matter is referred back to be retried if it is found for example that there has been an irregularity in the proceedings.

Table 4.5.3.5 The Judiciary Should Not Hold Its Members Accountable to the Law and to Litigants through Inquisitorial Proceedings

The judiciary should hold its members accountable to the law and litigants through inquisitorial proceedings

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	10	45.5	47.6	47.6
	Disagree	6	27.3	28.6	76.2
	Agree	3	13.6	14.3	90.5
	Strongly Agree	2	9.1	9.5	100.0
	Total	21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

In contrast to the judges' opinions about appeal proceedings, seventy-three percent of them disagreed that the judiciary should hold its members accountable through inquisitorial proceedings, such as disciplinary proceedings (Table 4.5.3.5). A possible explanation here might be that the judges may be of the opinion that inquisitorial proceedings could threaten their personal independence.

Table 4.5.3.6 Disciplinary Powers Should be Exercised over Judges

Disciplinary powers should be exercised over Judges

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	1	4.5	4.8	4.8
	Disagree	2	9.1	9.5	14.3
	Unsure	2	9.1	9.5	23.8
	Agree	11	50.0	52.4	76.2
	Strongly Agree	5	22.7	23.8	100.0
	Total	21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

Despite these results, seventy-three percent agreed that disciplinary powers should be exercised over judges (Table 4.5.3.6). One reason given by the judges in their interviews is the change in the

source pool from which judicial appointments were being made since 1994 by the Judicial Service Commission.

Table 4.5.3.7 Disciplinary Powers Should be Administered by a Disciplinary Panel

Disciplinary powers should be administered by a disciplinary panel.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Disagree	1	4.5	4.8	4.8
	Agree	15	68.2	71.4	76.2
	Strongly Agree	5	22.7	23.8	100.0
	Total	21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

Ninety-five percent of the judges are of the opinion that there should be a disciplinary panel, which administers the disciplinary powers (Table 4.5.3.7).

Table 4.5.3.8 Disciplinary Panel Should Not Consist of Judges and Non-Judges

Disciplinary panel should consist of judges and non-judges

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	12	54.5	57.1	57.1
	Disagree	5	22.7	23.8	81.0
	Unsure	1	4.5	4.8	85.7
	Agree	2	9.1	9.5	95.2
	Strongly Agree	1	4.5	4.8	100.0
	Total	21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

However, eighty-one percent of the judges disagreed that the panel should comprise both judges and non-judges (Table 4.5.3.8).

Table 4.5.3.9 Disciplinary Powers Should be Administered by Judges

Disciplinary powers should be administered by Judges.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	1	4.5	4.8	4.8
	Unsure	1	4.5	4.8	9.5
	Agree	6	27.3	28.6	38.1
	Strongly Agree	13	59.1	61.9	100.0
	Total	21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

In fact eighty-six percent of the judges were of the opinion that only judges should administer disciplinary powers over judges, in other words that discipline should take place within the judiciary (Table 4.5.3.9).

Table 4.5.3.10 Judicial Discipline Interferes with Judicial Impartiality

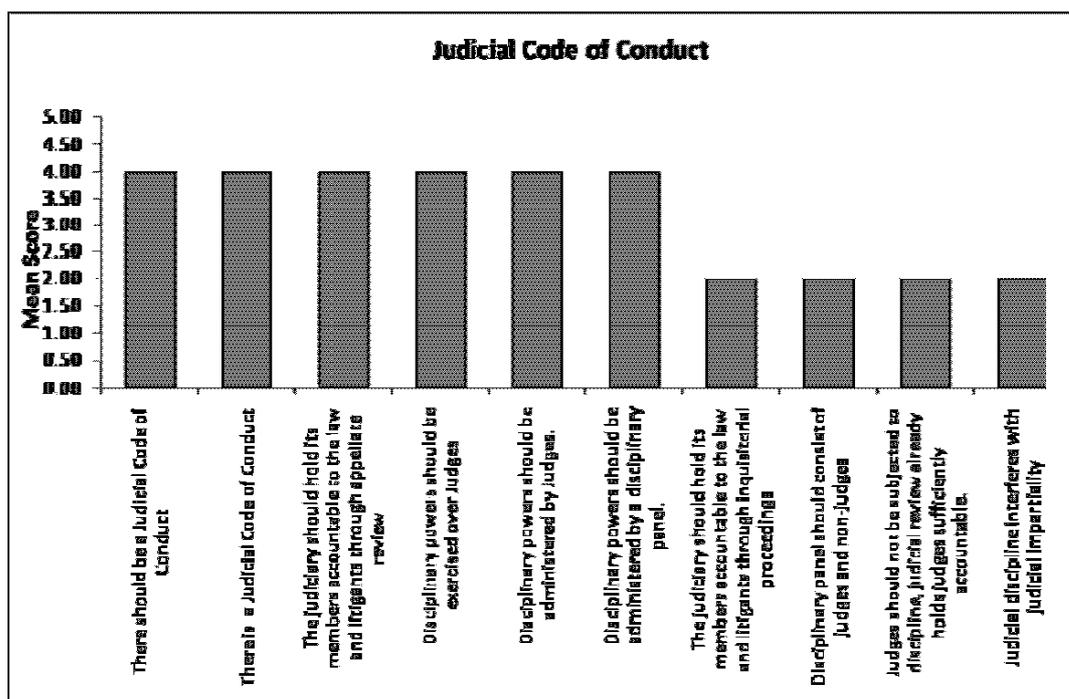
Judicial discipline interferes with judicial impartiality

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	7	31.8	33.3	33.3
	Disagree	9	40.9	42.9	76.2
	Unsure	1	4.5	4.8	81.0
	Agree	3	13.6	14.3	95.2
	Strongly Agree	1	4.5	4.8	100.0
	Total	21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

Seventy-six percent of the judges were of the opinion that judicial discipline does not interfere with judicial impartiality (Table 4.5.3.10). However, in their interviews, the judges qualified this statement by saying that it was acceptable, if the judiciary conducts the discipline internally. They said that their opinion would be different if judicial discipline is to be conducted externally, such as through the judicial commission or by non-members of the judiciary, as they believe that in that instance it would interfere with judicial independence and judicial impartiality.

Judges were equally distributed between agreement and disagreement with the statements on judicial code of conduct, as is reflected below in Figure 4.5.3. Six of the statements, which they agreed on, related to the code of conduct and to disciplinary issues. The judges agreed that there should be a code of conduct to regulate their behaviour; they agreed that the judiciary should hold its members accountable to the law and to litigants through the statutory and common law processes of appeal and review. They also agreed that it should be judges who should exercise disciplinary powers over other judges (not people outside of the judiciary) and that the disciplinary panel should only be made up of judges so that judicial impartiality and judicial independence could be ensured.

Figure 4.5.3 Judicial Code of Conduct



4.5.3.1 An Analysis of How the Judiciary Holds its Members Accountable:

Figure 4.5.3.1 How does the judiciary hold its members accountable?

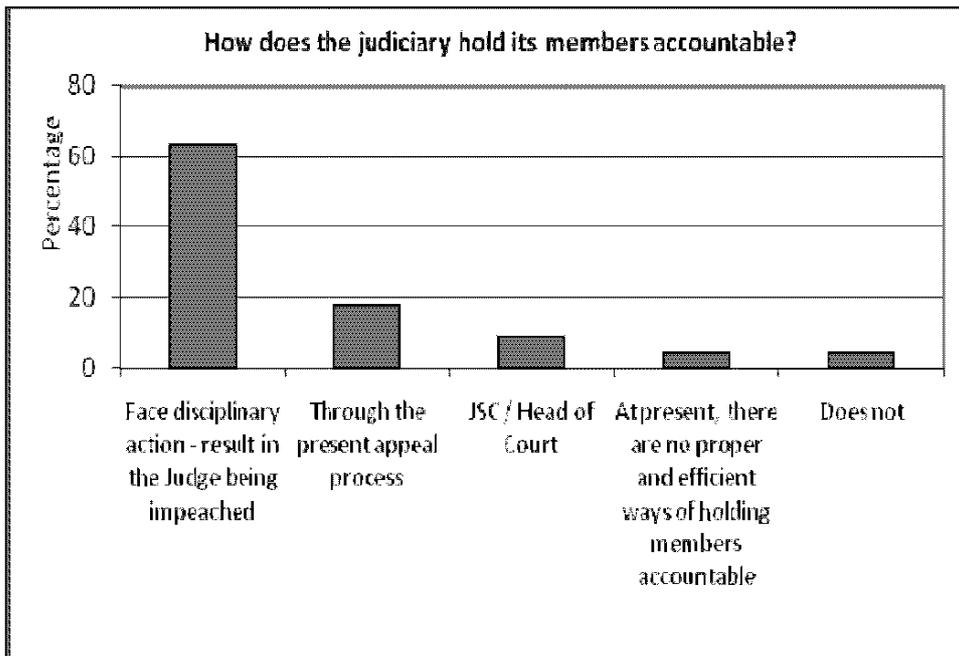


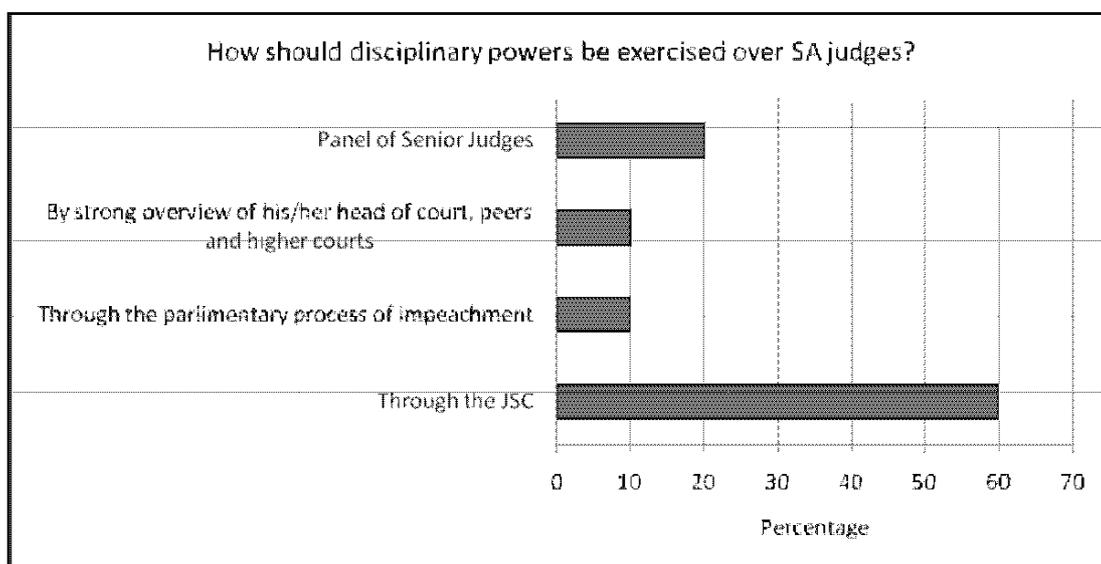
Figure 4.5.3.1 below shows that there is overwhelming support for judges to be impeached for improper conduct. This is in accordance with Section 177 of the Constitution of the Republic of South Africa, 1996. The remaining four statements dealt with various processes, bodies and individuals who should be responsible for disciplinary and impartiality issues and the effectiveness thereof (Figure 4.5.3.1). The judges are overwhelmingly of the opinion and are deeply concerned that judicial discipline could interfere with judicial impartiality and judicial independence.

4.5.3.2 The Following Methods were Suggested in the Exercise of Disciplinary Powers:

- ? Through the Judicial Service Commission
- ? Through the institutional process of impeachment
- ? By higher courts, heads of courts and peers
- ? By a panel of senior judges

All of the above indicate that members of the judiciary should conduct any disciplinary process internally. However, at present the more serious complaints are dealt with by the Judicial Service Commission, which has been criticized by some of the judges as being ineffective.

Figure 4.5.3.2 How should disciplinary powers be exercised over SA judges?



As shown in Figure 4.5.3.2 above, the majority of the respondents indicated that the Judicial Service Commission should exercise disciplinary powers over judges. This is also in accordance with Section 177 of the Constitution of the Republic of South Africa, 1996. However, ten percent of the respondents strongly disagreed that external disciplinary procedures for judges are necessary. They stated that there are other factors that contribute to alternative methods being used for disciplinary actions. There was also consensus amongst the judges interviewed and surveyed that not all judges need to be disciplined, as they felt that to do so would undermine the independence of the judiciary. They were therefore of the opinion that only those judges who behaved in a manner which offended society's view of how a judge ought to behave, should be regulated and disciplined. They gave the example of an arrogant judge, who constantly demeans or belittles people. A minority of the judges (ten percent) surveyed and interviewed felt that a panel of senior judges should manage the disciplinary process internally and by the heads of court and that there should be proper systems in place to ensure that the *audi alteram partem* process is

adhered to. The disciplinary process should not be used to target judges with differing views on for example court rulings, or judges who made unpopular decisions.

4.5.4 Part 5: Judicial Education and Training

Table 4.5.4.1 There Is No Formal System of Education for Judges in South Africa

There is a formal system of education for Judges in South Africa.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	4	18.2	19.0	19.0
	Disagree	10	45.5	47.6	66.7
	Unsure	2	9.1	9.5	76.2
	Agree	4	18.2	19.0	95.2
	Strongly Agree	1	4.5	4.8	100.0
	Total	21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

Sixty-six percent of the judges disagreed that there is a formal education system for judges in place in South Africa (Table 4.5.4.1).

Table 4.5.4.2 There Should be a Judicial Studies Board which Controls Judicial Education for Judges in South Africa

There should be a Judicial Studies Board which should control who should conduct judicial education for Judges in South Africa.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	2	9.1	9.5	9.5
	Disagree	3	13.6	14.3	23.8
	Unsure	3	13.6	14.3	38.1
	Agree	8	36.4	38.1	76.2
	Strongly Agree	5	22.7	23.8	100.0
	Total	21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

Fifty-nine percent of the judges agreed that there should be a judicial studies board, which controls judicial education for judges, in South Africa (Table 4.5.4.2).

Table 4.5.4.3 Judges Should Conduct Judicial Education for Judges in South Africa

Judges should conduct judicial education for Judges in South Africa

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	1	4.5	4.8	4.8
	Unsure	1	4.5	4.8	9.5
	Agree	9	40.9	42.9	52.4
	Strongly Agree	10	45.5	47.6	100.0
Total		21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

Eighty-six percent of the judges were of the opinion that judges should conduct judicial education for judges in South Africa (Table 4.5.4.3).

Table 4.5.4.4 The Minister of Justice Should Not Control Judicial Education For Judges In South Africa

The Minister of Justice should control who should conduct judicial education for Judges in South Africa

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	14	63.6	66.7	66.7
	Disagree	5	22.7	23.8	90.5
	Strongly Agree	2	9.1	9.5	100.0
	Total	21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

Ninety-percent of the judges disagreed that the Minister of Justice should control who should conduct judicial education for judges in South Africa (Table 4.5.4.4).

Table 4.5.4.5 Judges Should be Free From Internal Interference

Judges should be free from internal interference

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Disagree	4	18.2	18.2	18.2
	Agree	5	22.7	22.7	40.9
	Strongly Agree	13	59.1	59.1	100.0
	Total	22	100.0	100.0	

Eighty-two percent of the judges agreed that judges should be free from internal interference. Some of them stated in their interviews that they were of the opinion that internal interference could affect judicial impartiality and personal independence (Table 4.5.4.5 and Table 4.5.5.1).

Table 4.5.4.6 A Career Ladder within the Judiciary is Not Desirable

A career ladder within the judiciary is desirable

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	6	27.3	27.3	27.3
	Disagree	10	45.5	45.5	72.7
	Unsure	1	4.5	4.5	77.3
	Agree	3	13.6	13.6	90.9
	Strongly Agree	2	9.1	9.1	100.0
	Total		22	100.0	100.0

Seventy-three percent of the judges disagreed that a career ladder within the judiciary is desirable. However, some of them stated in their interviews that they were of the opinion that a career ladder could affect judicial impartiality and personal independence (Table 4.5.4.6). This was corroborated by the fact that seventy-two percent of the judges felt that a career ladder through the prospects of promotion might influence a judge's decisions (Table 4.5.4.7).

Table 4.5.4.7 A Career Ladder Through the Prospects of Promotion Might Influence a Judge in His or Her Decision

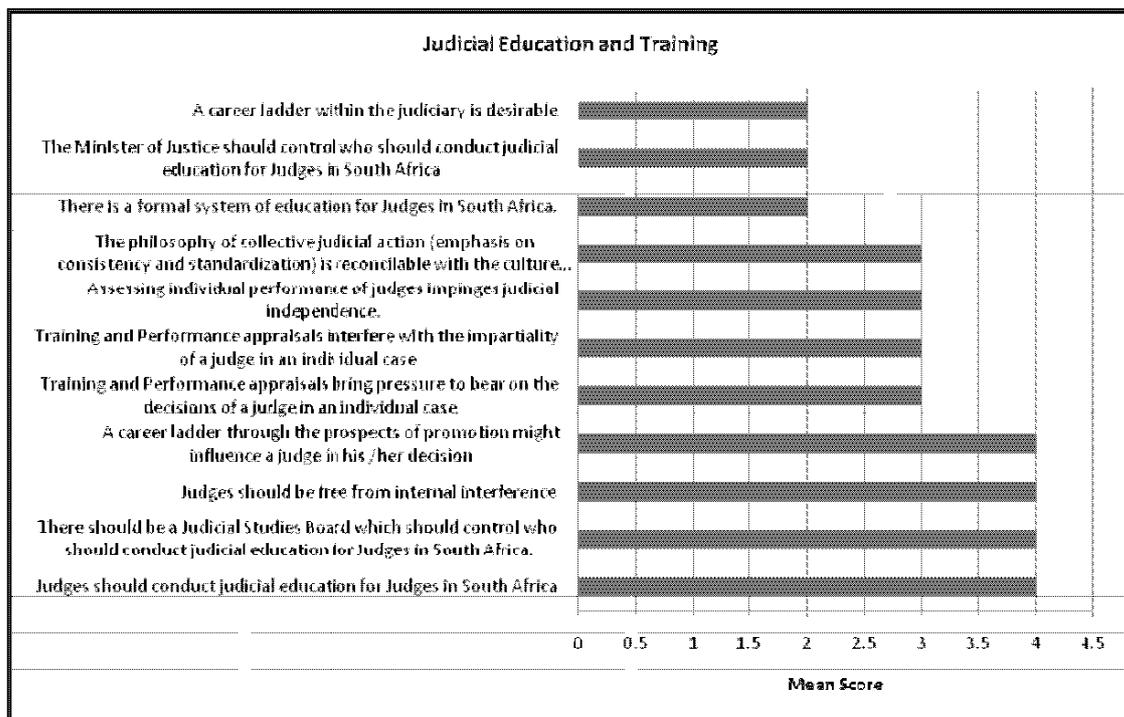
A career ladder through the prospects of promotion might influence a judge in his /her decision

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Disagree	5	22.7	22.7	22.7
Unsure	1	4.5	4.5	27.3
Agree	9	40.9	40.9	68.2
Strongly Agree	7	31.8	31.8	100.0
Total	22	100.0	100.0	

There is agreement with the first four factors (Figure 4.5.4), namely:

- ? that there should be judicial education, conducted by judges,
- ? that this should take place without interference from outside institutions,
- ? that judges should also be free from internal interference by their fellow judges, and
- ? that there should not be a career ladder within the judiciary.

Figure 4.5.4 Judicial Education and Training



All of these factors are important to ensure that a judge remains impartial and that his or her decisions are not influenced in any way (Figure 4.5.4). This is probably why the judges who were interviewed were also divided on the issue of whether judges can or should be trained or not. These judges expressed concern that if training is conducted inappropriately (by training judges to think in a certain way), or outside of the judiciary, the training might indirectly affect the impartiality of their decisions.

Some of the interviewed judges also said that they believed that one could not study to become a judge in the conventional sense (through a university or college for example). They were all of the opinion that judges should have a wide range of experience, which they believe cannot be taught in a classroom and they differed on the types of judicial training required. They were therefore of the opinion that the best training ground for a judge is first to become an advocate, to specialize in court work by practicing as an advocate for a minimum of fifteen years before accepting an appointment to the bench. The aforesaid judges were also of the opinion that the practical training received at Legal Aid Clinics and Practical Training Schools, is inadequate. The consensus amongst these judges was that if the aspirant judge were a high court specialist, he or she would need little or no training. They also agreed that training was very important if the aspirant judge was not a high court specialist.

Nevertheless, most of the judges interviewed were in favour of certain types of training being conducted, such as refresher training, ongoing or continued training on various aspects of the law (especially in new areas of the law or in developing areas of the law). Hence, some of the judges (interviewed) suggested that before an aspirant judge sits as an acting judge, he or she should attend at least six months' training at a judicial training college. Most of the judges interviewed also said that they were in favour of the informal judicial training systems, previously implemented by Judge Ian McFarland, Judge Kenneth Mtiyane as well as the training provided in the past by the Canadian government, all of which they said, is no longer being offered. In their interviews, some judges were of the opinion that they had not all been provided with the same opportunities for training. For example, the Constitutional Court judges and women judges had been sent all over the world on exchange programmes to gain exposure to other judicial systems.

The majority of the judges interviewed were in favour of having a judicial training college, but they felt that it should be run by senior more experienced retired judges, who should train judges, especially new judges who have had little or no court exposure in their practice careers or in

matters like court management and in the writing of judgements. They felt that retired judges would be most suitable as they had the time and the experience to get involved in the lecturing, training and the mentoring process of aspirant judges. One of the judges who were interviewed suggested that Judge Piet Combrink, who has prepared a booklet on giving new judges practical advice, would be an ideal person to train aspirant judges. The judges interviewed and surveyed agreed that the training must be held within the judiciary. They proposed that the School for Judicial Education, a properly constituted judicial training college, should be situated within the judiciary, and should be independent of the executive and be run under the control of judges or ex-judges.

The judges surveyed and interviewed were also of the opinion that the Chief Justice, and not the Minister of Justice, should also be involved in the training programmes. The judges were not in favour of the Minister of Justice controlling their appointments, their training and education or the court functions. They expressed concern that it might result in an increased concentration of power in the hands of the executive and could lead to a compliant judiciary, which they felt was not in the best interests of the nation.

The next four factors in Figure 4.5.4, dealt with the issues surrounding training and performance appraisals, which averaged a response of uncertainty. As previously stated above, the judges were split in their opinions on these issues. The majority of the Judges interviewed generally felt that training might, if controlled and conducted outside the judiciary, and performance appraisals most definitely would, interfere with the impartiality and the independence of the judiciary (Table 4.5.4.7).

The judges were also split on their opinions about training. The majority were of the opinion that the need for training has arisen because they believe that the Judicial Service Commission is selecting and recommending unqualified and inexperienced person for judicial appointments. In their opinion this is having a negative impact on the efficiency and effectiveness of the judiciary. The judges who were interviewed were also of the opinion that if the most suitable person were selected for the appointment to the bench, then training and performance appraisals would be unnecessary. They blamed the Judicial Service Commission's selection process for the inefficiencies and ineffectiveness and unethical behaviour of some members of the judiciary.

They were of the opinion that it is because of the Judicial Service Commission's selection of judicial appointments, that unsuitable judicial appointments are being made. This has raised the issue of the need for increased judicial training and for performance appraisals. Both of these would be an attempt to address the shortcomings in the judicial appointees and to remedy the perceived inefficiencies and ineffectiveness of the judiciary. The judges who were interviewed were of the opinion that if suitably professionally qualified, experienced and ethical profession people were appointed to the bench, there would be little need for discipline, management and training of members of the judiciary.

4.5.5 Part 6: Judicial Independence

Table 4.5.5.1 The Administrative Powers of the Judiciary Should Not be Transferred to the Executive

The administrative powers of the judiciary should be transferred to the Executive.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	8	36.4	38.1	38.1
	Disagree	10	45.5	47.6	85.7
	Unsure	1	4.5	4.8	90.5
	Agree	2	9.1	9.5	100.0
	Total	21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

The majority of the judges (eighty-six percent) disagreed with this statement, that the administrative powers should be transferred to the executive (Table 4.5.5.1). In their interviews, some of the judges stated that to do so, would undermine the functional independence of the judiciary. However, they acknowledged that at present the executive did exercise a great deal of administrative powers over the judiciary, for example through the registrars of the courts and through the court managers. They felt that these factors were adversely affecting the efficiency and effectiveness of the judiciary.

Table 4.5.5.2 There Should be an Independent Body Responsible for the Administration of the Courts

There should be an independent body responsible for the administration of the courts.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	4	18.2	18.2	18.2
	Disagree	3	13.6	13.6	31.8
	Unsure	3	13.6	13.6	45.5
	Agree	9	40.9	40.9	86.4
	Strongly Agree	3	13.6	13.6	100.0
	Total	22	100.0	100.0	

This is further corroborated by the fact that fifty-four percent of the judges agreed with the statement that there should be an independent body responsible for the administration of the courts (Table 4.5.5.2).

Table 4.5.5.3 The Budgeting Powers of the Judiciary Should Not be Transferred to the Executive

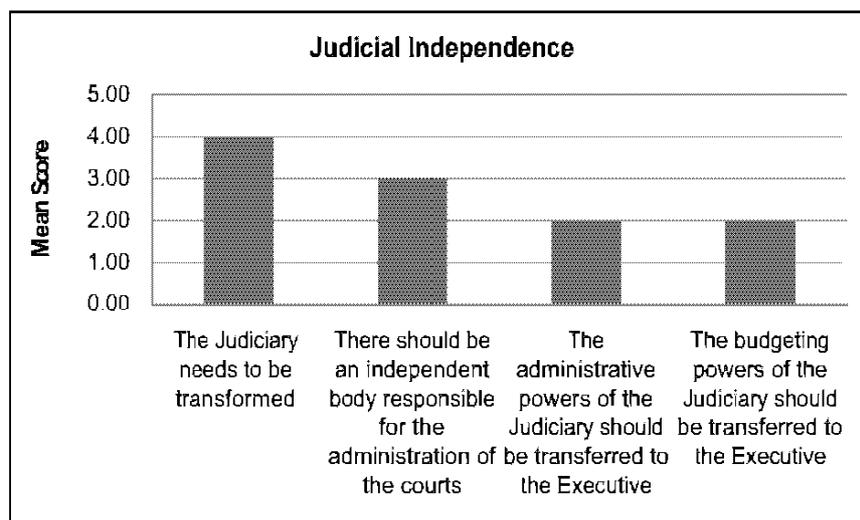
The budgeting powers of the judiciary should be transferred to the Executive.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	8	36.4	38.1	38.1
	Disagree	9	40.9	42.9	81.0
	Agree	2	9.1	9.5	90.5
	Strongly Agree	2	9.1	9.5	100.0
	Total	21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

Eighty-one percent of the judges also disagreed with the statement that the budgeting powers of the judiciary should be transferred to the executive (Table 4.5.5.3). In their interviews, they said that, for the sake of convenience, the budgeting powers already lay with the executive. They were of the opinion however, that it should rather be with the judiciary. Some judges even suggested that there should be a judicial administrative office, situated within the judiciary and falling under the Chief Justice. This office should handle the administration of the judiciary and the registrar of the courts and the court managers should report to the office of the Chief Justice. At present the registrar and the court managers report to the executive on judicial administrative matters.

In the first factor (Figure 4.5.5) there is common agreement amongst the respondents that the judiciary needs transformation. The diagrams below illustrate this further, showing that where forty percent of the respondents indicated that certain sectors of the judiciary, such as gender, need to be promoted. Nevertheless, there is opposition to the administrative and budgeting powers being removed from the judiciary and transferred to the executive. The judges in their interviews as well as the literature surveyed in Chapter Two stated that it would undermine judicial independence to do so.

Figure 4.5.5 Judicial Independence

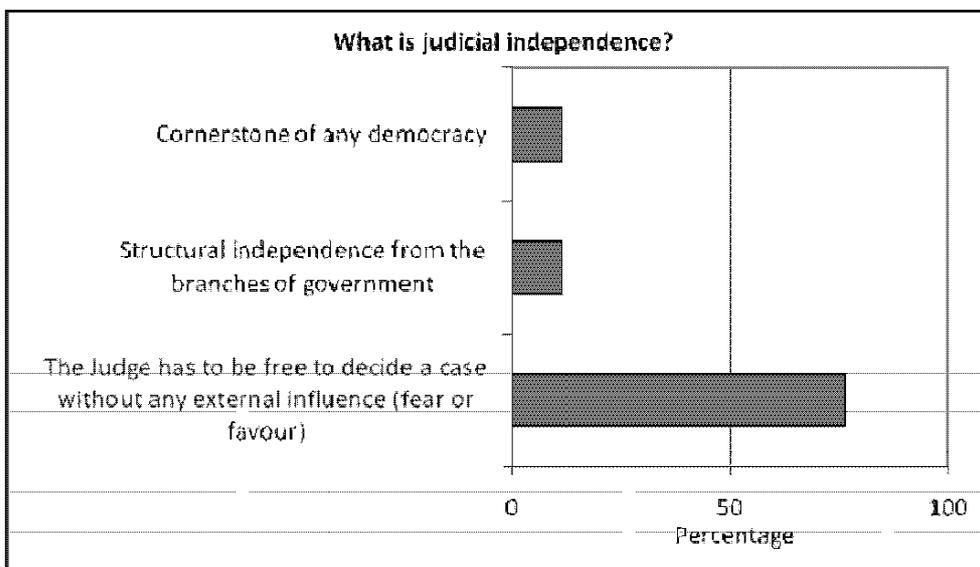


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4.5.5.1 Interpretations of Judicial Independence

Seventy-five percent of the respondents (Figure 4.5.5.1) defined judicial independence as judges having the freedom to decide a case without any external influence, fear or favour. Others said that judicial independence is the cornerstone of any democracy, whilst others were in favour of the structural independence of the judiciary from other arms of government.

Figure 4.5.5.1 What is Judicial Independence



The respondents and the interviewees also defined judicial independence as:

? The ability to exercise judicial powers without fear, favour or prejudice, in an environment free from political and bureaucratic influences.
? A judge being solely responsible for his decisions and not being accountable to anyone for them.
? Being able to have an unfettered judicial discretion.
? Being able to do as you think fit, what you think is justifiable.
? Not experiencing interference: judges have experience and they apply common sense.
? Not having anyone trying to influence, a judge's thinking along other lines and the judge knowing that there is no sanction or comeback.

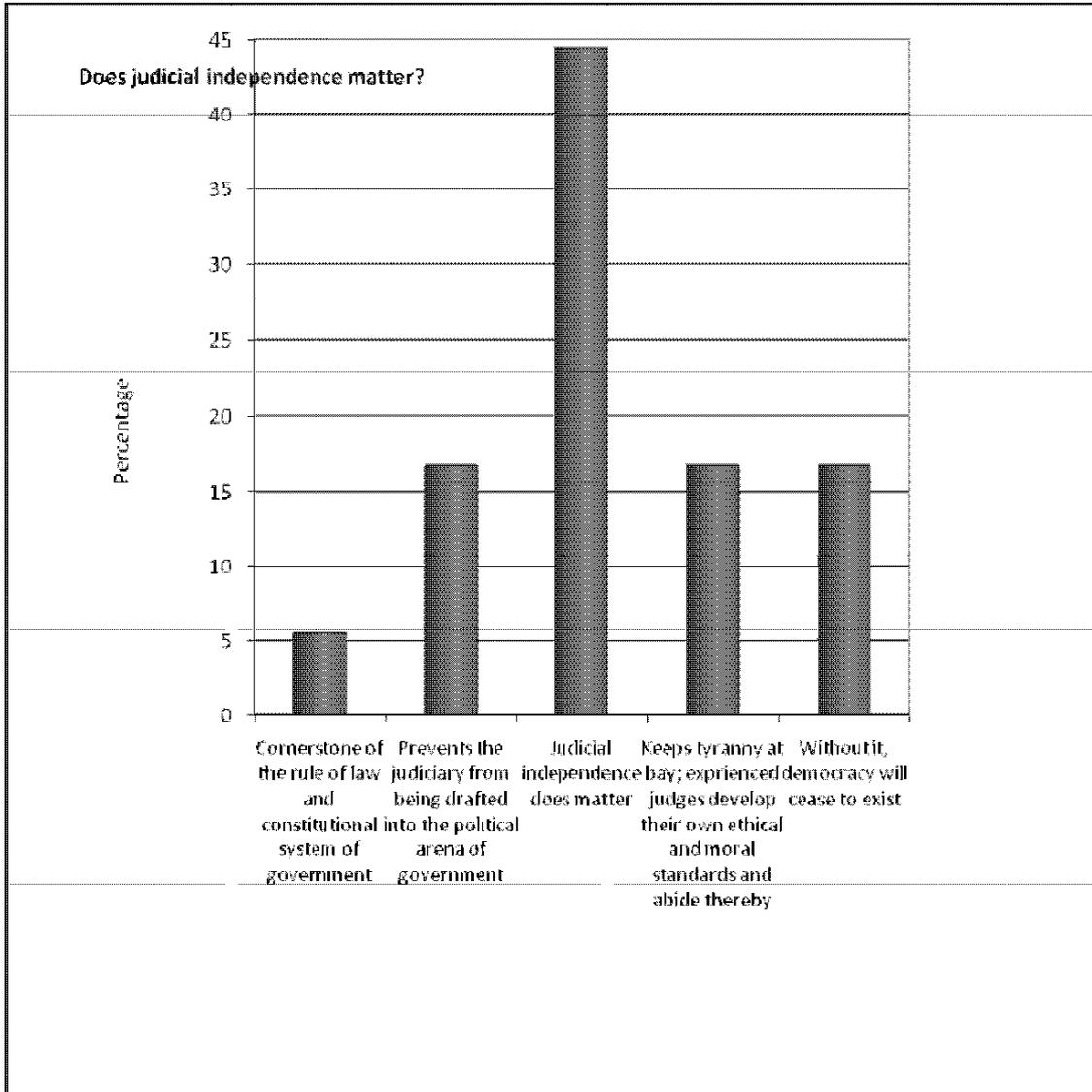
<ul style="list-style-type: none"> • Not being dependent on implied performance.
<ul style="list-style-type: none"> • Having the right to decide a case freely and fairly.
<ul style="list-style-type: none"> • Having independence from government.
<ul style="list-style-type: none"> • Being able to stand between the individual and the state, protecting the individual from any interference with his or her freedom, which is not justified by the law.
<ul style="list-style-type: none"> • Interpreting the law according to their learning and their conscience, without any interference from the executive and the legislature.
<ul style="list-style-type: none"> • The freedom to decide any dispute placed before one without fear or favour and uninfluenced by any aspect other than the demands of justice.
<ul style="list-style-type: none"> • The ability to approach any judgement without fear or favour and arrive at a decision on the merits of the case without influence.
<ul style="list-style-type: none"> • Being free from expediency or political influence; only the facts, the law and the credibility of witnesses are relevant.
<ul style="list-style-type: none"> • Being able to decide what is placed before him or her without fear and favour, he or she is colour and gender blind and he or she simply decides what is before him or her.
<ul style="list-style-type: none"> • Being able to decide a case before him or her on the facts without fear, favour or prejudice, according to his or her conscience.
<ul style="list-style-type: none"> • Being able to carry out judicial functions without fear or favour or prejudice and without any external influence.
<ul style="list-style-type: none"> • The independence to give judgements and do work without interference or the appearance of interference.
<ul style="list-style-type: none"> • Being able to decide a case without influence, threat, harassment, and intervention; have the ability to change their working environments, so that their working environments do not influence the way in which cases are decided.
<ul style="list-style-type: none"> • Being free from any political pressure in decision-making.
<ul style="list-style-type: none"> • Being able to speak justice without fear or favour and without any interference from politics.
<ul style="list-style-type: none"> • Being able to pronounce on any matter without fear, favour or prejudice.
<ul style="list-style-type: none"> • Be free of fear of implications. There should be no reason for such fear, a judge should feel completely free to make a decision without any interference.
<ul style="list-style-type: none"> • Not being told by anybody how to decide a matter. A judge must be free to make any decision in any matter without fear favour or prejudice.
<ul style="list-style-type: none"> • The ability to make a decision without external influence.
<ul style="list-style-type: none"> • The ability to decide cases without fear or favour.

<ul style="list-style-type: none"> • Being free to decide a case without any external influence, save for counsel's assistance.
<ul style="list-style-type: none"> • Having the right to decide cases without overt or covert pressure or influence.
<ul style="list-style-type: none"> • Not being influenced by politicians, either directly or indirectly.
<ul style="list-style-type: none"> • Being able to decide a matter honestly, in accordance with the law, and free from any outside interference.
<ul style="list-style-type: none"> • Having structural independence from other branches of government.
<ul style="list-style-type: none"> • The ability to decide cases purely on the facts, the constitution and the law.
<ul style="list-style-type: none"> • The ability to execute judicial functions without fear or favour and free from executive control.
<ul style="list-style-type: none"> • The right to be free from outside interference and to make decisions without fear or favour.
<ul style="list-style-type: none"> • Being able to work without fear or favour and without interference from anyone, for example the influence of stakeholders and other judges.
<ul style="list-style-type: none"> • Judges are independent of influence from other state organs and stakeholders

4.5.5.2 The significance of Judicial Independence

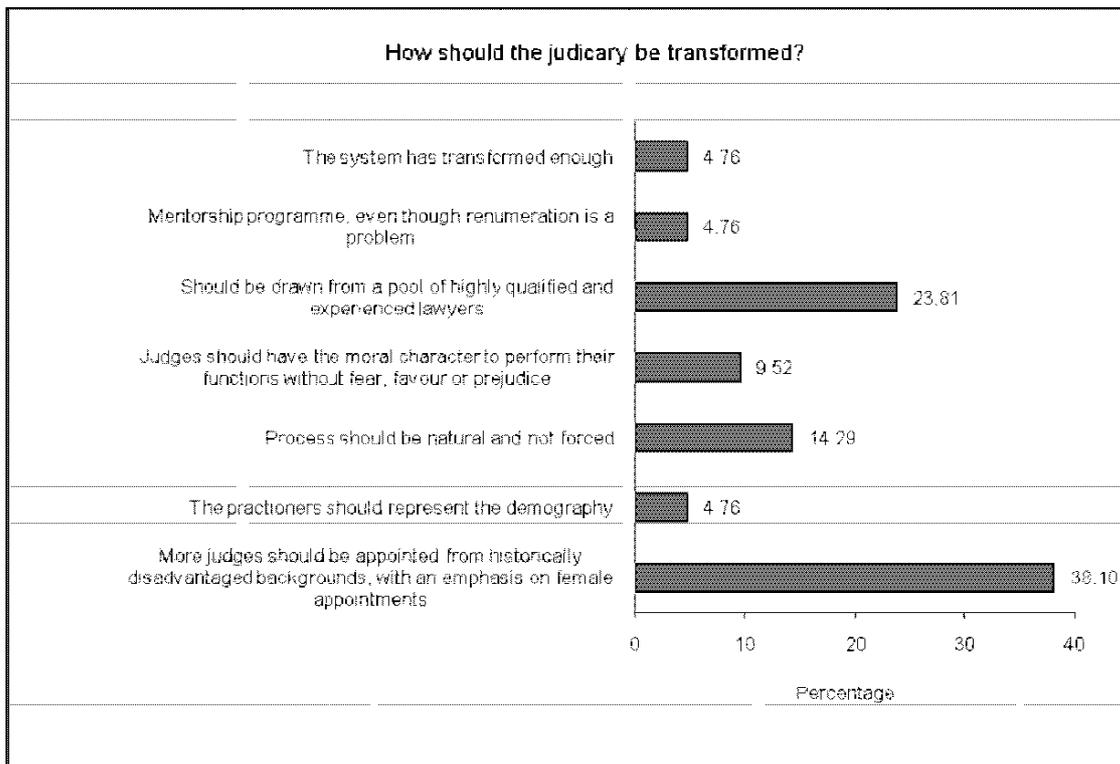
All the judges surveyed (Figure 4.5.5.2) felt that judicial independence was of critical importance for various reasons. Forty-five percent of them indicated that judicial independence mattered. A further fifteen percent elaborated and said that judicial independence was important to prevent the judiciary from being drafted into the political arena of government. Another fifteen percent went further and said that the reason why judicial independence mattered was to keep tyranny at bay. Yet a further fifteen percent felt so strongly about judicial independence that they said that without it, democracy would cease to exist. Five percent felt that judicial independence was essential, as they believed that it was the cornerstone of the rule of law and constitutional system of government.

Figure 4.5.5.2 Does Judicial Independence matter?



4.5.5.3 Transformation of the Judiciary:

Figure 4.5.5.3 How should the judiciary be transformed?



Emphasis has been placed on racial and gender equity (thirty-eight percent of the respondents selected this answer), with the quality of the source of the judges ranking second (twenty-four percent selected this) (Figure 4.5.5.3).

The majority of the judges interviewed agreed that transformation of the judiciary was necessary in order to address past imbalances and injustices. However, they felt that the demographics of the judiciary must reflect the demographics of its source pool, which is the demographics of the legal profession of advocates and attorneys, not the demographics of the entire South African population. The judges also stated in their interviews racial, gender discrepancies cannot be fixed overnight, and they felt that the Judicial Service Commission was trying to rush the process, rather unsuccessfully. The majority of the judges interviewed said that twenty years of practice at the bar is all the training that is required for someone to become a judge. They felt very strongly that one could not train aspirant judges at a college. The only way to train to become a judge is through experience gained whilst practicing at the bar.

The judges, who were interviewed, complained that they had to bear the brunt of the delays and the incompetence of inexperienced judges. In their interviews, they also said that they believed that placing unqualified, inexperienced people in the position of a judge would undermine the judiciary that is the cornerstone of the South African democracy and the South African constitution.

Most of the judges surveyed and interviewed said that affirmative action had been strongly implemented in the judiciary. Some felt that it had been over-implemented, especially with regard to promotion. They stated for example that every Judge President is African. Some of the judges interviewed felt that a number of ideal candidates were being overlooked for the positions. They said that they could name twenty people at the Bar whom they considered ideal candidates to be judges of the Supreme Court of Appeal and of the Constitutional Court, but who were not being selected. Some of the Judges who were interviewed felt that the government's affirmative action policy has put a serious dampener on the quality of applications received for judicial appointments. They stated that they knew of certain senior advocates, who although suitable to be appointed to the bench, are not prepared to accept appointments to the high court bench because of affirmative action. They have therefore chosen to remain in private practice. The judges who were interviewed also expressed concern that affirmative action is being used to appoint friends and relatives. They even went so far as to say: "it is not what you know, but whom you know".

Consequently, it would appear that the most suitable people are not being nominated or selected. In the researcher's opinion, this is not in the best interest of local and foreign investors or South Africans in general as it may result in a widespread loss of confidence in the legal system of the country.

Some of the judges interviewed from the Natal Provincial Division, are of the opinion that the Natal Provincial Division has, to a large extent, transformed. Fourteen years after democracy, more than half of the Natal Provincial Division judges are either people of colour or women. In support of the aforesaid statement, they provided the researcher with the following statistics. They said that the Natal Provincial Division presently (at the time that the interviews were conducted) comprises:

- nine white male judges,
- one white female judge,
- three Indian male judges,
- three Indian female judges,

- two Coloured male judges,
- one Coloured female judge,
- six African male judges.

By comparison, prior to 1994, there was only one judge of colour. However, they did acknowledge that, at the time that the interviews were conducted, there are still no African female judges appointed to the bench despite the fact that they believed that there were suitably qualified African females. One of the judges in his interview said that the end of 2008 this problem would in all probability be remedied as two white judges and one Indian judge are retiring by September 2008. Also, because of the heavy workload in the Natal Provincial Division, two new judicial posts had been created and they would be getting two additional judges. He felt that in total there would be five vacancies, which could be filled with people of colour, some of whom, he was certain, would be women.

The judges however, stated in their interviews that they were opposed to the fast tracking of people into high level positions, because they did not believe that it worked. The judges felt that the only way it would work was for everyone to go through the proper channels. One of the judges interviewed suggested that this could be achieved by strategically placing black practitioners in firms and in advocates groups. There they could be exposed to the right kind of experience so that they could become outstanding. He felt that to do otherwise, would be to do them a disservice. The same judge also posed a very important question, which is worth taking note of: "What is fourteen years in the life of a nation?"

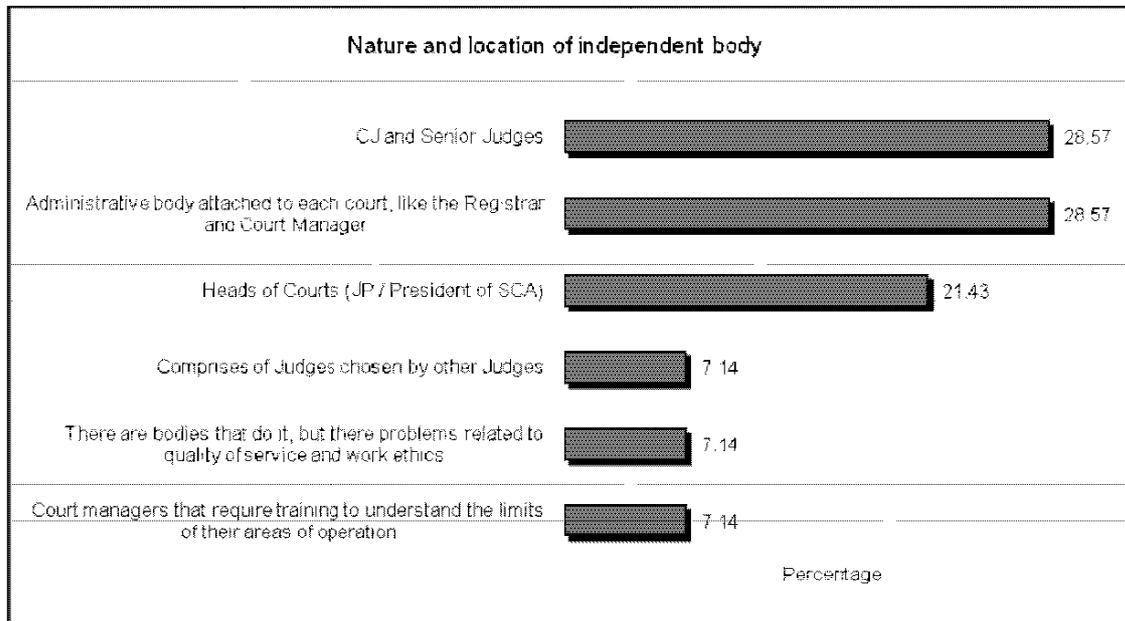
He felt very strongly that what is needed is twenty to thirty years' court practice experience before someone is ready for the bench. The judges also highlighted the problem of trying to promote a person of colour simply to achieve representativity in their interviews, especially if it was subsequently found that the candidate was ill suited and ill equipped to deal with the position. They used the complaints against Judge Hlope as an example of how affirmative action has gone wrong. A number of the judges interviewed felt that if Judge Hlope is found guilty of the complaints made against him that will prove that he is not suitable and should not have been appointed as the Judge President. They also expressed concern that under such circumstances he may not, be up to standard in that he may not have the necessary experience or the necessary background to deal with such an appointment.

Some of the judges interviewed also felt that affirmative action has gone far enough to address past inequalities as far as race is concerned, and that new judicial appointments should be made purely on merit in future. They do, however, acknowledge that gender representativity is still a problem. The judges who were interviewed were also divided on the merits of the acceleration programme for women being run by Judge Ivor Schwartzman. This programme plans to train twenty-four female lawyers who had been selected and earmarked to become judges. A number of the judges interviewed were critical of this programme, as they said that women who were being promoted to the bench should still be properly screened. Other judges interviewed felt that the programme is unnecessary as there are suitable African women available for the bench and that these women should be invited and encouraged to accept judicial appointments.

Although the judges did concede that for various reasons, such as financial circumstances and family responsibilities, suitably qualified women were not accepting appointments and they felt that the judiciary should make the bench more attractive to them. Some of the possible reasons given for their reluctance or disinterest are that these women are earning much more in private practice than they would on the bench. Their family obligations may be holding them back, especially if they foresee problems associated with relocation, travelling and young children.

The judges interviewed are of the opinion that the Judicial Service Commission cannot effect transformation overnight, and that they are causing problems by trying to do so. They are also of the opinion that the Judicial Service Commission's selection criteria should be objective, professional and unbiased and that aspirant judges' acting judgements should be evaluated to determine whether they are suitable or not for a permanent judicial appointment and should form part of the selection process.

Figure 4.5.5.4 The Nature and Location of an Independent Judicial Administrative Body



The Figure above shows that almost seventy-eight percent of the judges who participated in the survey believed that there should be an independent judicial administrative body, comprising the Chief Justice, all the Heads of Court and a representative panel of judges, some of which are senior for each of the superior courts and or their divisions (Figure 4.5.5.4). The independent judicial administrative body should be decentralized and should have branches attached to each of the superior courts. Each branch should be made up of the registrar’s office and the court managers for that particular court or division, all reporting and accounting to the independent judicial administrative body and not to the Minister of Justice. This administrative body should be located within the judiciary, to ensure the impartiality and independence of the judiciary.

4.5.6 Part 7: Judicial Self-Governance

Table 4.5.6.1 There Should be Institutional Accountability

There should be institutional accountability.

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Strongly Disagree	2	9.1	9.1	9.1
Disagree	2	9.1	9.1	18.2
Unsure	2	9.1	9.1	27.3
Agree	11	50.0	50.0	77.3
Strongly Agree	5	22.7	22.7	100.0
Total	22	100.0	100.0	

The majority of the judges (Table 4.5.6.1), namely seventy-three percent, agreed that there should be institutional accountability.

Table 4.5.6.2 Judges Should Exercise Authority Over Each Other Outside of the Realm of Appeals

Judges should exercise authority over each other outside of the realm of appeals

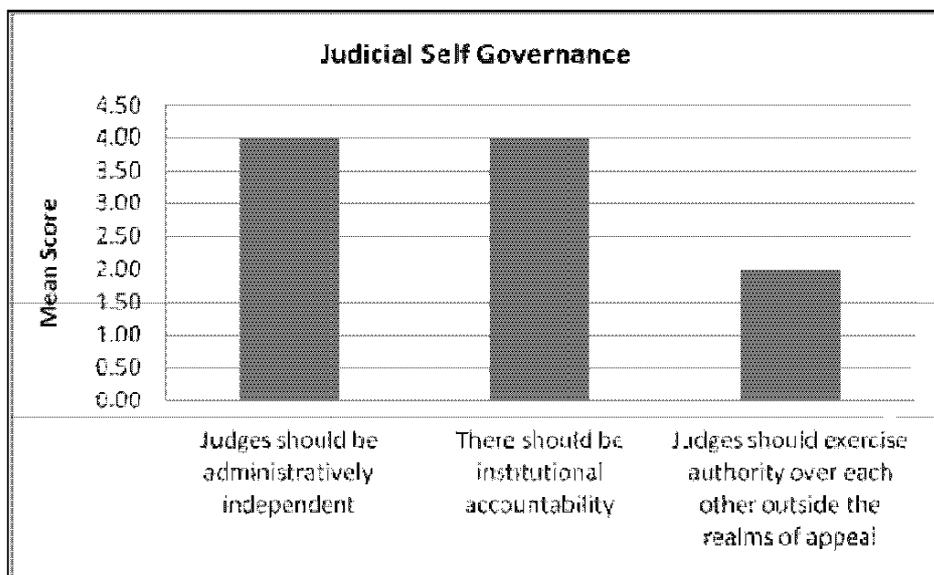
	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Strongly Disagree	7	31.8	31.8	31.8
Disagree	7	31.8	31.8	63.6
Unsure	1	4.5	4.5	68.2
Agree	7	31.8	31.8	100.0
Total	22	100.0	100.0	

The majority of the judges, namely sixty-three percent, disagreed with the statement that judges should exercise authority over each other outside of the realm of appeals, as it was felt that this would affect their impartiality (Table 4.5.6.2).

In terms of self-governance, judges believed that they should be administratively independent to ensure judicial independence and judicial impartiality (Figure 4.5.6). However, they also felt that there should be institutional accountability of the judiciary as they have a legal and an ethical responsibility to themselves, their peers, and the law and to society as a whole for the manner in which they conduct themselves and deliver their judgements. However, there seem to be

differences of opinion about whether judges should exercise authority over each other. A possible reason for such reluctance is that they fear that to exercise authority over each other outside the realms of appeals, could interfere with judicial independence and judicial impartiality (Figure 4.5.6). A number of the judges interviewed and surveyed felt that the appeal process was the most appropriate form of exercising authority over each other without interfering with judicial independence and judicial impartiality.

Figure 4.5.6 Judicial Self Governance



4.5.7 Part 8: The Judges' Opinions on Aspects Contained in the Proposed Judiciary Bills

Table 4.5.7.1 The Judiciary Bills Interfere With the Functional Independence of the Judiciary

The Judiciary bills interfere with the functional independence of the judiciary

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Disagree	2	9.1	9.1	9.1
	Unsure	2	9.1	9.1	18.2
	Agree	12	54.5	54.5	72.7
	Strongly Agree	6	27.3	27.3	100.0
	Total	22	100.0	100.0	

The majority of the judges (Table 4.5.7.1), namely eighty-two percent, agreed with the statement that the proposed judiciary Bills will interfere with the functional independence of the judiciary.

Table 4.5.7.2 Disciplinary Procedures for Judges Are Necessary and Should be Introduced

Disciplinary procedures for judges are necessary and should be introduced.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	1	4.5	4.5	4.5
	Disagree	4	18.2	18.2	22.7
	Unsure	1	4.5	4.5	27.3
	Agree	11	50.0	50.0	77.3
	Strongly Agree	5	22.7	22.7	100.0
	Total	22	100.0	100.0	

Despite the objection mentioned above, the majority of the judges, namely seventy-three percent, agreed with the statement that disciplinary procedures for judges are necessary and should be introduced for the various reasons as stated earlier on in this chapter (Table 4.5.7.2).

Table 4.5.7.3 A Judicial Training College for Judges is Necessary and Should Be Established

A training college for Judges is necessary and should be established.

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Strongly Disagree	1	4.5	4.5	4.5
	Disagree	5	22.7	22.7	27.3
	Unsure	1	4.5	4.5	31.8
	Agree	11	50.0	50.0	81.8
	Strongly Agree	3	13.6	13.6	95.5
	9	1	4.5	4.5	100.0
	Total	22	100.0	100.0	

For the same reasons, the majority of the judges agreed that a judicial training college is necessary and should be established (Table 4.5.7.3) and that a financial register of interests is necessary (Table 4.5.7.4).

The judges agreed that disciplinary procedures for judges are necessary and should be introduced (Figure 4.5.7). As previously stated in this chapter, one of the reasons given in the interviews is that the pool of potential candidates from which judges are currently being selected, has grown and changed. Judges are no longer only being selected from the ranks of senior advocates as they had been prior to 1994.

Table 4.5.7.4 A Register for Financial Interest is Necessary

A register for financial interest is necessary

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Disagree	4	18.2	19.0	19.0
	Unsure	3	13.6	14.3	33.3
	Agree	10	45.5	47.6	81.0
	Strongly Agree	4	18.2	19.0	100.0
	Total	21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

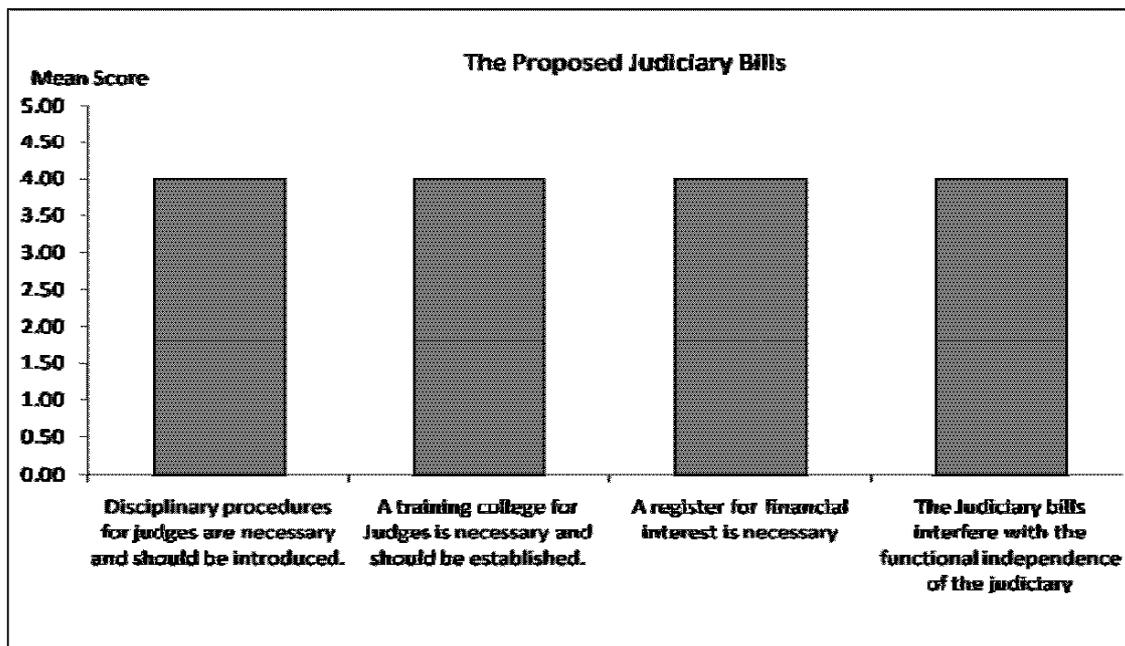
The judges interviewed believe that senior advocates, especially Silk, are best suited to being judges, especially if they:

- have specialized in high court work for a number of years;

- ? have dealt with complex matters;
- ? have gained a vast range of experience;
- ? are mature;
- ? are highly ethical and respected by their peers.

In addition, they agreed that a training college has become necessary for judges and should be established (Figure 4.5.7). A number of the judges interviewed attribute this need to the fact that because of affirmative action, less experienced and/or inexperienced people are being selected to become judges. They are not only being selected from the ranks of advocates, but also from academics, attorneys and magistrates and these people may lack high court experience.

Figure 4.5.7 The Proposed Judiciary Bills



The Judges also agreed for the same reasons stated before, that a register for financial interest is necessary because the pool of potential judicial candidates from whom judges are selected has grown and changed and they are concerned that the same ethical standards which apply to advocates are not being applied to academics, attorneys and magistrates.

There was consensus amongst them that the judiciary Bills interfere with the functional independence of the judiciary (Figure 4.5.6), especially the Superior Courts Bill [B 52 – 2003] and the 14th Constitutional Amendment Bill [B 60 – 2003], the Judicial Education Bill [B 4 – 2007] and the Judicial Service Commission Amendment Bill [B 50 – 2007] to a lesser extent.

4.5.8 Part 9: Management of Judges

Table 4.5.8. Judicial Management Increases Productivity and Reduces Costs

Judicial management increases productivity and reduces costs.

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid Strongly Disagree	4	18.2	18.2	18.2
Disagree	5	22.7	22.7	40.9
Unsure	5	22.7	22.7	63.6
Agree	6	27.3	27.3	90.9
Strongly Agree	2	9.1	9.1	100.0
Total	22	100.0	100.0	

There was almost an equal split of opinions on the issue of whether judicial management increases productivity and reduces costs or not (Table 4.5.8). In their interviews some of the judges agreed that judicial management will increase productivity of some members of the judiciary who are not self-motivated and self-regulated. However, they felt that to apply judicial management across the board to all judges, would be counterproductive and de-motivating for members of the judiciary who are self-motivated. Once again, the judges blamed the fact that the Judicial Service Commission has selected unsuitable candidates, as being the root cause for judicial inefficiencies and ineffectiveness.

The judges interviewed believe that if the Judicial Service Commission were to select based on merit and not race or gender, then a number of the problems surrounding unethical behaviour, judicial inefficiencies and judicial ineffectiveness would be eliminated and there would not be a need for judicial management. However, the judges admit that the heads of court do administratively manage the judges who fall under the jurisdiction of their courts, for example with the allocation of cases to the individual judges. This is demonstrated below (Figure 4.5.8.1).

4.5.8.1 Should South African Judges be Managed and Controlled?

Figure 4.5.8.1 Management and Control of Judges

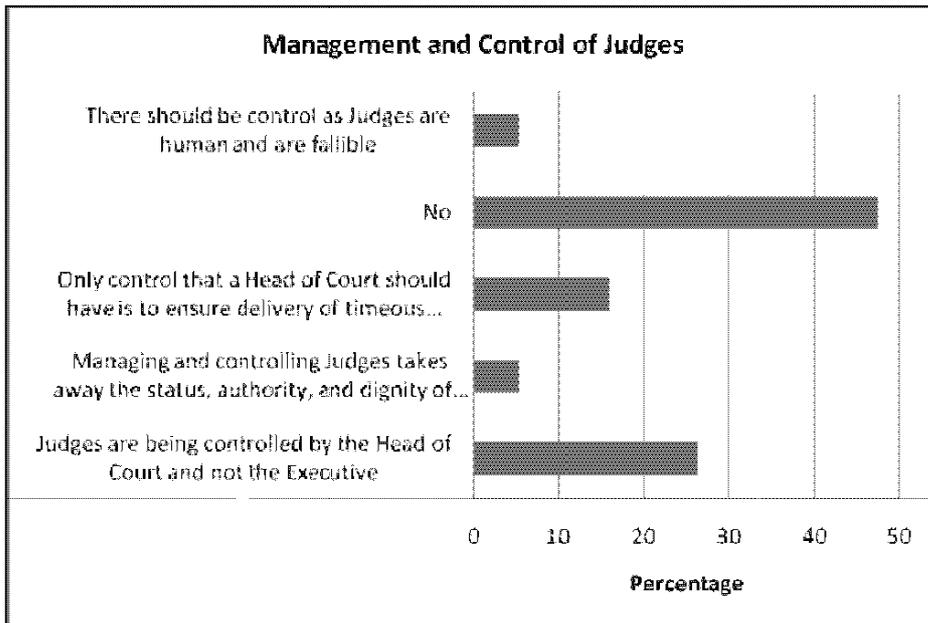


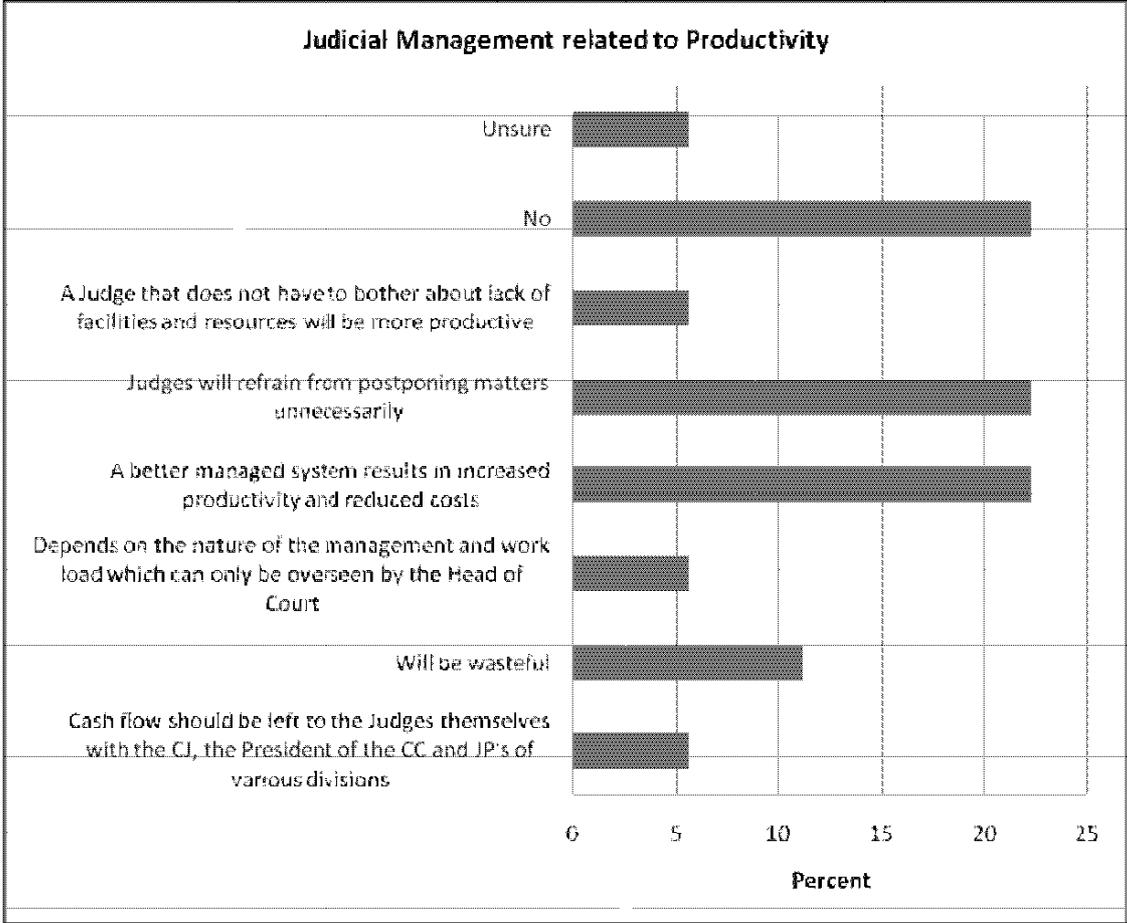
Figure 4.5.8.1 above shows that judges are of the strong opinion that they should not be controlled. Forty percent of them indicated this directly as a strong comment, whilst the remaining gave choices of who should control judges, and the impacts of such measures.

4.5.8.2 Does Judicial Management Increase Productivity?

There would appear to be arguments for and against judicial management in relation to productivity (Figure 4.5.8.2.). Issues highlighted included the following:

- There should be no management as it would be a wasteful exercise.
- Resources are an issue and these should be controlled by the judges (who, in their opinion, would better manage their own funds)
- Management should streamline functionalities (such as, overheads, delivery, etc.)

Figure 4.5.8.2 Judicial Management related to Productivity

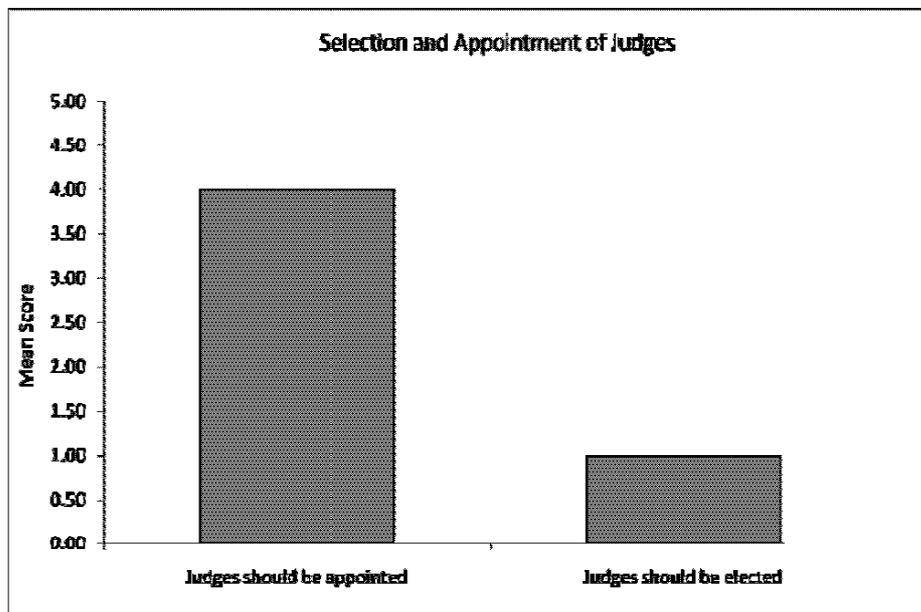


4.5.9 Part 9: The Election or Appointment of Judges

There was an overwhelmingly positive response to the statement that judges should be appointed (Figure 4.5.9). The reason given by the Judges, who participated in the interviews, is that if judges are elected, this would impact on their impartiality. The danger would be that the Judges may be tempted to decide a case not on merit, but how it would impact upon their re-election. The judges therefore felt that judges should rather be appointed to avoid them becoming political pawns and applying judgements to secure their next election as a judge. Another reason given in the

interviews is that the electorate do not fully know the competence of a judicial candidate. Some of the judges interviewed felt that elections were a bad system because they were of the opinion that there was the danger that a man or woman may be chosen on charisma and not on ability.

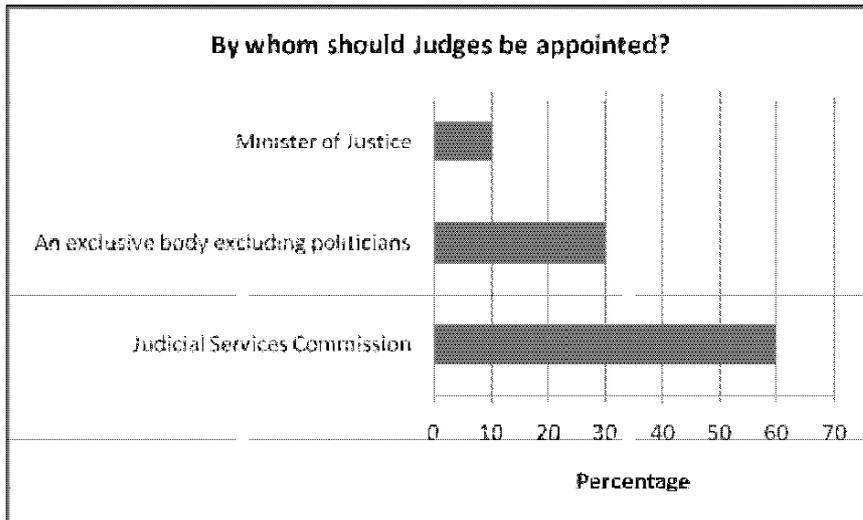
Figure 4.5.9 Selection and Appointment of Judges



The judges were also of the opinion that judicial elections destroyed judicial independence, as unpopular judgements or judgements against politicians could be influenced and become farcical, as happened in the OJ Simpson case. Another reason given by the judges in their interviews is that the election of judges will never work in South Africa. South Africa is a racially, culturally and religiously diverse country, which is further complicated by the fact that there are a number of different cultures within a particular race group. For example, in the African population there are different tribes such as Zulu, Xhosa, Sotho and Pondo. In addition, a tribal majority instead of perceived competence could decide elections. Nevertheless, there were a small minority of judges who were not completely opposed to judges being elected.

4.5.9.1 Who Should Assist the President in Making Judicial Appointments?

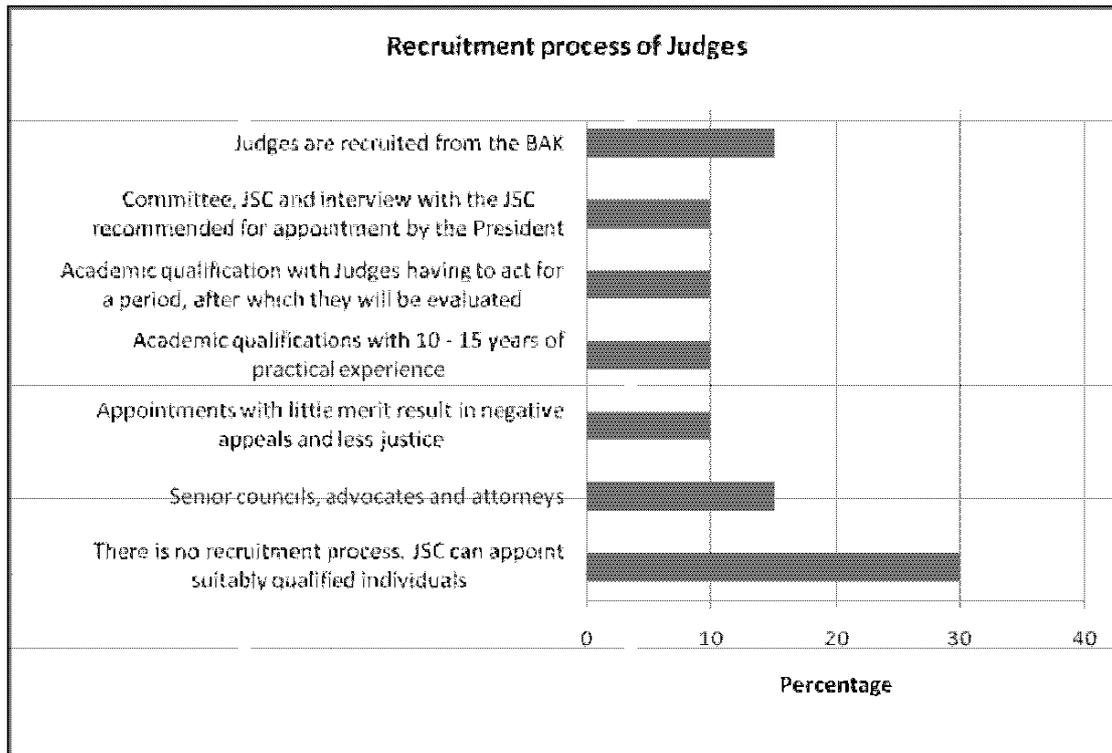
Figure 4.5.9.1 Who Should Appoint Judges?



The majority of the respondents (Figure 4.5.9.1) indicated that the Judicial Service Commission should be responsible for assisting the President in selecting suitable candidates for judicial appointments. This is in accordance with Section 174 of the Constitution of the Republic of South Africa, 1996. The judges who were interviewed said that the present Judicial Service Commission system is a compromise. The judges who were in favour of the Judicial Service Commission said in their interviews that they were of the opinion that the selection proceedings conducted by the Judicial Service Commission are more transparent, as the judicial candidates' interviews are held in public and the press was entitled to attend. Thirty percent of the judges felt that the judicial selection body should exclude politicians and only ten percent were of the opinion that judges should be appointed on the recommendation of the Minister of Justice.

4.5.9.2 Recruitment Process for Judicial Appointments

Figure 4.5.9.2 Recruitment process of Judges



The judges differed in their opinions on how and from where (source pool) judges should be recruited as well as how judges should be selected (Figure 4.5.9.2). Thirty percent of them said that there was no recruitment process and that the Judicial Service Commission appointed suitably qualified persons from the legal profession, either from the bar (advocates) or from the side bar (attorneys) attorneys or from academia (law lecturers, professors, etc). However, in their interviews they stated that judges were presently recruited from the bar, the side bar, the magistracy, and from universities. The judges said that the candidates then submitted their *curriculum vitae's* to the Judicial Service Commission for consideration which in turn prepared a shortlist of the names of nominees put forward, who were then considered in an open interview session.

The judges stated in their interviews that they were of the opinion that the recruitment process was problematic, as it was easier for people with “inside contacts” to get recruited rather than people being recruited on ability. The judges interviewed said it was also possible for the candidates to be nominated either by themselves, or by their peers, or by politicians or by well-connected friends. Some of the judges interviewed therefore felt that there is a large measure of bureaucracy involved in the recruitment and selection process. Some of them said that there is “a large measure of who you know, not just what you know”, as the focus is on transformation (race and gender) rather than whether the person is best suited or not for the judicial appointment. They said that their opinion was based on their observations when nominations had been put forward, such as the names of chairpersons of a particular branch of the legal profession, irrespective of whether the nominee would be able to do the work or had the necessary experience.

The judges also expressed concern in their interviews that the Judicial Service Commission appeared to be concerned with appointing aspirant judges whose political affiliations suited government. They also said that gender was a primary factor, as the Judicial Service Commission wanted fifty percent of the judiciary to be female and of colour. This ratio is disproportionate to the demographics of the pool of potential candidates from which they are being selected. The Judges warned, in their interviews, that although this recruitment and selection process might have merit, it also has serious drawbacks. One is that there is no peer evaluation of members of the side bar, the academics, the prosecution or the magistracy. They said that judges were previously appointed from the ranks of senior counsel. These people were used to managing their own briefs and they had reached seniority through a process of evaluation by their peers and by their “clients” (the attorneys who briefed them). They had also developed a proven track record and were evaluated by the judges on the bench, in front of whom they appeared regularly. In addition, an advocate cannot apply for Silk unless the body of advocates agree and the Judge President of the Division, in which the advocate practices, also approves after he has consulted with the judges in his division and determined that the person is worthy.

The judges say that this evaluation process does not happen with the side bar and they do not know how the candidates, who are nominated, are selected for their names to be put forward. The judges in their interviews also stated that the bar comprises of advocates who have specialized in litigation. This is different from the side-bar in that not all attorneys specialize in litigation. A number of them limit themselves to simply doing administrative work, such as drafting contracts, winding up estates, conveyancing, and notarial work. The judges interviewed also said that it is the

first time in history, since 1994, that judges are being appointed from the ranks of attorneys. Some of the judges also stated in their interviews that they were opposed to academics being appointed as judicial officers, especially those who lacked court experience. Others were opposed to magistrates being appointed to the bench. They stated that they were concerned that magistrates might be biased and might feel an allegiance towards the Department of Justice, by whom they had previously been employed.

In their interviews, the judges also spoke about the programme which had been implemented by the Chief Justice, for the advancement of women judges to undergo six months to a year of training to become a judge. Some of the judges were in favour thereof, whilst others were not. Also, they said that aspirant judges were putting forward their names for training as acting judges and that once they had received training, they were being given acting appointments and in due course they were applying for permanent appointments. However, the judges felt that the Justice College is not able to determine whether a candidate is suitable by the measures that they apply and is therefore not the appropriate body to make a recommendation to the President concerning a judicial appointment. The judges stated in their interviews that they were of the opinion that judicial appointments should not be automatic, that a bench of the very best people is needed, who have an enormous amount of experience. Some of the judges (interviewed) are also of the opinion that presently the appointments are largely based on political and struggle credentials. Despite them having said this, the judges said that they were not opposed to the implementation of affirmative action as long as the best people were appointed as judges and everybody was just not simply promoted to achieve race and gender representativity. They said however, that the final decision rested with President who made the actual appointment.

The judges also conceded in their interviews that it is almost impossible to define, who is suitable for a judicial appointment and who is not. They admitted that it is very difficult to define the selection criteria for a good judicial appointment objectively. That is why they are of the opinion that judges should be selected from the ranks of Senior Counsel, as was the case in the past. The perception is that this is no longer happening and that a number of them are being excluded because of their colour. Some have been advised by the Judicial Service Commission not to apply, as the majority of senior counsels are still white. Therefore, they are of the opinion that quality and experience is not being taken into account, which they felt is wrong and is undermining the judiciary. Some of them have suggested that aspirant judges should be recruited after the heads of

court have consulted with the judges of that particular division, to determine whether the judicial candidate is suitable.

4.5.9.3 Selection Process for Judicial Appointments

The judges interviewed said that the recruitment and selection process is prescribed by statute, in Sections 174, 175 and 178 of the Constitution of the Republic of South Africa, 1996. They say that since 1994, vacancies are announced in the government gazette, which is then available for public scrutiny. They say that when a vacancy is advertised, the names of judicial candidates are put forward by their peers (from the Bar council, the Law Societies or the University Councils). The nominees must then indicate their willingness to submit themselves to the selection process of the Judicial Service Commission by completing a questionnaire about themselves and their experience. The Judge President of the Province will also provide background details of applicant's judgments. These documents are all submitted to Judicial Service Commission secretariat (the short listing committee of the Judicial Service Commission) for consideration. After careful consideration, a shortlist of candidates who will be interviewed in public in Cape Town by the Judicial Service Commission is prepared. An open hearing with the candidates will be conducted, in which the press are also involved.

The majority of the judges surveyed and interviewed are of the opinion, that the Judicial Service Commission is relatively politicized. The reason for their opinion is that of the twenty-three representatives on the Judicial Service Commission, only seven are judicial administrative representatives. The remaining sixteen representatives are political appointees. The judicial representatives are by far in the minority, when they feel that they should be in the majority.

They say that the Judicial Service Commission takes written submissions (from the Bar council, the Law Society, Black Lawyers Association or National Association of Democratic Lawyers who must furnish a report about the suitability of the candidate) into account. The nominees are also discussed with the Judge Presidents of the particular division and, after deliberations; a recommendation is made to the President, who usually rubber-stamps the recommendation. The judges also pointed out that the procedure for ordinary judges, differed slightly from that of the Constitutional Court judges. Some of judges interviewed were strongly opposed to the idea of a body comprising of politicians selecting judges. They felt that the collective judiciary should rather

select the new appointees. Their concern is with appointing a candidate who “has potential” and the disregarding of injustices, which may occur as a result of such an inexperienced person being appointed. They are of the opinion that ideally, judges should be appointed by a body of independent persons from the legal professions who are not influenced by political considerations.

A number of them favour the previous system of judges being appointed from the ranks of Senior Counsel, King’s Counsel or Queen’s Counsel. The reason being that in becoming senior counsel, a great deal of experience has been gained. Essentially, the candidate would have either been a prosecutor or attorney, would have written the bar exams to become an advocate and then would have practiced at the bar for a number of years. During that time they would have progressed through the ranks of junior counsel, senior junior counsel and eventually they would have become senior counsel. Along the way they would have had to prove that they had achieved a standard of juristic excellence and then, only on the recommendation of their own body of society of advocates and on the recommendation of the Judge President of their Division to the President, would they become Silk.

They are of the opinion that following this process would ensure that the best and the most suitable are appointed to the bench. Although the judges do acknowledge that it does not follow automatically that any good Silk will make a good judge, they nevertheless believe that the probabilities are good. Some judges therefore believe that to appoint judges from sources other than the bar, is a disadvantage. The majority of the judges in their interviews expressed the opinion that members from the Bar receive a greater richness and breadth of experience than the other professions. They also believe that people from outside of the Bar do not have kind of diverse experience that advocates have representing diverse clients. Hence, some of the judges interviewed are of the opinion that the judiciary is no longer getting “the cream of the crop”.

They are also concerned about the work ethic of the new judicial appointees. They fear, for example:

- that magistrates might come to the bench with a public service mentality about fixed hours of work, as opposed to members of the Bar who will continue with a task until it is completed, regardless of when and how long it takes
- that a prosecutor might be biased in favour of the state’s case as he or she has no experience defending civil cases

- that attorneys may be appointed who may not necessarily do court work, who are unable to make it in private practice, or are running struggling one-man practices specializing in a certain areas of work
- that the law professors may not have represented people in court.

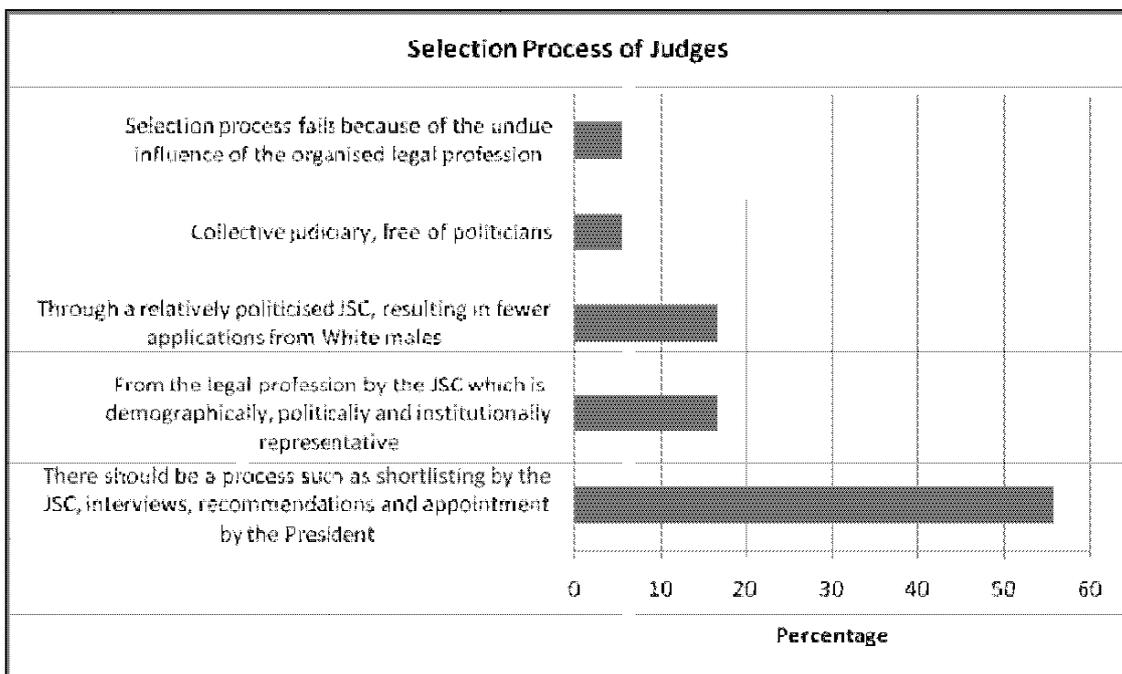
It is clear that the judges interviewed believed that court experience is crucial for deciding whether a candidate is suitable for an appointment to the bench. It is the first time in South African history that judges are being appointed from the ranks of attorneys. The judges feel that there should be a system of ranking amongst attorneys, the same way as amongst advocates - junior, middle, senior and silk. Then one would know if the applicant has adequate experience. Judges are not happy with the selection and appointment of academics *per se* as they feel that academics need to know what happens in courts before they can sit as a judge. Some felt that magistrates and academics should not be appointed, as they needed to have practiced at the bar first. The reason for this attitude is that magistrates deal mainly with criminal work, have a background of public service, and do not have independent thinking and private training. They also have a subconscious loyalty to the state, which has employed them for twenty to thirty years may find it difficult to make an order against the state.

The judges interviewed were of the opinion that if highly experienced and highly ethical appointees were appointed, there would not be a need for training and supervision. They were also of the opinion that work ethic is essential for the proper functioning of the judiciary. They felt strongly that if the aspirant judges are selected on ability and on merit, regardless of colour or gender, then the best persons would be selected to become judges. They were therefore of the opinion that whoever made the selection and recommendation of judicial appointments should use more objective selection criteria. Some of the qualities that the judges believed the Judicial Service Commission should look for in aspirant judges are:

- a high degree of intelligence,
- the ability to write,
- to have been efficient court practitioners in their professions,
- to have a proven track record, be able to deal with complex matters,
- to be able to meet the demands of the position as judge,
- to be able to work under pressure,

- ? to be self-disciplined, trustworthy, have a spirit of accountability and be men and women of great integrity, honesty and reliability, so that their work and their private life is beyond reproach,
- ? to have an established personality, and
- ? to come from an independent background.

Figure 4.5.9.3 Selection Process of Judges

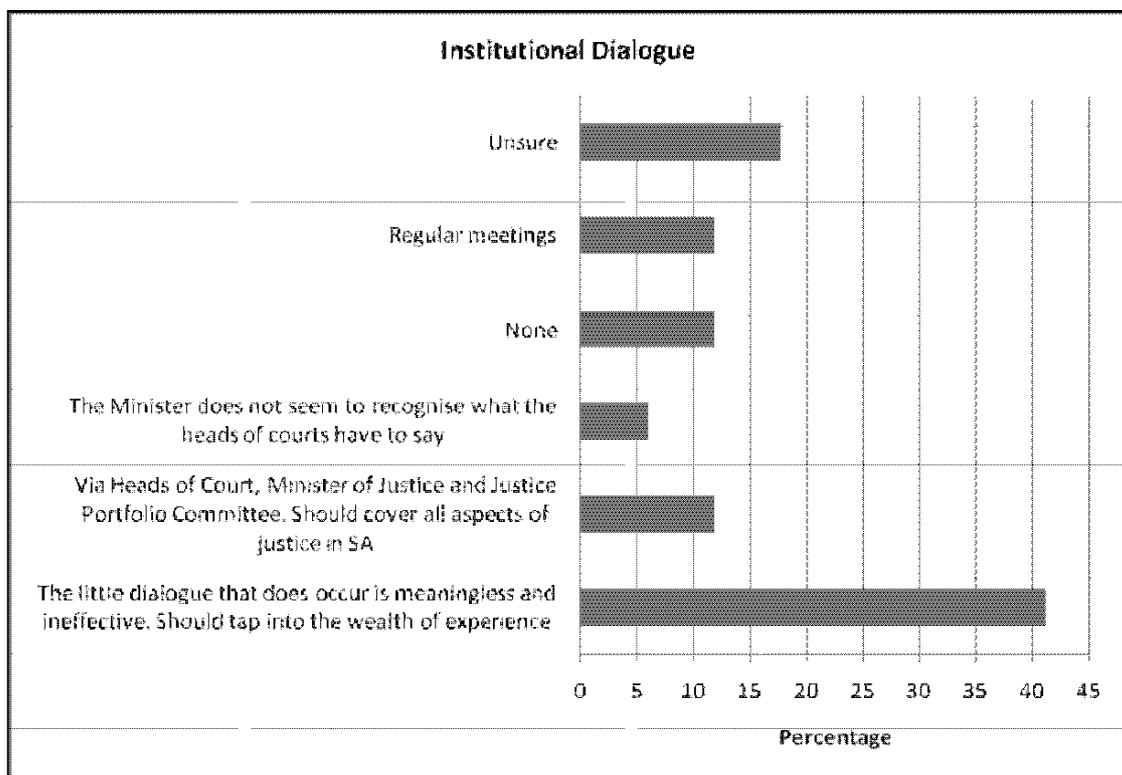


The judges are of the opinion that aspirant judges need to be industrious, hard working, heed the call of duty. They cannot expect to work office hours (otherwise their job will never get done); they need to be objective, open-minded and able to think rationally. Their political involvement and social involvement is also relevant. The judges said in their interviews that the Judicial Service Commission is now focussing on asking what community service the aspirant judge has done, as opposed to enquiring into whether the aspirant judge is “struggle-orientated”. The judges are of the opinion that in fact most of the aspirant judges are too young to have been involved in the struggle, although if they were, it would still be a badge of honour. They say that the questions now being asked of the aspirant judges during their selection interviews focuses on what their involvement in

Human Rights has been, that is what they have done for others, how selfless they have been, whether they have helped in law clinics, and whether they have sat on committees rather than on whether the aspirant judges has been political activists.

4.5.10 Part 10 : Institutional Dialogue

Figure 4.5.10 Institutional Dialogue



There is a strong negative tendency (sixty six percent) in the response for whether there is institutional dialogue or not (Figure 4.5.10). Eighteen percent of the respondents indicated that no institutional dialogue took place at all. Some of the judges, who were interviewed, were of the opinion that practical problems like the rationalization of the jurisdiction of the courts and the request for additional resources to deal with the backlog are matters for dialogue, but that this type of dialogue was not occurring. Forty-one percent of the judges felt that the dialogue, which was

taking place, is meaningless and six percent of them felt that the Minister Ms Brigitte Mbandla did not recognize the heads of courts' contributions.

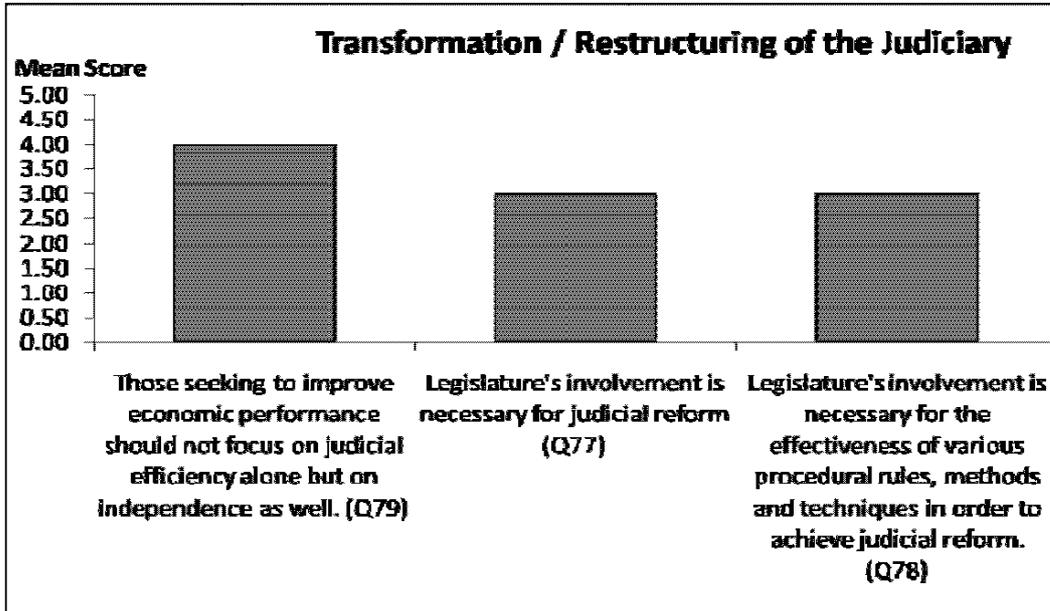
However, some of the judges interviewed disagreed and said that institutional dialogue does take place that there are regular discussions between the Chief Justice and the Minister of Justice. They also said that the Chief Justice regularly appears before the parliamentary committee on justice and that there are also regular meetings of the heads of court (Judges President, Chief Justice and President of the Supreme Court of Appeal. The Minister of Justice also attends (although other judges contradicted this statement and said that she did not attend the meetings regularly, that she is conspicuous in her absence, that she often sends a junior who is unable to answer the judges' questions).

Some of the judges felt that there is very little, if any, dialogue between the legislature and the judiciary. They were of the opinion that the heads of court met with the Minister of Justice and the chair of the Justice Portfolio committee of Parliament only once a year and they felt that whatever engagement there has been, was meaningless and ineffective. Some of the proposals put forward by the judges to improve dialogue included having more regular meetings (twelve percent) and including the various role-players (twelve percent) (Figure 4.5.10).

4.5.11 Part 11: Judicial Transformation and Restructuring of the Judiciary

The majority of the judges agreed that those seeking to improve economic performance should not focus on judicial efficiency alone, but on independence as well (Figure 4.5.11). The judges differed in their opinions on whether legislature's involvement is necessary for the effectiveness of various procedural rules, methods and techniques in order to achieve judicial reform. Some of the judges were in favour of legislative involvement as they said that law making is the exclusive jurisdiction of the legislature. Others were against it because they felt that the legislature had no idea how the courts functioned and that politicians had their own political agendas. The majority felt that the legislature should outline the procedure, but that the methods and techniques should be left to a non-political Judicial Service Commission.

Figure 4.5.11 Judicial Transformation and Restructuring of the Judiciary



Both the judges who were surveyed and those who were interviewed agreed that transformation should take place. Transformation is a constitutional imperative, in terms of Section 174 (2) of the Constitution of South Africa, 1996, which states, “the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed”. The judges conceded that the Judicial Service Commission had been tasked by the legislature, in terms of Section 178 of the Constitution of the Republic of South Africa of 1996, with the responsibility of selecting suitable candidates for recommendation to the President, for permanent judicial appointments to the bench.

However, the judges were concerned with the manner in which judicial candidates are being selected. They were of the opinion that the Judicial Service Commission should avoid selecting and recommending inexperienced judicial candidates for permanent appointments, simply to transform the bench. They were of the opinion that government’s need for political transformation has resulted in the Judicial Service Commission recommending judicial candidates to be appointed to the bench, who in their opinion, are not suitable for the bench and whom they do not believe have the necessary background, experience or professional qualifications.

They said that whilst they agreed that it is important to have regard for transformation, they were of the opinion that high court, the practice experience is a critical factor which must be considered by the Judicial Service Commission, when recommending judicial candidates for appointment to a superior court bench. The judges (interviewed) were also of the opinion that the Judge Presidents of each of the Provincial Divisions of the High Courts, the President of the Supreme Court of Appeal and the Chief Justice all need to be more proactively involved in the selection process.

The judges (interviewed) were of the opinion that there are young, able and good judicial candidates of colour, who are suitable for permanent judicial appointments but who are, in their opinion, not keen to make themselves available to preside on the bench, because of the financial sacrifice they will have to make to go to the bench. In their interviews, the judges they can earn more money in private practice than on the bench. Hence, they are of the opinion that there are a few, who are successful in their profession, who in their opinion are making millions in private practice, who would be willing to heed the call of duty, give up their lucrative practices to preside on the bench.

The interviewees are therefore of the opinion that the chief obstacle to attracting the right people to the bench is the judges' remuneration and their working conditions. The judges (interviewed) are of the opinion that some of the judicial candidates, who are accepting appointments to the bench, may not necessarily be the ones who are of the best in their profession. The judges have suggested that the heads of court, with the assistance of the judges under their jurisdiction, should identify potential judicial candidates and groom them through a mentorship programme.

It is clear that the majority of the judges interviewed are of the opinion that the net has been cast too far and too wide to meet the transformational imperatives. They are of the opinion that the whole transformation process, which the civil service has embarked upon, has been carried out with such rapidity and this, in their opinion, has resulted in incumbents not having the requisite experience for the job. This has had a negative impact on the efficient running of the courts.

Nevertheless, some of the judges (interviewed) are still of the opinion that transformation has not been completely achieved, because of the lack of gender representativity, especially concerning African women. These judges however, acknowledge that transformation cannot happen overnight and they warn that if the executive tries to rush the process, it will be at the expense of good experienced judges. One of the aforementioned judges, in his interview, also stated the quality of

judges would, in his opinion, be diluted by too hasty transformation. Nevertheless, he is of the opinion that it is possible to identify the potential candidates who are suitable, but he said that the biggest hurdle is to persuade African counsel and women to come to the bench. He reaffirmed what the other judges had said that the good black silks would be put off by a judge's salary and would say that there was no incentive for them to come to the bench. He is also of the opinion that they do not feel the need to heed the call of duty at this stage in their lives, as they feel that it is their turn to make money.

A number of them confirmed that there was definitely a financial sacrifice involved in accepting an appointment to the bench. One of the judges even went so far, in his interview, as to draw a comparison between what he had previously earned as Senior Counsel in private practice and what he currently earned on the bench. He said that he had earned five times more than what he currently earns as a judge on the bench where he works even longer hours, with very little time for personal relaxation and holidays. The same judge is of the opinion that transformation has probably been stretched as far as the judicial system can stand without the judiciary's deterioration, given the available manpower. Some of the judges interviewed stated that institutions have been created to address the shortcomings in the judicial appointments, for example the training of female jurists and jurists of colour. However, the judges are of the opinion that this is a short-term solution.

One of the judges (during his interview) pointed out that the concept of affirmative action is not a new concept. He said that it existed long before 1994 and cited the fact that it was given constitutional recognition in America, where in his opinion it has failed. He suggested that the playing fields should be levelled, that more black people and more women should be given opportunities, of which they have been deprived in the past, that school education and training facilities should be enhanced for them. He said that they should be provided with the opportunity to develop, so that they can perform at the required level. He also suggested that the legislature and the executive should ensure that all South Africans compete on the same level. He said that government could start by empowering black business, so that a strong black middle class could be developed. This is what has happened. He is of the opinion that once this has occurred, there will be large black firms who will employ good black lawyers and attorneys. This in turn will lead to the development of good black advocates, briefed by big business. The aforesaid judge is of the opinion that black business will support black lawyers and that if the black advocates are good

enough, they will become silks. He is of the opinion that the life-long learning process cannot be rushed and that black attorneys and advocates need to go through the entire process.

Some of the other judges, during their interviews, also supported the previously mentioned judge's opinion that law firms still needed to be transformed. One of the judges said that despite South Africa being fifteen years into its new democracy, he was of the opinion that the briefing patterns have still not changed, namely that white firms are still briefing white advocates. He also accused the State Attorney of not doing anything to transform their briefing patterns either. He was also of the opinion that women and black advocates needed to be well-connected to get work.

Another Judge (interviewed) who shared these views, said that he was not opposed to the idea of the entire judiciary being black, provided the job was done in a judicial manner with integrity, ethos, self-discipline, and with morality. He was also of the opinion that the previous Minister of Justice, Mr Dulla Omar, had a far better understanding of the judiciary than any of the subsequent Ministers of Justice. The previously mentioned judge was also of the opinion that Mr Omar was serious about transformation and believed that it should take place within the four corners of the constitution. The judge said that he regretted that the transformation of the judiciary had not been finalized under the subsequent Minister of Justice Mr Penuel Maduna, when that the "Justice Bills" had been settled with the judiciary. He blamed the subsequent change in the ministry for matters becoming unsettled. In particular, he blamed the most recent previous Minister of Justice Ms Bridigette Mbandla and her Deputy Minister of Justice Mr Johnny De Lange the most. He was of the opinion that they were the reason why the "Justice Bills" were not finally settled. He accused them of having reneged on what had previously been settled with the judiciary by the previous Minister of Justice, Mr Maduna.

The abovementioned judge said that they (the Ministers) had done so without giving any explanation for their actions. He also questioned their motives for having introduced certain new controversial provisions, which were unacceptable to the judiciary. He confirmed that most of the judges had accepted that the judiciary must be transformed and that there was pressure on government to meet targets to appoint black people, in particular African people, and women. However, he was of the opinion that the problem lay with the Judicial Service Commission having to "fish in a small pond", in which (he believed) there was a very limited pool of really qualified people, especially of colour. He was of the opinion that because the Judicial Service Commission is under political and government pressure, it is appointing less qualified people. Although he

admits that the lack of experienced people of colour is due to political traditional reasons. In his opinion, the aforementioned reasons have resulted in unsuitable people being appointed to the bench. He believes that this has resulted in the executive wanting to control these appointees, as they fear that the judiciary is losing credibility.

The majority of the judges interviewed support the opinion that the legal profession needs to be transformed. They are of the opinion that the legal profession has not transformed sufficiently to create suitable candidates for the bench and they have even suggested that the situation should receive the attention of the legislature and the executive. However, they do not believe that the appointment of unqualified or inexperienced women and black judges is the way to address past race and gender imbalances in the judiciary. Some of the judges interviewed expressed concern that if black judges or women who are not suited or who are under-qualified are appointed, then the very foundation of the constitution may be undermined. These judges are of the opinion that the long-term solution should be to create a pool of highly qualified and experienced black and female lawyers from which judges can be appointed to the superior courts of South Africa.

Other judges interviewed felt that the high court system has been adequately transformed and that the problem lay with the magistracy, where greater female representativity is also necessary.

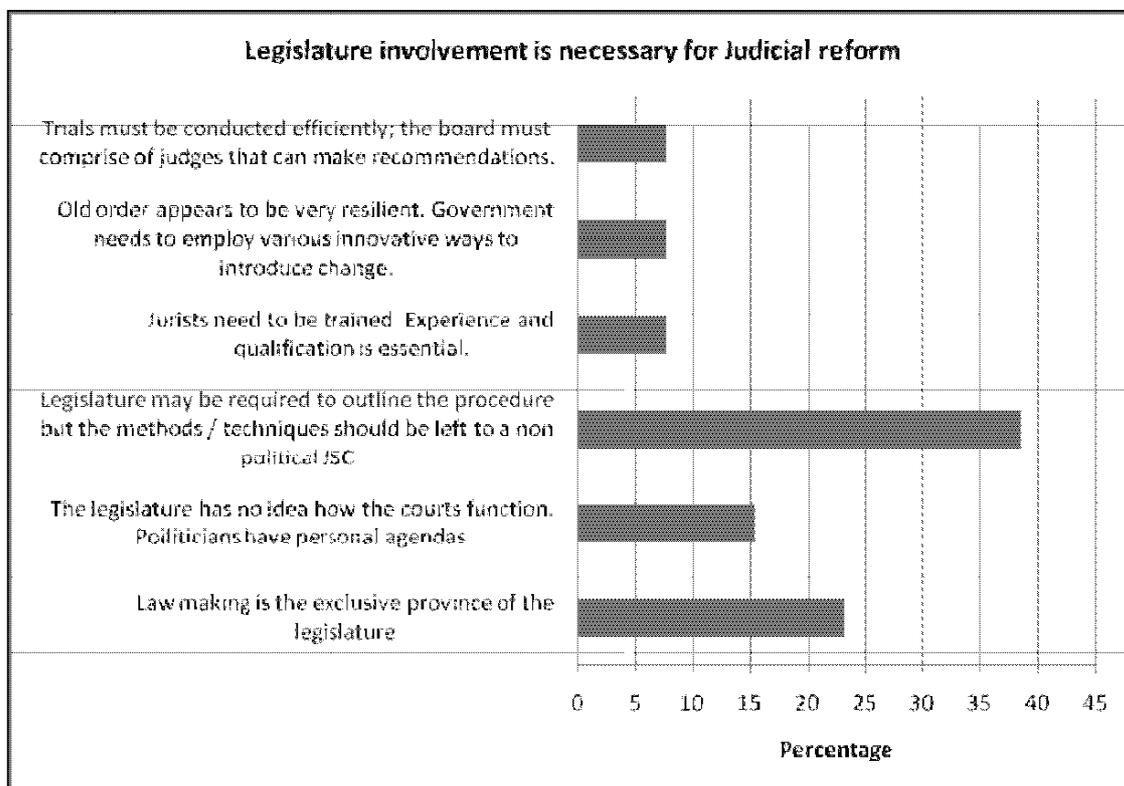
Finally, some of the interviewees were of the opinion that transformation is not just a word, it is an attitude. They are of the opinion that the judiciary should be transformed by the appointment of judges, who have the moral character, the experience and the expertise to perform their functions without fear, favour or prejudice.

4.5.11.1 Whether Legislative Involvement is Necessary for Judicial Reform?

The judges differed in their opinions as to whether the legislature's involvement is necessary for judicial reform (Figure 4.5.11.1). Some of the judges were of the opinion that the legislature's involvement is necessary but they feel that the selection process has gone wrong. They are of the opinion that the source pool, from which judicial candidates are selected, does not reflect the racial and gender composition of the whole of South Africa and that the legislature and the executive should address this. They say that judges need to be people of experience and are concerned that weak inexperienced judges may be influenced by and follow the lead of a more experienced

colleague and could swing in a majority decision. They are also critical of the present system of fast tracking aspirant female judges who are trained by senior judges. They say that amongst the present candidates, there are three women judges who are not from the bench or at bar.

Figure 4.5.11.1 Whether Legislative Involvement is Necessary for Judicial reform



Other judges disagreed that legislature's involvement is necessary for judicial reform. They are of the opinion that the people best equipped to “reform” the judiciary are those who understand what is required of a judge (in terms of the judge’s ability and character), who understood what work is involved and what characteristics are needed and who possesses those characteristics. The judges were of the opinion that those who are best equipped to understand what is required, are their professional peers and senior members of the professions who have court experience. Some of them were therefore of the opinion that legislation may only be required to outline the procedures and that the methods and techniques should be left to a responsible (non-political) Judicial Service Commission and that experience, not potential should be used as a guide (Figure 4.5.11.1).

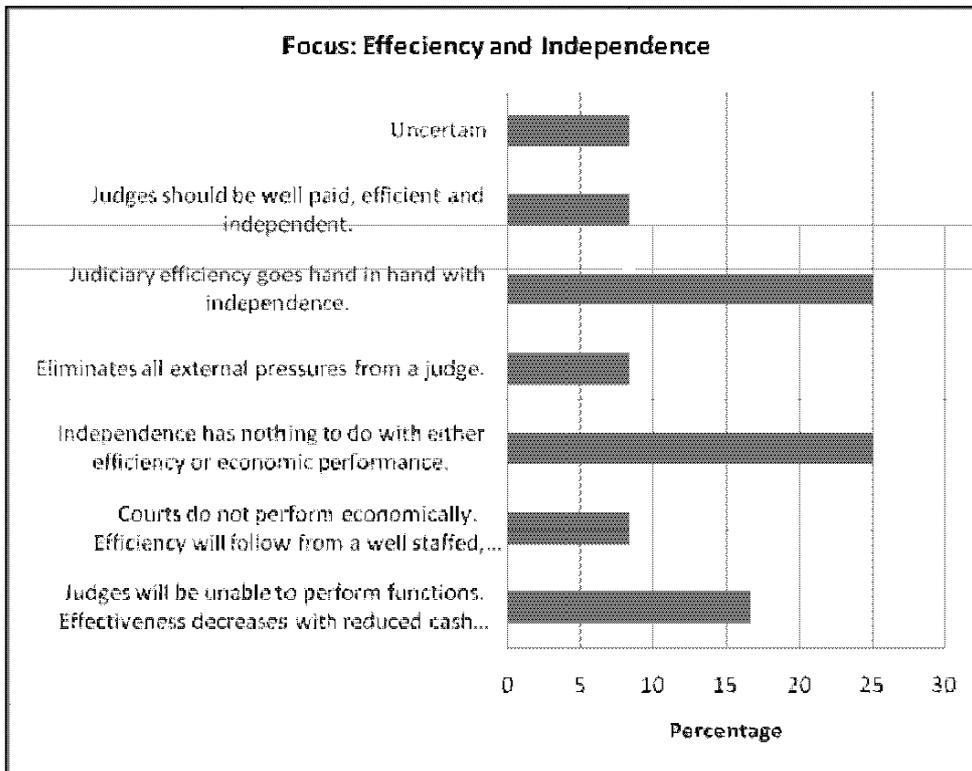
Some of the interviewees said that legislature's involvement is necessary for the effectiveness of various procedural rules, methods and techniques in order to achieve judicial reform, but that this has to be done in consultation with the judiciary (Figure 4.5.11.1). They were of the opinion that far-reaching and all encompassing changes to rules do sometimes require legislative input. Others were of the view that, in accordance with the doctrine of separation of powers, the judiciary has no power make laws. They were also of the opinion that its primary task is to interpret and apply the law and they therefore felt that it is proper that the legislature is responsible for judicial reform through appropriate legislation. Some of them believed that the first problem was a product of the legacy of apartheid: the system was trying to put things right and to address past imbalances through transformation by simply appointing more judges from the historically disadvantaged communities with the emphasis on women.

However, one of the judges interviewed felt that transformation has created further problems, in that the Judicial Service Commission through appointing black women to the bench indiscriminately is creating new imbalances. The judges interviewed also felt that, like in any other sphere of society, the judiciary should reflect the gender and race composition of its source, the legal practitioners, not the nation as it would artificially skew representativity. They believed that experience could not be fast-tracked. They are therefore of the opinion that, when selecting judicial candidates, the Judicial Service Commission must take the demographics of the legal practitioners from whom it draws its judicial candidates into account, not the demographics of the whole of South Africa.

4.5.11.2 Focus Should Not Only Be on Efficiency but Also on Judicial Independence

One of the judges interviewed said that the doctrine of separation of powers is essential. He maintains that if reform is required, it must come from within the judiciary. He agrees that legislature's involvement is necessary for judicial reform because the constitution requires the legislature to put national legislation into place to allow the judiciary to function properly. Although he agrees that there should be transformation, he warns that transformation at all costs is an abomination, as it becomes impossible to ensure that justice is carried out. The public will then not get justice anymore under those circumstances.

Figure 4.5.11.2 Focus: Efficiency and Independence



There were also some judges interviewed and surveyed who did not believe that legislative involvement is necessary for judicial reform as they felt that the legislature has no idea how the courts functioned, that politicians all have hidden agendas and that they make a mess of most of it. They say that the best *modi operandi* can be legislated, but that morality and work ethics cannot be legislated. The judges were of the opinion that the judiciary should be left to transform itself responsibly in a progressive balanced manner. They felt that it should be a natural merit process, wherein only suitably qualified and experienced candidates should be appointed and previously disadvantaged candidates who are able and capable of doing the job, should be given preference.

4.6 Inferential Statistics

4.6.1 Cross-tabulations

All of the tables below indicate a Pearson correlation value between two sets of variables. Of all the bivariate tabulations, the ones listed below showed a significant relationship at the 0.01(*) or 0.05(**) levels of significance.

The values are interpreted in relation to the general statements as follows:

Positive correlations – This showed a directly proportional relationship between the variables. That is, if there was agreement (or disagreement) in one statement, there was a similar agreement (or disagreement) in the other.

Negative correlations – This indicated an inverse relationship between variables. That is, if there was agreement (or disagreement) in one statement, then there was disagreement (or agreement) in the other.

Assessing individual performance of judges impinges judicial independence vs Training and Performance Appraisals interfere with the impartiality of a judge in an individual case	.908(**)
A career ladder through the prospects of promotion might influence a judge in his /her decision vs A career ladder within the judiciary is desirable	-.608(**)
Judges should be free from internal interference vs Judges should exercise authority over each other outside of the realm of appeals	-.653(**)

There is a very strong positive relationship between judicial independence and the impartiality of a judge. This means that restricting independence (in whatever way, such as assessment) will affect a judge's impartiality.

Judges are strongly opposed to a career ladder incentive as they may be tempted to make judgements that would improve their chances of promotion in the judicial hierarchy.

Judges are strongly opposed to authority being exercised over them outside of the realms of appeal as it would adversely influence their impartiality.

Judicial discipline interferes with judicial impartiality vs Disciplinary powers should be exercised over judges	-.715(**)
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There is a strong negative correlation between judges' impartiality and disciplinary control. The implication here is that the more judges are disciplined (controlled), the less likely they are to act impartially.

The Minister of Justice should make the appointments of judges of all superior courts including the Constitutional Court vs The executive should have control over the way the Court functions	.427(*)
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There is a positive relationship between the minister making the appointments of judges and the executive controlling the way that the court functions. This means that giving the minister or the executive control over judicial appointments and the way that the court functions will have an impact on judicial independence.

The Executive should have control over the way the Court functions vs The Rules of Court should be made by the Minister of Justice	.698(**)
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There is a very strong positive relationship between the executive having control over the way that the court functions and the rules of court being made by the Minister of Justice. This means that if the Minister of Justice exercises control over the way that the court functions or makes the rules of court, this will adversely affect functional independence of the courts.

The Executive should have control over the way the Court functions vs Judicial education should be placed under the control of the Minister of Justice	.673(**)
Rules of Court should be made by the Minister of Justice vs Judicial education should be placed under the control of the Minister of Justice	.614(**)

There is a very strong positive relationship between the executive having control over the way that the court functions and judicial education being placed under the control of the Minister of Justice. This means that if the Minister of Justice exercises control over the way that the court functions or judicial education it will adversely influence functional independence of the courts.

There is a very strong positive relationship between the rules of court being made by the Minister and judicial education being placed under the control of the Minister of Justice. This means that if the Minister of Justice makes the rules of court or exercises control over judicial education it will adversely influence functional independence of the courts.

	The Minister of Justice should make the appointments of judges of all Higher Courts including the Constitutional Court	The Executive should have control over the way the Court functions	The Rules of Court should be made by the Minister of Justice	Judicial Education should be placed under the control of the Minister of Justice	The Minister of Justice should make the appointments of Acting Judges of all Higher Courts including the Constitutional Court	The Minister of Justice should have financial control of the Judicial Budget	The Minister of Justice should control who should conduct judicial education for judges in South Africa	The administrative powers of the judiciary should be transferred to the Executive.	The budgeting powers of the judiciary should be transferred to the Executive.	Judges should be administratively independent
The Executive should have control over the way the Court functions	427(*)	1								
The Rules of Court should be made by the Minister of Justice	0.225	698(**)	1							
Judicial Education should be placed under the control of the Minister of Justice	0.318	673(**)	614(**)	1						
The Minister of Justice should make the appointments of Acting Judges of all Higher Courts including the Constitutional Court	571(**)	544(**)	489(*)	840(**)	1					
The Minister of Justice should have financial control of the Judicial Budget	0.396	0.541	446(*)	597(**)	562(**)	1				

The administrative powers of the judiciary should be transferred to the Executive.	0.168	.568(**)	.761(**)	.718(**)	.524(*)	.546(*)	0.422	1		
The budgeting powers of the judiciary should be transferred to the Executive.	0.106	0.427	.494(*)	.616(**)	.507(*)	.527(*)	0.264	.623(**)	1	
Judges should be administratively independent	-.581(**)	-0.356	-0.354	-.638(**)	-.783(**)	-.585(**)	-0.372	-0.406	.464(*)	1
Judges should be autonomous	-0.109	0.087	0.086	0.009	-0.041	0.076	-.467(*)	-0.078	-0.046	0.280
The Executive should have a say but not control over the way the Court functions	.462(*)	0.394	.518(*)	.578(**)	.479(*)	.675(**)	.482(*)	.726(**)	0.429	-.516(*)

Legislature's involvement is necessary for the effectiveness of various procedural rules, methods and techniques in order to achieve judicial reform vs Legislature's involvement is necessary for judicial reform	.563(*)
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There is agreement that for reform to occur there would have to be legislative involvement. This involvement would include the effectiveness of procedural rules, methods and techniques.

The Minister of Justice should make the appointments of Acting Judges of all superior courts including the Constitutional Court vs Judges should be elected	.460(*)
The Minister of Justice should make the appointments of Acting Judges of all superior courts including the Constitutional Court vs The Minister of Justice should make the appointments of Judges of all superior courts including the Constitutional Court	.571(**)

There is a positive relationship between whether the Minister of Justice should make the appointments of Acting Judges and the Judges being elected. The judges were opposed to both. There is also a positive relationship between whether the Minister of Justice should make the appointments of Acting Judges and the appointment of permanent Judges to the superior courts because once again the judges were opposed to both.

Legislature's involvement is necessary for judicial reform vs The Judiciary Bills interfere with the functional independence of the judiciary	.576(**)
Legislature's involvement is necessary for the effectiveness of various procedural rules, methods and techniques in order to achieve judicial reform vs A training college for judges is necessary and should be established	.539(*)
Legislature's involvement is necessary for the effectiveness of various procedural rules, methods and techniques in order to achieve judicial reform vs The Judiciary Bills interfere with the functional independence of the judiciary	.494(*)
Legislature's involvement is necessary for the effectiveness of various procedural rules, methods and techniques in order to achieve judicial reform vs Legislature's involvement is necessary for judicial reform	.563(*)

There is an overall positive relationship between the involvement of legislature and each of the corresponding statements. However, these do not necessarily mean a linear extension of the idea. For example, the first statement indicates that legislative involvement is necessary for reform but it is also in agreement with the negative statement that the judiciary Bills do affect the functional independence of the judiciary.

The judges also believe that the legislature should be involved with the establishment of a training college but believe that the authority and independence of the school should be independent of the legislature.

Disciplinary powers should be administered by judges vs Judges should not be subjected to discipline, judicial review already holds judges sufficiently accountable	- .614(**)
Disciplinary powers should be administered by judges vs Judicial discipline interferes with judicial impartiality	-.483(*)
Judges should not be subjected to discipline, judicial review already holds judges sufficiently accountable vs Judicial discipline interferes with judicial impartiality	.938(**)

The main theme here is that the judicial review system already has checks and balances in place to monitor judges. Hence, there is no need for further disciplinary structures.

		Judges should be autonomous	The Executive should have control over the way the Court functions	The Rules of Court should be made by the Minister of Justice	Judicial Education should be placed under the control of the Minister of Justice	The Minister of Justice should make the appointments of Acting Judges of all superior courts including the Constitutional Court	The Minister of Justice should have financial control of the Judicial Budget	The Minister of Justice should control who should conduct judicial education for Judges in South Africa	The Executive should have a say but not control over the way the Court functions	Judges should be administratively independent	Bureaucratization of the Judiciary threatens the foundations of the judicial process	The administrative powers of the judiciary should be transferred to the Executive.	A register for financial interest is necessary
The Rules of Court should be made by the Minister of Justice	Pearson Correlation	0.086	.698(**)	1	.614(**)	.489(*)	.446(*)	0.291	.518(*)	-0.354	-0.056	.761(**)	0.020
Judicial Education should be placed under the control of the Minister of Justice	Pearson Correlation	0.009	.673(**)	.614(**)	1	.840(**)	.597(**)	0.360	.578(**)	-.638(**)	-0.151	.716(**)	-0.123
The Minister of Justice should make the appointments of Acting Judges of all superior courts including the Constitutional Court	Pearson Correlation	-0.041	.544(**)	.489(*)	.840(**)	1	.562(**)	0.271	.479(*)	-.783(**)	-0.341	.524(*)	-0.211
The Minister of Justice should have financial control of the Judicial Budget	Pearson Correlation	0.076	0.341	.446(*)	.597(**)	.562(**)	1	0.381	.675(**)	-.585(**)	-0.099	.546(*)	-0.123
The Minister of Justice should control who should conduct judicial education for Judges in South Africa	Pearson Correlation	-.467(*)	0.186	0.291	0.360	0.271	0.381	1	.482(*)	-0.372	-0.065	0.422	-0.344
The Executive should have a say but not control over the way the Court functions	Pearson Correlation	-0.253	0.394	.518(*)	.578(**)	.479(*)	.675(**)	.482(*)	1	-.516(*)	-0.111	.726(**)	0.128
The Judiciary Bills hand over Judicial Control to the Minister of Justice	Pearson Correlation	0.241	-0.120	-0.030	-0.269	-0.226	-0.093	-0.332	-0.077	0.345	0.293	0.003	0.195
Judges should be administratively independent	Pearson Correlation	0.280	-0.356	-0.354	-.638(**)	-.783(**)	-.585(**)	-0.372	-.516(*)	1	.566(**)	-0.406	0.219

Bureaucratization of the Judiciary threatens the foundations of the judicial process	Pearson Correlation	0.219	-0.009	-0.056	-0.151	-0.341	-0.099	-0.065	-0.111	.566(**)	1	0.013	0.070
The administrative powers of the judiciary should be transferred to the Executive.	Pearson Correlation	-0.078	.568(**)	.761(**)	.716(**)	.524(*)	.546(*)	0.422	.726(**)	-0.406	0.913	1	-0.044
The budgeting powers of the judiciary should be transferred to the Executive.	Pearson Correlation	-0.046	0.427	.494(*)	.616(**)	.507(*)	.527(*)	0.264	0.429	.464(*)	.499(*)	.621(**)	0.102
The Judiciary Bills interfere with the functional independence of the judiciary	Pearson Correlation	-0.254	-0.268	-.447(*)	-0.231	-0.266	0.000	0.095	0.056	0.181	0.000	-0.156	0.322
There should be institutional accountability.	Pearson Correlation	0.221	0.198	0.206	0.024	0.076	0.156	-0.406	0.064	-0.069	-0.255	0.073	.583(**)
There should be an independent body responsible for the administration of the courts.	Pearson Correlation	0.399	0.018	-0.355	-0.156	-0.273	-.489(*)	-0.415	-0.318	0.291	0.023	-0.331	-0.035

		Judicial discipline interferes with judicial impartiality	Disciplinary powers should be exercised over Judges	Judges should administer disciplinary powers.	Judges should not be subjected to discipline; judicial review already holds judges sufficiently accountable.
Disciplinary powers should be exercised over Judges	Pearson Correlation	-.715(**)	1	.745(**)	-.828(**)
Judges should administer disciplinary powers.	Pearson Correlation	-.483(*)	.745(**)	1	-.614(**)
A disciplinary panel should administer disciplinary powers.	Pearson Correlation	-0.347	.536(**)	0.212	-0.410
Judges should not be subjected to discipline; judicial review already holds judges sufficiently accountable.	Pearson Correlation	-.938(**)	-.828(**)	-.614(**)	1
Disciplinary procedures for judges are necessary and should be introduced.	Pearson Correlation	-.874(**)	.684(**)	0.584	-.805(**)

Almost all of the factors are either positively or negatively significant for the table above.

4.6.1.2 Who Should Control Judicial Education?

		Training and Performance appraisals bring pressure to bear on the decisions of a judge in an individual case	Judges should conduct judicial education for judges in South Africa	There should be a Judicial Studies Board, which should control who should conduct judicial education for judges in South Africa.
Training and Performance appraisals interfere with the impartiality of a judge in an individual case	Pearson Correlation	.817(**)	-0.048	-0.175
The Minister of Justice should control who should conduct judicial education for judges in South Africa	Pearson Correlation	0.219	-.466(*)	0.393
A training college for judges is necessary and should be established.	Pearson Correlation	-0.298	0.334	.489(*)

There is an inverse relationship between the centres that should control judicial education. The stronger the opinion that the Minister of Justice should control education, the greater is the reaction that this should not be the case and that judges should be in charge.

4.6.2 Hypothesis Testing

The null hypothesis is that the items that constitute a variable are independent - or, that the likelihood of getting the same number of respondents per variable items is the same. The alternative hypothesis to be tested is that the likelihoods are not the same; hence, there would be dependence.

Hypotheses tests: P-VALUES AND STATISTICAL SIGNIFICANCE

The traditional approach to reporting a result requires a statement of statistical significance.

A **p-value** is generated from a **test statistic**. A significant result is indicated with " $p < 0.05$ ".

The table below indicates the chi-square results for the analysis, per variable statement. All the highlighted values indicate that there is a significant statistical difference between the items that constitute the variable (ie. the number of respondents per item is not the same).

For example: The p-value for Age is 0.95 (which is greater than 0.05). This implies that the null hypothesis, that there is approximately the same number of people in the different age categories, is true.

However, the p-value for Gender is 0.00 (which is less than 0.05). This means that by gender, there is a difference in the number of males and the number of females in the sample.

	p-value
Age	0.9516
Gender	0.0000
Current Position	0.0000
Grew up in an area that was:	0.0105
Grew up in the following country:	0.0000
Race	0.0000
Highest Academic Qualification	0.0003
Highest Professional Qualification	0.5427
Appointed as a Judge	0.0881
Number of years as a Judge	0.8967
Currently a judge of ___ Court / Division	0.0543
The Judiciary is bureaucratised	0.0673
Bureaucratization of the Judiciary is necessary	0.0002
Bureaucratization of the Judiciary threatens the foundations of the judicial process	0.0554
Judges should be autonomous	0.0105
Individual responsibility needs to give way to corporate responsibility	0.2604
Judicial power is exercised through a multitude of judges	0.0093
The legal and managerial duties of judges should be separated	0.0361
Good performance is secured by tight bureaucratic control and supervision	0.0031
Good performance is secured by self management, by relying on professional ethics and morality	0.0105
The Minister of Justice should make the appointments of judges of all superior courts including the Constitutional Court	0.0031
The Executive should have control over the way the Court functions	0.0000
The Executive should have a say, but not control over the way the Court functions	0.1529

The Rules of Court should be made by the Minister of Justice	0.0021
Judicial Education should be placed under the control of the Minister of Justice	0.0057
The Minister of Justice should make the appointments of Acting Judges of all superior courts including the Constitutional Court	0.0133
The Judiciary Bills hand over judicial control to the Minister of Justice	0.0076
The Minister of Justice should have financial control of the Judicial Budget	0.0361
There should be a Judicial Code of Conduct	0.0080
There is a Judicial Code of Conduct	0.0361
The judiciary should hold its members accountable to the law and litigants through appellate review	0.0204
The judiciary should hold its members accountable to the law and litigants through inquisitorial proceedings	0.0607
Briefly explain in your own words how the judiciary holds its members accountable to the law and litigants in South Africa	0.0000
Disciplinary powers should be exercised over judges	0.0031
Briefly explain in your own words whether and if so how disciplinary powers should be exercised over judges in South Africa	0.0035
Disciplinary powers should be administered by judges.	0.0004
A disciplinary panel should administer disciplinary powers.	0.0006
Disciplinary panel should consist of judges and non-judges	0.0004
Judges should not be subjected to discipline: judicial review already holds judges sufficiently accountable.	0.0215
Judicial discipline interferes with judicial impartiality	0.0136
There is a formal system of education for judges in South Africa.	0.0204
Judges should conduct judicial education for judges in South Africa	0.0031
There should be a Judicial Studies Board, which should control and conduct judicial education for judges in South Africa.	0.2461
The Minister of Justice should control who should conduct judicial education for judges in South Africa	0.0038
Training and Performance appraisals bring pressure to bear on the decisions of a judge in an individual case	0.2397
Training and Performance appraisals interfere with the impartiality of a judge in an individual case	0.0174
Assessing individual performance of judges impinges judicial independence.	0.0140
Judges should be free from internal interference	0.0362
A career ladder within the judiciary is desirable	0.0167
A career ladder through the prospects of promotion might influence a judge in his /her decision	0.0952
The philosophy of collective judicial action (emphasis on consistency and standardization) is reconcilable with the culture of autonomous decision-making.	0.2922
What is judicial independence?	0.0008
Does judicial independence matter and if so, why?	0.1093
The Judiciary needs to be transformed	0.0059
Explain how the judiciary should be transformed.	0.0296

The administrative powers of the judiciary should be transferred to the Executive.	0.0107
There should be an independent body responsible for the administration of the courts.	0.1860
Briefly explain in your own words what and where this independent body should be	0.4336
The budgeting powers of the judiciary should be transferred to the Executive.	0.0431
Judges should exercise authority over each other outside of the realm of appeals	0.1786
Should Judges exercise authority over each other outside of the realm of appeals?	0.1577
Judges should be administratively independent	0.0004
There should be institutional accountability.	0.0076
Disciplinary procedures for judges are necessary and should be introduced.	0.0042
A training college for judges is necessary and should be established.	0.0008
A register for financial interest is necessary	0.1188
The Judiciary Bills interfere with the functional independence of the judiciary	0.0068
How will the judicial Bills interfere with the functional independence of the judiciary?	0.3954
Should Judges in South Africa be managed and controlled?	0.0190
Judicial management increases productivity and reduces costs.	0.7190
Does Judicial management increase productivity and reduce costs?	0.4405
Judges should be elected	0.0001
Judges should be appointed	1.0000
Who should appoint judges?	0.0224
Describe the recruitment process of judges in South Africa	0.6093
Describe how judges are selected and appointed in South Africa	0.0041
What dialogue does the legislature, the Courts participate in, and what is their aim?	0.1530
Legislature's involvement is necessary for judicial reform (Q77)	0.0167
Briefly explain in your own words why you agree or disagree (Q77)	0.7885
Legislature's involvement is necessary for the effectiveness of various procedural rules, methods and techniques in order to achieve judicial reform. (Q78)	0.6446
Briefly explain in your own words why you agree or disagree (Q78)	0.3138
Those seeking to improve economic performance should not focus on judicial efficiency alone but on independence as well. (Q79)	0.4235
Briefly explain in your own words why you agree or disagree (Q79)	0.7877

4.7 Chapter Summary

The interpretation of these results highlights the fact that legislature and executive are increasingly interfering with the functioning of the judiciary. This is happening directly through legislation such as the proposed Superior Courts Bill and the 14th Amendment to the Constitution and indirectly through the Judicial Service Commission in the manner in which judicial candidates are recruited and selected and through the disciplinary process of disciplining members of the judiciary. This direct and indirect interference, in some instances, threatens judicial independence. One example of this is the disciplining of judicial members by the Judicial Service Commission which threatens the personal independence of the Judges. Other instances, such as the present composition of the Judicial Service Commission as well as the selection process by the Judicial Service Commission of suitable judicial appointments, are having an adverse impact on the structural and functional independence of the judiciary.

The judges have also highlighted the other legislative and executive threats to the functional and personal independence of the judiciary, namely their conditions of service and remuneration and the lack of or inadequacy of financial and human resources for proper functioning of the courts.

These judges have indicated that addressing the flaws in the selection process of the Judicial Service Commission for appointment of judges was paramount in addressing the issues of judicial inefficiency, ineffectiveness, work ethic and the ethical conduct of its members. Remuneration, workloads and working conditions issues such as adequate human, financial and capital resources, longer recesses, followed this issue and so on. The judges also perceived that experience in high court practice and training, were important considerations for selection. It would appear that there might be a close correlation between the amount of court practice experience an aspirant judge has, and the judicial training required once he or she has been appointed to the bench (the greater the high court practice experience, the less training that will be required).

There is also a correlation between professional ethics and judicial conduct. It would appear that professional qualifications considered more important than academic qualifications. This dimension could therefore be significantly correlated across all other dimensions and certain biographical variables may influence perceived importance of certain dimensions.

The results obtained appear to be consistent with the literature available on aspects of this topic covered in Chapter Two. They underline the need for the Judicial Service Commission's recruitment and selection processes as well as the selection criteria for judicial appointments are revisited. The composition of the Judicial Service Commission should be changed so that either it comprises only members of the judiciary and the legal profession or that the judiciary and the legal profession combined form an overwhelming majority in order to address this research problem. Chapter 5 provides a more in-depth discussion of the results, addresses the objectives, and answers the research questions of the case study.

CHAPTER FIVE

DISCUSSION

5.1 Introduction

In the previous chapter the results were presented of the fieldwork undertaken. This chapter serves to build on what has been presented by means of a discussion of the quantitative and qualitative data. It will attempt to make findings and to draw conclusions from that data. Implicit is the recognition that the results are explained and assessed within the context of the literature reviewed in Chapter Two and previous research conducted both locally and internationally. The research presented in this research identifies the judges' opinions and their perceptions of what the impact and effect political interference by the Legislature and the Executive, through the proposed judicial Bills, has been and will be on judicial independence, through the proposed judicial bills, and whether local and international investor confidence in South Africa has been undermined.

The purpose this study is to make a meaningful contribution to the body of research that has already been conducted and which still needs to be conducted for the South African government, the South African legal community and for South African society as a whole, including the business community, to provide a framework for extensive research into this field.

5.2 Whether an Imbalance Exists between Judicial Independence and Judicial Accountability in South Africa?

Some have said that "judicial independence and democratic accountability stand in irreconcilable tension with each other" (Ferejohn and Kramer, 2002, page 962), whilst others say that judicial accountability is an essential counterbalance to judicial independence and that it is therefore essential for a balance to be maintained between the two (American Bar Association 1997, page 45). From the literature surveyed in Chapter Two and the results contained in Chapter Four, it

would appear that at present there is a balance between judicial independence and judicial accountability. This is being maintained between the two in South Africa through the implementation of the principle of the doctrine of separation of powers and through the constitutional tension, which exists between the three pillars of government: the legislature, the executive and the judiciary. Each exercises their government authority: the legislature by enacting, amending or repealing laws; the executive by executing and enforcing the law; and the judiciary by determining the law in disputes and how it should be applied to situations. However, it is submitted that the real danger posed by the judiciary bills is that an imbalance between the two will result from their enactment. This will be exacerbated by the recent proliferation of judicial criticism directed at individual judges, which is undermining public confidence in the judiciary. Because of this, issues such as judicial independence and judicial accountability are taking centre stage in South Africa. Both the literature surveyed in Chapter Two and the survey results and the interviews conducted with members of the judiciary in Chapter Four show that the delicate balance between judicial independence and judicial accountability in South Africa is under threat from both the legislature and the executive, especially if the proposed judicial bills are enacted in their present form.

5.2.1 Judicial Independence

From the literature surveyed in Chapter Two as well as from the research results contained in Chapter Four, there appears to be a widely accepted definition of judicial independence. Seventy-five percent of the judges' (Figure 4.5.5.1) definitions of judicial independence are similar to that of Boule, Harris and Hoexter (1989, page 200) and that of Rautenbach and Malherbe (1996, page 232). The characteristics include that judges must "have the freedom to decide a case without any external influence, fear or favour". When asked to define Judicial Independence, one of the judges in his interview said that, "Judges must be clever, courageous and comfortable to decide cases without influence, threat, harassment, and intervention, and be able to change their working environment that may affect the way in which they decide their cases." When the judges were asked in their interviews how one would assess judicial independence, they replied that it could be assessed from the judgements which they delivered,

especially those judgements that went against powerful stakeholders, the state, politicians and political parties. A number of the judges, surveyed and interviewed, were even of the opinion that Judicial Independence is one of the cornerstones of a democracy and that the judiciary should be structurally independent from the other two arms of government. They are also of the opinion that the judiciary is the only form of protection that an ordinary citizen has when they have a dispute with government. There is an overwhelming support by the judges that judicial independence matters (Figure 4.5.5.2).

As stated in the literature surveyed in Chapter Two as well as from the results of what the Judges said, in Chapter Four, there is an overwhelming consensus that judicial independence, especially in a constitutional dispensation (such as South Africa's), is indispensable to ensure the supremacy of the constitution. The judges are in agreement with the literature that suggested that there has been a rise in public demand for the South African government to be more transparent and accountable to South African ordinary citizens with the advent of the new South African constitutional dispensation. By implication, this includes the judiciary (as it is the third organ of state). The danger however, as so aptly put by the American Bar Association, is that "If judicial independence is to be preserved, public confidence in the judiciary must be maintained. A public that does not trust its judges to exercise sound, even-handed, independent judgment, will look upon judicial independence - guaranteed by life tenure and undiminished compensation - as a problem to be eradicated, rather than a virtue to be preserved." (American Bar Association, 1997, page 45)

This research has found that the legislature and the executive have relied on this type of argument to make inroads into the independence of the judiciary. However, as has been suggested by the American Bar Association (1997), that to revitalize public confidence in the judiciary, the legislature, the executive and the judiciary have to manifest the "spirit of restraint and common purpose" (American Bar Association, 1997, page 45). These sentiments were also expressed by Langa CJ (2006) when he said that "all the other organs of state", including the Ministry of Justice, must assist and support the courts in achieving and exercising its independence (Langa CJ, 2006, cited in The General Council of the Bar Human Rights Committee Conference Report, 2006, page 67). Kriegler J (2006) expressed similar

disappointment in both the executive and the legislature for not having protected and defended the judiciary when the judge presiding over a case, which involved the former Deputy President, was criticized and unrestrained things were said against him (Kriegler J, 2006, cited in the General Council of the Bar Human Rights Commission's transcript on page 51).

The judges who participated in this research were of the opinion that impartial law is dependent upon an impartial and independent judiciary. They believe this is the key to justice in South Africa, to ensuring that the rights of citizens are protected and that the executive and the legislature do not exceed their powers and encroach on matters, which should only be dealt with by the judiciary. Hence, it is submitted that South Africa needs a strong, vibrant and fiercely independent judiciary, which takes into account the principles of equality, dignity and human rights for all, when promoting and dispensing social justice. However, the majority of the judges who participated in the interviews believed that their financial and functional independence are also presently under threat by the executive and that if the amendments to the Superior Courts Act and the Constitution are passed, that these threats will intensify and possibly even undermine the independence of the judiciary. This is corroborated by the findings and conclusions of the International Bar Association's Human Rights Institute report of July 2008.

Both from the literature surveyed in Chapter Two and from the research results in Chapter Four, legal experts have expressed strong opinions that judges should not be controlled or manipulated by the executive, as this will undermine not only their independence, but the South African constitution as well. There were conflicting views on whether the efficiency and effectiveness of the judiciary influenced its independence. Some of the judges surveyed were of the opinion that judicial independence has nothing to do with either efficiency or economic performance. The researcher submits that legislative and executive interference with the independence of the judiciary does indeed affect the judiciary's efficiency and effectiveness in dispensing justice. It holds true that there are judicial inefficiencies and ineffectiveness in the judiciary. These are evident in the fact that the executive and the legislature have been trying to address the those inefficiencies and ineffectiveness in the judiciary through the proposed judiciary Bills. Some of the judges during their interviews spoke about the problems the senior judges were experiencing

in having to sort out the problems caused in judiciary through inexperience, heavy workloads, and other factors.

5.2.2 Judicial Accountability

In the surveys and interviews of this research, the judges agreed that judges should be held accountable for their day-to-day actions (in terms of the context of their work, their work allocation, case management and their judgements) as well as to the Judge President (also known as the head of court) of their division. They thought it appropriate for judges to be accountable to their heads of court (who after all is their “line manager”) that draw up the court rolls and allocate the cases to the various judges. They also felt that it was important that the public must have confidence in their ability to hear their disputes and therefore agreed that they should be accountable to the high office they held. They know what is right and wrong and what is acceptable and unacceptable. As stated by one of the judges, in his interview, there is consensus amongst the Judges that they know how to behave in their work and in their private lives. They should be beyond reproach because of their professional ethical background and that they must set an example to the rest of society as they sit in judgement of them.

The Judges also confirmed that the judiciary holds its members accountable through various processes, namely the appeals process; the review process; and disciplinary enquiries. Some of these processes are internal (held by the heads of court and senior judges) and others are external (held by the Judicial Services Commission, which has disciplinary powers, in terms of Section 177 of the Constitution of South Africa of 1996, for the more serious complaints). In certain circumstances, a disciplinary process can result in the removal and the impeachment of a judge by parliament (the ultimate sanction). The results in Chapter Four also indicate that there is overwhelming indication from the judges that the constitutional process of impeachment is adequate and is the correct process to hold members of the judiciary accountable as it ensures and protects their security of tenure. However, the judges stated in their interviews that they do not believe that judges should be held accountable and disciplined for everything that they do or for every decision that they take, as this would negatively impact upon their impartiality and

upon their independence. Nevertheless, in their interviews the judges agreed that the judiciary does have an element of corporate responsibility (institutional accountability) that holds its members accountable to not only the law and the litigants through appeal proceedings, but also through the judicial complaints system. The conduct of the individual judges can be investigated, either informally by the head of court of a particular division of court, or formally by the Judicial Service Commission when there are allegations of gross incompetence or misconduct on the part of a judge.

Consequently, the majority of judges surveyed and interviewed felt that that the present appeal process, while exposing the court's processes and decisions to public scrutiny, is sufficient to hold members of the judiciary accountable to the law and litigants in South Africa. It is also submitted that there is a distinction between the appeal or review process and the disciplinary process. In the appeal or review process the judge, whose decision is being appealed or reviewed, is not a party to the proceedings and he or she cannot be sued. However, in the disciplinary process, the judge against whom a complaint has been made is a party to the proceedings and the sanction applies directly to him or her. This could influence his or her impartiality when deciding cases. Judges believe that to ensure judicial independence, although they are institutionally accountable, they should be individually, functionally and administratively independent, as indicated in Figures 4.5.5 and Figure 4.5.6.

The increase in judicial criticism as well as the executive and legislature's failure to protect the judiciary, are the primary causes for the increased demands by the public for greater accountability and transparency within the judiciary. In addition, as mentioned by some of the judges in their interviews, under the previous constitutional dispensation an incorrect perception might have existed that judges were almost immune to being questioned about their behaviour. Despite this, the majority of the judges surveyed and interviewed, concur with the literature surveyed in Chapter Two that Judges are accountable. They believe that they do hold themselves accountable to their oath of office, their conscience, the truth, the law, the litigants before them, the public, their heads of court (the judge presidents) of their respective divisions and to their peers. In their interviews some of the judges said that they believed that it was their duty to ascertain the facts in any given matter and to then apply the law. They also admitted that they

write their judgements as they think fit without undue outside influence. Nevertheless, as previously stated, they do concede that there are limitations to their autonomy. Some of them have also conceded that due to the nature of their tasks and their responsibilities, judges to a large degree are unsupervised. They might therefore appear to be accountable only to themselves, but that is not truth. Consequently, a number of judges interviewed are of the opinion that this incorrect perception may also have contributed to the increased demands by the public for greater accountability and transparency within the judiciary.

The majority of the judges surveyed and interviewed are also of the opinion that the inefficiencies and ineffectiveness that is occurring in the judiciary can be attributed to the Judicial Service Commission's interference with the Judiciary's recruitment and selection process in its attempt to achieve transformation. Although, it is conceded that the Judicial Service Commission has brought about transformation, it is submitted that it has happened at a great cost to the efficiency and effectiveness of the judiciary. The judiciary is under-represented on the Judicial Service Commission and new judicial appointments are no longer only being made from Advocates and Senior Counsel, but also from other members in the legal profession, including academics, attorneys, and magistrates (who are not members of the Bar). These people do not have the necessary superior courts experience nor have they specialized in superior court work.

In their interviews the judges stated that this was one of the inherent problems with the selection process where judicial members who do not come from the Bar do not have the same level of experience or who have not been subjected to the same kind of pressure in practice as advocates have been (in preparing for and conducting trials). The judges are therefore of the opinion that the lack of court experience and pressure will affect the members' (who do not come from the Bar) performance on the bench and in dealing with complex cases. The interviewed judges also felt that because of the inherent flaws in the selection process, the same standards could no longer be applied. This resulted in a difference in the ethical standards between the Bar, the Side Bar, the Magistracy and the Universities. However, the researcher respectfully disagrees and submits that the same ethical standards should still apply, as there is no real difference in ethical standards between the advocates and attorneys. It is however, suggested that a uniform set of

ethical standards, based on the two previously mentioned professions' ethical standards, should be drawn up and should apply to the entire legal community.

As can be seen, issues over judicial independence and judicial accountability have taken centre stage in South Africa as the delicate balance between judicial independence and judicial accountability comes under threat by the legislature and the executive as becomes subject to judicial criticism.

5.3 Only Administrative Management by the Heads of Court

The judges, who participated in the surveys and interviews of this research, expressed their concerns about the word 'manage' and about the issue of who should manage them. They said that they were not opposed to being administratively managed by their heads of court. They were completely opposed to being managed from the outside (by the executive or the Minister of Justice). They felt that this would be in conflict with the doctrine of separation of powers and would adversely affect their impartiality and their judicial independence. The Judges were also totally opposed to being controlled by anyone. Figure 4.5.8.1, clearly illustrates the strong opinion, which they express that they should not be controlled. Forty percent of them indicated this directly as a strong comment, whilst the remaining gave reasons as to who should manage judges and what the impact of such measures would be.

Also, in Figure 4.5.8.2 it can be seen that there are arguments both for and against judicial management in relation to productivity. The issues highlighted include the fact that there should be no management as it would be a wasteful exercise. Inadequate resources are also an issue and the judges (who, in their opinion, would better manage their own funds) should control these but on the other hand, management would streamline functionalities such as, overheads, delivery, etc. There is almost an equal split of opinions on the issue of management and control (refer to Table 4.5.8). For the reasons stated above, some judges conceded that managing judges might

increase productivity. However, they also felt that a better-managed court system would increase productivity and reduce costs.

It has also been established that there was agreement amongst the judges (refer to Figure 4.5.10) that the focus should not only be on judicial efficiency but also on judicial independence. This is supported by Figure 4.5.11.1.2, which shows that twenty five percent of the judges supported the argument that the focus should not be on efficiency alone, but also on Judicial Independence. Some went even further to say that judicial independence has nothing to do with either efficiency or economic performance. Almost seventy-eight percent of the judges surveyed (refer to Figure 4.5.5.4) believed that an independent judicial administrative body should be located within the Judiciary. This body, comprising the Chief Justice, Heads of Court, Senior Judges and Court Administrative Officials (like the Registrars and the Court Managers - reporting to the independent judicial administrative body) should possibly be situated in the Office of the Chief Justice and not with the executive. An alternative is to place this independent judicial body which is responsible for the administration of the courts, under the auspices of the Judicial Service Commission (minus political control).

The results in Chapter Four show that, of the judges who participated in the survey, they are divided about whether judges should exercise authority over each other. Those judges who participated in the interviews said that they feared that if judges exercised authority over each other that it might adversely influence their judicial impartiality and their independence, these concerns were also expressed shared by Albertyn (2006, page 134). Their disagreement over the necessity to govern the judiciary is illustrated in Figure 4.5.6. It is therefore submitted that neither external nor internal control should be exercised over individual members of the judiciary, as this would undermine their individual impartiality and the independence of the judiciary. It is also submitted that only the legislative and executive authority provided for in the South African Constitution of 1996 and in terms of its Bill of Rights, should be exercised over the judiciary.

The reasons given by the judges who agreed that there is a need to manage judges, was because new judicial appointments were no longer being selected from the bar. Bar members were

mainly senior counsels who had two decades worth of experience, who had proven themselves amongst their peers and who knew how to behave. In the interviews, some of the judges felt that appointments being made from the ranks of attorneys, magistrates and academic were watering down the bench. The majority of the judges surveyed and interviewed said they were embarrassed about certain allegations being made against some of their colleagues' behaviour. They referred in particular to the actions of Judge Hlope, Judge Motata and Judge Poswa. They blamed the Judicial Service Commission for selecting members of the judiciary from the ranks of, inter alia, attorneys, politicians and academics. They said these appointees now enjoyed a large amount of freedom, which they are not used to. They also said that, in most instances, an attorney in a law firm would usually be under the control of a senior partner and that suddenly this same attorney would be almost totally independent as a Judge.

5.4 Judicial Independence Cannot be Maintained, if There is Legislative and Executive Interference with Judicial Personnel

There is overwhelming support, both in the literature surveyed and in the research findings, that judicial independence cannot be maintained if the legislature and the executive control judicial personnel through their appointments, training and discipline. Such control over the judiciary will result in the judiciary becoming increasingly bureaucratized. In their interviews the judges, were also of the opinion that the hand of the executive is strengthened by making weak judicial appointments and that judicial independence and the constitution are undermined by the erosion of the separation of powers between the executive and the judiciary.

5.4.1 The Effects of Increased Bureaucratization on the Judiciary

The judges, who participated in the research, had strong opinions (as illustrated in Figure 4.5.1) that the judiciary should not be bureaucratized. They were in complete agreement that judges should be autonomous; that good performance is secured by self-management (which relies on

professional ethics and morality) and that bureaucratization of the judiciary will threaten the foundations of the judicial process. However, the same judges were divided on the issue of whether the judiciary is presently bureaucratized, as there were an equal number of judges who agreed and who disagreed with the statement. Also, in their interviews the judges supported the survey findings and said that the judiciary is presently not bureaucratized. They do however fear that there is a real danger that, if the judicial Bills and similar legislation is passed to regulate and control the judiciary, it will become bureaucratized. Nevertheless, the judges, who participated in the research, felt that bureaucratization is unnecessary. Tight bureaucratic control and supervision will not necessarily secure good performance and individual responsibility should not give way to corporate responsibility, as this would undermine the independence of the judiciary and their culture of individualism. Owen (1983, page 1442) and Botero *et al.* (2003, page 61), expressed similar views.

5.4.2 Increased Executive and Legislative Interference through the Judicial Bills

There were an equal number of judges who agreed with the statement on executive and legislative interference, as there were judges who disagreed with the statement, which averaged 3.0 (Figure 4.5.2) that the Judicial Bills handed over judicial control to the Minister of Justice. It is suggested that the previously mentioned results might have been different had the five judiciary Bills been separated out. It is felt that the disagreement could have been with the Judicial Conduct Bill and the Judicial Service Commission Amendment Bill, which deal to a lesser extent with the Minister of Justice's control over the judiciary and more with increasing the Judicial Service Commission's powers to discipline individual members of the judiciary.

Nevertheless, if one were to add the judiciary's comments contained in the literature survey to the abovementioned results, there is overwhelming consensus that the majority of the Judiciary Bills, in particular the Superior Courts Amendment Bill, the Fourteenth Constitutional Amendment Bill and the Judicial Education Bill hand over judicial control to the Minister of Justice. The remaining statements indicate that the judges are opposed to the executive, through the Minister of Justice, having control over their court functions, the rules of court, judicial

education, acting judicial appointments, financial control of the judiciary and its budget. They are of the opinion that these Bills, if implemented, will undermine the independence of the judiciary.

An equal number of judges agreed and disagreed that legislative involvement was necessary for judicial reform and for ensuring the effectiveness of court administration (see Figure 4.5.10). The judges who participated in the research stated in their interviews that they were concerned with the impact that legislative and executive involvement would have on the independence of the judiciary. They were of the opinion that the judiciary is best suited to decide how the courts should run. This is confirmed in Figure 4.5.5, where the judges indicated that they are opposed to the administrative and budgeting powers being removed from the judiciary and transferred to the executive. These views were also expressed by; *inter alia*, Kriegler J (2006, page 50) and Chaskalson J (2006, page 18).

Forty-one percent of the judges, who participated in the research (illustrated in Figure 4.5.9), felt that the dialogue with the executive is meaningless and six percent of the respondents felt that the Minister of Justice does not recognize the heads of courts' contributions. Twelve percent of the judges proposed that this could be improved by having regular meetings, including various role-players.

5.5 The Negative Impact that Judicial Transformation has had on the Efficient and Effective Functioning of the South African Judiciary.

The government's transformation policies as applied to judicial personnel, concerning, *inter alia*, the appointments, training and disciplining, is having a negative impact on the efficiency and effectiveness of the South African judiciary. The judges agree that the judiciary needs to be transformed. They were also in agreement with the literature reviewed in Chapter Two that judges should be appointed rather than elected. The majority of the judges, who participated in

the research, were of the view that the judiciary has successfully been transformed in terms of race, but not gender and the majority of them felt that female judges still need to be promoted.

However, the judges were also of the opinion that the implementation of transformation, which has been undertaken by the Judicial Service Commission in a haphazard fashion, has had a negative impact on the efficiency and effectiveness of the South African judiciary. They felt that the current recruitment and selection processes being implemented by the Judicial Service Commission to give effect to transformation were flawed and were contributing to the negative impact on the efficiency and effectiveness of the South African judiciary. The judges were of the opinion that the flaws in the selection process have resulted in the need for judicial training, supervision and discipline to increase. They were also of the opinion that these increased needs will adversely impact upon and erode judicial independence further.

5.5.1 The Judicial Service Commission's Flawed Recruitment and Selection Processes

In their interviews the judges expressed their concerns that if judicial transformation is being implemented simply “for the sake of transformation only”, this will have a negative impact on judicial efficiency and effectiveness (as illustrated in Figure 4.5.5.3), which indicates that the need for transformation is recognized but also highlights other factors. The judges said that judicial appointees needed to be selected carefully and that there were important selection criteria, which needed to be considered during the selection process. These include:

- the judicial nominee's level of seniority in his or her profession,
- his or her years of experience in superior court litigation and superior court experience,
- his or her personal work ethic,
- his or her personal integrity,
- his or her level of maturity, and
- whether he or she is self-disciplined and self-motivated.

Samples of his or her acting judgements should be evaluated to determine his or her performance potential as a judge. The demographics of the legal profession from which judicial candidates are selected (not the whole of South Africa) should also be taken into account. The judges were therefore of the opinion that if the above important factors are overlooked, unsuitable candidates will be appointed to the bench. This will result in increased judicial inefficiencies and ineffectiveness such as unreasonable postponements of cases, inordinate delays in the giving of judgements, increased appeals and reviews, increased costs and expenses and possibly less justice, inappropriate or unethical judicial behaviour bringing the judiciary into disrepute.

5.5.1.1 Flaws Identified in the Current Recruitment Process

There appears to be uncertainty amongst members of the judiciary about what the current recruitment process is. Some of the judges surveyed and interviewed in this research were of the opinion that the Judicial Service Commission does not have a formal recruitment process. Others were of the opinion that there was a recruitment process but that there was a large amount of bureaucracy involved. They felt that the primary concern was with subjective selection criteria as opposed to objective selection criteria. This meant that candidates who are not suitable for a judge's post were being selected and the right type of applicant who might be suitable, was being overlooked or not even considered.

In the interviews the judges said that judicial candidates were presently recruited from the broader legal community including from magistrates and university law lecturers, not just from the legal profession (which comprises the bar and the sidebar). This differs from the way in which judicial candidates were recruited under the previous dispensation where candidates were recruited primarily from the legal profession, in particular from the ranks of advocates who were silks or senior advocates and who had long term, in some cases in excess of twenty years, court experience as an advocate. The judges interviewed in this research, also said that judicial candidates are able to nominate themselves or be nominated by members of their profession or by their legal professional bodies. Some of the judges also mentioned that there are some highly suitable candidates who have been discouraged from applying because of their race, their gender or due to their financial constraints.

The judges who were interviewed were of the opinion that the main disadvantage of the present recruitment process is that the Judicial Service Commission has restricted its selection of judicial appointees to the pool of candidates whose names have been put forward by their legal professions or the universities. These judges were of the opinion that suitable candidates should be recruited after consultation with the judges of a particular division in which the vacancy exists. In their interviews, the majority of the judges also suggested that the Judicial Service Commission and the heads of court should implement proactive measures to recruit suitable judicial candidates and not wait for nominations to be put forward by members of the legal community. Nevertheless, a number of the judges felt that the current selection process conducted by the Judicial Service Commission is a more open and transparent manner of selecting judicial appointees.

5.5.1.2 Flaws Identified with the Current Selection Process

The judges who participated in the research with the Judicial Service Commission's selection process identified a number of flaws. One of the major flaws identified is that people with little or no experience are being appointed, on the Judicial Service Commission's recommendations. A number of the judges said that the perception is that there are no minimum academic and professional requirements for being selected as a judge, although they do believe that the norm appears to be that the candidate must at least have an LLB degree and some exposure as an acting judge in any one of the divisions.

Another major flaw they identified was that in their opinion the Judicial Service Commission is too politicized and that there were more non-judicial members in the Judicial Service Commission than members of the judiciary. Other flaws identified by the judges include the fact that the Judicial Service Commission does not follow a proper recruitment process and that some of their recommendations for judicial appointments are made for the wrong reasons. For example, emphasis is placed on colour and transformation, instead of on merit. Another major concern was that important selection criteria such as practical court experience, expertise, having an open mind and being objective might be overlooked.

The majority of the judges who were interviewed were of the opinion that it is easier for a silk to become a judge than an attorney, a magistrate or an academic. Some of the reasons given for their opinions was that a silk appears frequently in the superior courts so, having practiced in the superior court environment is familiar with court procedure and court etiquette and is more likely to be objective and have an open mind. It is also interesting to note that only ten percent of the judges surveyed felt that the Minister of Justice should make the selection and recommendations to assist the President in appointing judges.

In their interviews the judges said that silks and senior advocates are more suitable for judicial appointments than other members of the broader legal community. They were of the opinion that a silk is more open-minded and objective and that it is easier for him or her to listen to both sides as he or she has represented or defended both sides. This contrasts with prosecutors and magistrates or attorneys, who are less likely to be neutral as they may have a one-sided perspective and would therefore have to guard against showing an affinity with one of the parties to the case.

The judges were of the opinion that advocates have a distinct advantage, in that it is much quicker for the adversarial role to be eroded in them. They also have the advantage that they are fully acquainted with superior court procedures. They have appeared before judges so they have learned how judges deal with situations. They have gained experience in their own cases as well as in what occurs in the superior courts. The majority of the judges who were interviewed were of the opinion that if they had to choose between selecting people from various professions, a silk was the better option.

They cited the inherent dangers with other professions as well as with magistrates, prosecutors and academics. For example, they believe that magistrates and prosecutors have civil servant mindsets as they had been under the control of the Department of Justice. This could lead to notions they may not feel free to deliver decisions that would go against the master (ruling party) in crucial times or that they may look at a particular law and feel obliged to interpret it from the state's point of view.

Some of the judges identified certain problems experienced with aspirant judges. For example, an aspirant judge who has come from a poor background has not been exposed to sophisticated commercial work, either as an attorney or as an advocate, and has very often only practiced criminal law and third party motor vehicle accident claims. In order to be a good judge, they feel that the quality of experience, the maturity of character, and court experience of at least fifteen years cannot be underestimated.

They therefore suggest that the Judicial Service Commission's minimum selection requirements should be a postgraduate LLB academic qualification, and in addition to this, a minimum of ten to fifteen years professional practice experience is necessary before someone should be considered suitable for a judicial appointment. They say that at present, constitutionally speaking, there are no minimum requirements. All that is required is for the judicial candidate to be "a fit and proper person", which by implication means that the aspirant judge does not even need to have a legal qualification!

The judges interviewed said that under the old regime, it was customary for aspirant judges to have BA (LLB) as their academic qualifications as well as to have been a senior advocate or silk with at least twenty years experience of practice at the bar. Some of the judges said that even three to four years, as senior counsel is still not good enough: aspirant judges should have at least have a law degree with twenty four years training in practice. They are also concerned that the BA (LLB) requirement has been relaxed and that the LLB in itself has become watered down (it is now an undergraduate degree, whereas, previously it was a postgraduate qualification). They believe that, although an LLB is sufficient as a formal degree, nobody should be considered for appointment to bench unless he or she also has, a minimum of twenty-five years experience as a practitioner, post LLB.

Some of the judges, interviewed, concede that there are attorneys who are equally competent and qualified to become a judge. However, they are not so sure about academics, especially if the academics do not have any practical court experience and have come from a purely academic background. They are of the opinion that academics may have the intellectual know-how, but not the professional practical experience. They say that intellectual know-how and professional

practical experience are worlds apart and that an LLM or LLD makes no difference in practice. Although, they do concede that there are judges who have been selected from the ranks of academia who have made great judgements. Nevertheless, they believe that the judiciary needs people from the profession.

In his interview, one of the judges mentioned that lawyers, academics and even senior attorneys who have been appointed to the bench, have cracked under the pressure and resigned because they did not have the requisite experience to back them up in dealing with difficult and complex matters. Consequently, the majority of the judges interviewed were of the opinion that all (if not all, then an overwhelming majority) of the members of the Judicial Service Commission who are charged with the actual selection and interview process should be Heads of Courts, senior judges and judges, as they know what the requirements for a good judge are.

The judges are of the opinion that the need for training, supervision and discipline has arisen because of the Judicial Service Commission is choosing judicial appointees from the ranks of the legal professions, rather than only from senior counsel.

5.5.2 Justifications for Increased Judicial Training and Judicial Discipline

The majority of the judges interviewed said that the increased need for judicial training and judicial discipline has arisen because of the Judicial Service Commission's flawed recruitment and selection processes. These have resulted in the appointment of inexperienced and unethical people. Some of the judges interviewed, said that training courses are needed to deal with new appointees who have little or no court exposure. They also said that there was no such thing as instant training (a "kits hof") and it is unrealistic to expect that one can take a person who has insufficient experience, or with four years worth of post LLB experience, put them into a college and fashion them into a judge. The majority of the judges also said in their interviews that most of the judicial education required, in order to become a judge, is obtained at "the rock face". They are therefore of the opinion that someone aspiring to become a judge first needs to obtain an appropriate postgraduate law degree LLB (not an undergraduate LLB after completing an

undergraduate degree such as BA, B. Comm., etc) and thereafter needs to have a number of years' professional practical experience in court, before considering becoming a judge.

The judges interviewed were also of the opinion that university degrees in themselves are inadequate, as only the legal principles can be learnt at university and that the application thereof only comes through experience. They are also of the opinion that if only highly experienced and highly ethical judicial appointees are appointed to the bench, there will be no need for training or discipline. Consequently, they are of the opinion that there is no school like legal practice and that the judiciary therefore needs someone who has practised for a while, for example eighteen years. By implication, their view is that if less highly experienced and less ethical people are appointed, it will result in greater judicial inefficiencies and judicial ineffectiveness, which in turn will require greater supervision, training and discipline. The judges, who were interviewed, are therefore of the opinion that it is equally important that only people with the right experience and the right type of exposure are selected, which they do not believe is happening at present. They perceive that less qualified and less experienced people of colour are being selected and recommended for judicial appointments, as the Judicial Service Commission is under pressure to transform the judiciary.

Some of the judges, interviewed were also of the opinion that amongst the new people coming in, there are people who do not know the judicial system, nor the ethics of the legal profession nor the requirements of the job, as they have not been brought up in the discipline. Despite this, a number of the judges, interviewed were of the opinion that the present professional approach for selecting judges is not bad, but they believe that it can be improved by insisting that aspirant judges, especially those who do not come from the bar, such as magistrates, attorneys and academics, undergo rigorous training at a judicial college to try and fill some of the gaps in their knowledge and experience, and sit as an acting judge before accepting a nomination for a judicial appointment.

The judges, interviewed were of the opinion that aspirant judges, who have no experience in writing judgements, will require training on how to write judgements before they can be appointed to the bench. They said that advocates write mostly opinions, so they will need to be

trained on how to write judgements. However, they were of the opinion that an advocate will require less training than an attorney, a magistrate or an academic. Some of the judges expressed the opinion that academics wrote the worst judgements, which they attributed to academics being used to writing academic papers. The judges' perceptions are that magistrates and prosecutors are exclusively involved in dealing with the Magistrate's Courts Act and that they are more likely to need training in superior courts procedures, than advocates or attorneys, who have practiced in both courts. They said that, in their opinion, another problem with magistrates and prosecutors was that their training had primarily been in criminal work and that they had received little or no training in civil work, whereas eighty percent of the work in the high court is civil; and the more difficult work in the high court, is civil. However, the judges interviewed are also concerned about an attorney who is only involved with administrative work such as debt collections or estates. They feel that such attorneys are not suitable and will require training before they can become effective and efficient judges.

Some of the judges are also of the opinion that many of the judicial nominees, who do not come from the bar, do not know how to behave in the superior courts or what the customary practices in the superior courts are. Other problems, which they have with some of the judicial candidates, are that they do not know how to deal with objections or points *in limine*. The judges, interviewed, were of the opinion that these judicial candidates will need more practical training, which they suggested could be provided through mock trials, in which it is explained to them what has to be done.

The judges, interviewed, said that the problem with supervision and mentoring of aspirant judges, is that no judge sits in another judge's court, so there is no way of them knowing how an aspirant judge sits in his or her court and how he or she is dealing with his or her cases. They are also of the opinion that if there is supervision, it would constitute an internal interference with a judge's or an acting judge's impartiality and could undermine the independence of the judiciary. Some of the judges, interviewed, are concerned that LLB candidates who have not attended justice college might be disqualified from being selected and appointed as judges, simply because they have not attended justice college. These aforesaid judges believe that those candidates should not be disqualified on those grounds only. They also expressed concern that if

judicial appointments were made directly from the justice training college, then it should be the Judicial Service Commission who decides over the suitability of judicial candidates and not some training college or the executive. The Justice College should empower judges but there should be no examinations.

The majority of the judges, interviewed, said that a weekend course is not good enough, that an aspirant judge cannot be trained in a weekend or even in one year. They were therefore opposed to the idea that aspirant judges can simply be given a crash course on how to conduct a trial. They also felt that a manual, which would tell an aspirant judge how he or she should be judging, is also not good enough. Nevertheless, the majority of them are in favour of a proper judicial college to help overcome and remedy some of the judicial inefficiencies and judicial ineffectiveness which have arisen as a result of the flaws in the recruitment and selection process. This would be acceptable on condition that retired judges, who would lecture, populate it and train aspirant judges to deal with the type of work they will encounter in court and would guide them on how to approach difficult problems on their own.

Despite the aforesaid, the judges still maintain that the best judicial education and training for aspirant judges is to gain ten to fifteen or even twenty years worth of court practice experience, where they would be exposed to the robustness of a courtroom and to the analysis of weighing up evidence. As previously pointed out, the judges are of the opinion that the LLB degree is only the formal education, merely the beginning of a long learning process, and that lawyers only really start to learn once they have completed their LLB degrees and begin to practice law.

5.5.3 Judicial Education Training College Could Further Compound the Existing Flaws in the Recruitment and Selection Processes

The judges are critical of government's fast tracking of disadvantaged people, especially through the women's training college as they say that it is unnecessary. They are of the opinion that there are enough good black females in the profession, at the bar and the side bar, who would be

suitable for appointments. These candidates simply need to be approached by the heads of court and asked to make themselves available to the bench. As previously stated, the judges, interviewed, also say that there is no such thing as instant judicial training it simply will not work.

They say the only way to groom people to be good and efficient judges is for them to go through the proper channels. One of the judges, in his interview, suggested that black practitioners should be exposed to the right experiences so that they can rise to the required level; otherwise they are being done a disservice. Another judge, in his interview, made an important observation, he said, “what is fourteen years in the life of a nation?” He is adamant that aspirant judges need to have twenty to thirty years practice experience before they take up an appointment on the bench.

The judges, interviewed, also said that a Justice College will not be able to determine whether a candidate is suitable to be appointed as a judge, by the measures that they apply. They concede that although the Justice College might create a pool of acting justices, from which permanent appointments can be selected, they are of the opinion that it should not be exclusionary. For to do so, would mean that many people who should become judges, are left out. They warn that if choice is limited to the Justice College pool only, it will cause problems. One of the concerns raised is that if, for example, it were intended that training should be followed by an exam, what would happen if the candidate failed the exam and is found to be unsuitable? Will he or she be discarded to give others a chance? Alternatively, will he or she be afforded another opportunity to improve him or herself? In addition, does it mean that people who are successfully trained automatically qualify for the next available appointment when a post is advertised? In other words, does it create “a legitimate expectation” in the minds of the aspirant judges that they will be selected from the training process if they are successful and excluded if they fail?

Their primary concern is whether a person who has not participated in the process would be automatically excluded. The judges are of the opinion that the training should be an empowering process, open to all with equal opportunity. They say that some should not be identified to the exclusion of others, as it will create the perception that preference is given to the candidates who

have gone through the process. The judges were also opposed to using a process, which is similar to that of the magistrates' commission process, in which tests are used to satisfy the head of Justice College that the candidate is a "fit and proper person". It is submitted that this would also be contrary to the constitution.

5.5.4 Impacts of Flaws in the Selection Process on Judicial Efficiency and Effectiveness

The respondents said that the whole transformation process has been embarked upon with such rapidity that the incumbents do not have the necessary court experience. This has had a negative impact on the running of the courts and has resulted in other experienced judges being burdened with extra work and having to bear the brunt of the delays and the incompetence of the inexperienced judges. They also warn that members of the public may suffer injustices if an unqualified, inexperienced person is appointed in the position of a judge. This scenario undermines the efficiency and effectiveness of the judiciary, which is the cornerstone of democracy, and the constitution of South Africa.

5.6 The South African Judiciary's Code of Conduct.

The majority of judges were in agreement that there is and that there should be a Judicial Code of Conduct, as illustrated in Figure 4.5.3. However, some judges interviewed disagreed and are of the opinion that there is an informal code of conduct but not a formal code of conduct. They blame the previous Minister of Justice Mbandla and the Judiciary Bills for the situation. They said that they are in favour of the code of ethics as drafted by Judge Harms being adopted as the formal code of ethics. However, the previous Minister of Justice Mbandla introduced a new code of conduct in the Judiciary Bills, which the Judges had objected to. Consequently, some of them are of the opinion that the judiciary does not have a formal code of conduct to enforce and that the sanctions put in place only censured a judge. At the time when they participated in the research (which was prior to the recent passing of legislation dealing with this issue) they therefore felt that the Judicial Service Commission "did not have any teeth", as there was no formal code in place, which could be enforced. The only process, which was in place at the time,

was the constitutional process of impeachment. The judges, interviewed, nevertheless agreed that the judiciary should and does hold its members accountable, through the process of appeal and that disciplinary power should be exercised over judges by a disciplinary panel of judges. Consequently, they are of the opinion that it is important that the disciplinary panel only comprises judges to ensure that judicial impartiality and the independence of the judiciary is maintained.

5.7 The Judicial Complaints System

From the literature surveyed in Chapter Two as well as from the findings in Chapter Four, it was found that the Judicial Services Commission does have a disciplinary body within its structures, namely the Judicial Conduct Committee. This subcommittee is responsible for the disciplining of judges and in terms of Sections 178 and 180 of the Constitution of the Republic of South Africa, 1996 it is empowered to deal with the more serious complaints against judges. The judges, interviewed and surveyed, said that there are also various other processes, which are used to hold judges accountable, such as the appeal process, which generally holds members accountable.

Some of the judges, interviewed felt that the appeal process already generally holds judges sufficiently accountable. They say that an informal complaints system exists for the less serious complaints, whereby the heads of court and senior judges discipline individual judges informally.

According to the judges interviewed, the informal complaints procedure has been as follows:

- a complaint is lodged with the Judge President who first tries to deal with the matter in consultation with the Judge, against who the complaint has been made;
- if it remains unresolved or the matter is serious, the matter is then formally referred to the Judicial Service Commission for investigation;
- a finding is made and an appropriate sanction is imposed;
- a recommendation can be made to Parliament that a judge who has been found guilty of gross misconduct, be impeached. For this, Parliament will need a two thirds majority.

They were divided on whether the disciplinary hearings should be held in public. Some are of the opinion that the judge's high office needs to be taken into account and that the disciplinary proceedings should take place behind closed doors, *in camera*. Others disagreed and said that the disciplinary hearing should be open and transparent as there would be too many questions raised if the proceedings were held behind closed doors. They also felt that another advantage of trying a person in open court is that "justice is seen to be done".

The aforesaid judges as well as those who have spoken at various forums mentioned in the literature in Chapter Two have warned that one must not shake the public's confidence in judiciary by making every complaint public. They also felt that not every complaint should be aired in public and are of the opinion that only the more serious allegations should be referred to the Judicial Service Commission for consideration. This would minimize political interference with the internal personnel operations of the judiciary. They have also cautioned that one must be mindful of the fact that a judge must be able to apply the law fearlessly so it is important that a distinction be drawn between disgruntled litigants and genuine cases where discipline is required. Some of the judges have said that there are judges amongst them, who are more forthright and more robust than other judges are and that they could be subjected to constant discipline for everything that they did if one is not mindful of the aforementioned fact. This could shake the confidence of the judiciary.

The judges, interviewed, warn that it is dangerous to exert pressure on the judiciary, to make them more pliable and that it is not in the interests of society to put its judges habitually on public trial. This would potentially lead to a situation where there might be pressure put on judges not to make unpopular decisions and this which might lead to unwanted publicity and compliant proceedings. The adverse comments which are presently being made about Judge Nicholson as a result of the Supreme Court of Appeal's judgement in National Director of Public Prosecutions vs Zuma (573/2008) [2009] ZASCA (12 January 2009) is an example of such an event. Consequently, the judges, interviewed, have said that what was needed was for a judge to sit without extraneous proceedings.

They said that the principle is that judges must be able to speak justice freely and without fear, otherwise a judge might be scared to give an unpopular decision, as the judiciary could become inundated with complaints and they do not want a judge to become preoccupied with frivolous complaints. It is therefore important to distinguish between the complaints made against a judge. They suggest that judges, whose behaviour might require correction, should be drawn aside by senior judges and told the error of their ways. They maintain that this will have the desired effect, whereas the public complaints process could become messy. The judges, in their interviews, suggested that the appropriate head of court should decide whether a complaint, which has been lodged against a judge under his jurisdiction, should be handled informally or formally.

Some of the types of complaints, which the head of court will have to consider, are for example:

- the manner in which a judge presides where his or her general conduct of the bench, is found to be obnoxious, either that he or she is being difficult or rude to witnesses and or to counsel;
- where there are undue or inordinate delays in the giving of judgements; or matters are being postponed without good reason;
- where his or her behaviour is unethical.

The judges, interviewed, were of the opinion that serious complaints against judges might warrant investigation and a hearing by the Judicial Service Commission into the alleged misconduct. Recent examples are the allegations made against Judge Hlope for his conduct in the Pharmaceutical case, Judge Motata and Judge Poswa charged with drunken driving. The judges, interviewed, agreed that the public are entitled to be aware of judges who do not conduct themselves properly and that the public are entitled to have them impeached by a two thirds majority of Parliament, if the impeachment has been recommended by the Judicial Service Commission.

There is overwhelming support for the notion that judges should be impeached by Parliament for improper conduct. This is in line with the Constitution, but is also the most extreme form of discipline, used only as the last resort. It will be done on the recommendation of the Judicial

Service Commission, after an enquiry into the judge's alleged gross misconduct has been held and which has found him or her guilty, as indicated by the results in Figure 4.5.3.1. However, the judges who were interviewed, expressed their doubt about whether the impeachment process would work, as the ruling party has a large majority.

The judges are of the opinion that it is important to see judicial complaint proceedings in their context and to rather leave it to the heads of court to investigate the complaint. If the heads of court find the complaint serious enough, they will then refer the complaint to the Judicial Service Commission disciplinary panel. The judges interviewed believe that the previously mentioned panel should be made up exclusively of judges.

As can be seen from the results illustrated in Figure 4.5.3, the judges disagreed with the statements that members of the judiciary should be held accountable through inquisitorial proceedings, that the disciplinary panel should comprise judges and non-judges that judicial review on its own hold judges sufficiently accountable and that judicial discipline *per se* interferes with judicial impartiality.

5.8 There Should be an Internal Judicial Disciplinary Panel

On the whole, from the literature surveyed in Chapter Two as well as from research results contained in Chapter Four, it would appear that the Judges are in favour an internal disciplinary process and that the disciplinary panel should comprise judges only, and be situated within the judiciary. It was found that the judges supported the idea that the Judicial Service Commission should have a disciplinary panel within its structure. The majority of judges (refer to Figure 4.5.3.2) indicated that the Judicial Service Commission's disciplinary panel, which is an external body, is responsible for judicial discipline. Although, a number of them are not opposed to the Judicial Service Commission having a disciplinary panel within its structure, they nevertheless felt that the Judicial Service Commission needed to be non-politicized, as they were of the opinion that disciplinary powers over judges should not be vested in the hands of the politicians,

but in the judiciary. Their greatest complaint against the Judicial Service Commission is that it comprises too many politicians and not enough judges. The judges do however; recognise that there are other alternative informal internal methods of disciplinary actions used by the heads of courts, for less serious complaints against individual judges.

The researcher agrees with what a judge said in his interview: that the same principles should apply with regards to principle of impeachment as those which apply to the striking off of legal practitioners. The concept of “a fit and proper person” is of paramount importance. He said that honesty and integrity are paramount, and he is of the opinion that one does not need a rulebook to decide on these issues. He also said that in terms of the Attorneys Act no. 53 of 1979 and the Admission of Advocates Act No. 74 of 1964, peers from their respective professions, should judge them. Hence, he is of the opinion that the same principle should be applied to a judge and that his or her peers, not people from outside of the judiciary, should judge a judge. He also said that when deciding on the misconduct of legal practitioners (advocates or attorneys), that the disciplinary panel of the Bar Council or the Law Society needs to decide whether the “accused” professional is “a fit or proper person”. Similar principles should apply to the judiciary, in deciding on whether a judge is fit to hold the office of a judge.

The researcher also agrees with the statements made by another judge, interviewed, who said “if you cannot trust judges, who can you trust?” and “Why appoint somebody whose integrity cannot be relied upon as a judge”. The judges who were interviewed were of the opinion that a judge who is accused of and found guilty of an alleged serious misconduct, would never have been appointed in the first place, had he or she been appointed on merit. They also felt that such a person is not worthy of remaining a judge and that he or she should be impeached. Also, a third judge, when interviewed, agreed that the judicial disciplinary panel should be situated within the judiciary. He pointed out that the South African police services also have an internal disciplinary mechanism and policemen who transgressed their police code were disciplined. He was of the opinion that the same principle should apply to the judiciary and that it should be entitled to its own internal disciplinary process. Although, it has been legislated that the disciplinary body is part of the Judicial Service Commission, which is an external body, it is nevertheless submitted, by the researcher, that a better alternative would be for the judicial disciplinary panel to be

situated within the judiciary, as part of an internal judicial structure such as the Office of the Chief Justice.

5.9 There Should be No Executive or Legislative Interference with Judicial Personnel Processes of Selection, Appointment, Training and Disciplining of Judges

In accordance with the doctrine of separation of powers, the researcher believes that the judiciary should have complete control over its personnel processes and that there should not be any outside interference, including from the executive and the legislature of the South African government. This would then ensure the independence of the judiciary. Nevertheless, it is conceded that the Judicial Service Commission was established by legislation to assist with transformation of the judiciary. However, it is submitted that with the assistance of the Judicial Service Commission, transformation of the judiciary in terms of race and to a lesser degree gender has, to a large extent, been achieved and that the Judicial Service Commission is no longer necessary. It has become an unnecessary interference with the independence of the judiciary. To extend the Judicial Service Commission's powers to control judicial discipline would be an inroad into judicial independence. As previously mentioned, the majority of the judges surveyed and interviewed, were of the opinion that the judiciary itself should control the selection and recommendation processes for the appointment of judges and should oversee judicial training; and the judicial disciplinary processes, to ensure the independence of the judiciary. The researcher agrees with these judges.

It is submitted that the judges have respected and adhered to the doctrine of separation of powers by acknowledging that the legislature had a mandate by the populace, which in turn has mandated the Judicial Service Commission to select and recommend judicial appointments. It has also investigated and disciplined judges for misconduct to which they are not opposed to in principle, but their major concern is that the Judicial Service commission has become over-politicized. The researcher agrees with the judges, interviewed, that the over politicization of the Judicial Service Commission and the under-representation of the judiciary on the Judicial

Service Commission, is having an adverse effect on judicial efficiency, effectiveness and judicial accountability, thereby threatening judicial independence.

The researcher agrees with the judges', suggestion that in matters which directly affect the judiciary, they should have greater representation on the Judicial Service Commission and that they should even be in the majority. However, the researcher submits that the Judicial Service Commission has served its purpose, which was to transform the judiciary, that it is no longer necessary. Its powers should not be extended and it should be disbanded as it is now interfering with the independence of the judiciary and is having a negative impact on its efficiency and effectiveness. Consequently, the researcher is of the opinion that the judiciary should control its personnel processes internally and that there should be no external interference.

The researcher also agrees with the judges who were surveyed and interviewed, that the Minister of Justice should not be in control of or involved in the training of judges or in the running of the Judicial Training College. Only the judiciary should be in control thereof, otherwise the independence of the judiciary would be undermined as can be seen in Figure 4.5.4. The judges, in their interviews, are of the opinion that the judiciary should remain in control of these processes to ensure their independence and they expressed their concern about executive and legislative interference, which is eroding judicial independence. They were also opposed to the idea of a career ladder in the judiciary and agreed that its existence could influence a judge's decision in a case, which would have an adverse effect on judicial impartiality and the independence of the judiciary.

5.10 Executive Should Not Control the Judiciary's Finances or the Administration of the Courts as it Undermines the Functional Independence of the Judiciary

The majority of the interviewees strongly agreed that the judiciary Bills interfere with the functional independence of the judiciary. They say that there is an attempt to place the judiciary under the control of politicians. They also say that too much authority is vested in the Minister of

Justice in respect of the functioning of the judiciary. They are concerned that the judicial Bills seek to transfer critical areas of supervision from the judiciary to the executive by rendering them answerable to and susceptible to influence by the executive.

A number of the judges interviewed say that the powers presently enjoyed by the Minister of Justice, which will be increased if the judicial Bills are passed in their present form, will inhibit the growth of judicial independence. Hence, they are of the opinion that the judicial Bills pose a threat to the functional independence of the judiciary, as the Department of Justice wants complete and sole control of the administration of the courts.

It is felt that the judiciary should not be subject to the control of the executive because, as, previously stated, the interests of the executive often require a compliant judiciary. The judges interviewed also questioned how judges can function optimally when they are not in control of their budgets and they are of the opinion that judges, not the Department of Justice, are in the best position to decide what the judiciary's really needs. The non-judicial functions are connected with the judicial function and the two can therefore not be separated. Hence, the judges interviewed said that they needed their courts to operate effectively and efficiently in areas of administration and general maintenance and upkeep. The majority of them said they wanted to be able to focus on their judicial function and that a court manager, under the control of the judiciary, should deal with issues of court administration.

The judges interviewed said that the budgeting powers of the judiciary presently reside with the registrar of the court, the Department of Justice and that the judiciary has no budgetary powers. They said that at present they inform their judge president what their needs are. The judge president of their division or their head of court then meets with the court managers, who prioritize the courts' needs, then compile and implement the court's budget.

The judges said that the problem presently lay with the court managers and the court registrars who are accountable to their head office, to the Department of Justice and its bureaucracy. They are of the opinion that this makes the entire decision-making process cumbersome and less efficient. Some of the judges, interviewed, have complained that the court managers are at

present making their lives difficult, thereby forcing them to become involved in issues which fall outside of their scope of work. They say that the court manager exercises indirect control over the judges because they do not supply infrastructure for the courts to run smoothly. This then threatens the independence of the judiciary, through their working conditions by providing judges with poor working conditions, hiring incompetent staff and firing competent staff, lack of court interpreters, having air conditioners that do not work and neglecting the court building, etc.

They were also of the opinion that the court registrar interferes with the functional independence of the judiciary, concerning the judges' secretaries' hours of work, especially with working after-hours, overtime and on weekends. The aforesaid judges are also of the opinion that staff appointments, which are not up to scratch, impact on the judge's ability to deliver judgements properly through, for example the discrepancies in the files being brought to court.

Hence, they are of the opinion that the political influence in the judiciary through the availability or unavailability of money impacts upon a judge being able to do his or her job properly. The judges, interviewed said that having adequate resources and facilities plays an important role in their being efficient and effective. Included in these needs are having computers, laptops, an equitable distribution of facilities and resources, being given sufficient and direct access to libraries. They say that judges do not do administrative work but that they are incapacitated by the inefficiencies of administration, for example the lack of paper for the photocopier. Hence, they are of the opinion that they need the freedom to do what they have to do, without having to struggle with administrative inefficiencies.

In addition, the interviewees said that another problem is their heavy workloads. The courts are extremely busy, matters are pouring in and the judges are required to finalize them as quickly as possible. The problem is that judges have insufficient time to devote their proper attention to all cases and to give considered decisions. They consequently often have to make "gut decisions", for which experience is required and which becomes a problem for some of their colleagues who are inadequately trained or inexperienced. To eliminate this, the judges, interviewed, suggested that the court managers and court registrars should rather fall under the judiciary, account to the Chief Justice and the judiciary should appoint the judicial administrative staff. The researcher

fully supports their suggestion and further submits that this change will give the judiciary greater independence over their finances and their court administration, thereby ensuring the functional independence of the judiciary.

The majority of the judges, interviewed, agreed that the judiciary should administratively manage judges, but they should not be controlled in the way they work. The judiciary should administer and assist with the smooth functioning of their courts, by providing the best possible environment, with the best possible equipment and with the best possible facilities. The previously mentioned judges agree that under such circumstances, judicial administrative management will increase productivity and reduce costs, as they are of the opinion that a judge who does not have to be concerned with a lack of resources and facilities and who is without administrative woes will have more time to concentrate on decision making.

The judges suggested that ideally, the Chief Justice should be given a budget by parliament and he should be able to appoint his own judicial and administrative staff. He in turn, should give every division of the high court their own budget and they should be allowed to appoint their own judicial and administrative staff. The office of the Chief Justice should be created and have cohesive administrative control over the entire judiciary. They also suggest that the court managers should report directly to the heads of court (who are the judicial administrative heads) because local decisions for local difficulties are an efficient system and the heads of court know the requirements of their division. They say that the most efficient way would be for each division of high court to have budgetary independence with needs levels of what is essential, what is desirable and what is nice to have. Although the judges, interviewed did concede that it will be an additional administrative burden for the heads of court, they said that it would have additional advantages, from which the entire judiciary will benefit.

The general opinion is that the judiciary should control its own finances and budget. The judicial budget should be allocated to the judiciary by parliament and should fall under the control of the Chief Justice. In their interviews, the judges expressed concerns over who should control the finances, because of the danger that it could interfere with the functional and personal independence of the judiciary. In their interviews they also said that financial control can be

indirect (influence their decisions), for example if the executive and the legislature perceive certain judges as being “difficult”, the treasury could control or limit their budget expenditure with regards to facilities and resources to ensure compliance. In addition, financial constraints could be imposed on judicial efficiency by inadequately supplying the judiciary with resources, which could hinder them in their day-to-day activities.

All admit it, both in the literature surveyed in Chapter Two as well as in the surveys and interviews conducted, that the budgeting powers of the South African judiciary at present lie with the executive. However, the researcher as well as the majority of the judges, surveyed and interviewed agrees that the judiciary must be sufficiently financed so that they are not dependent on the state. It is also felt that the executive and the legislature have the potential to undermine the independence of the judiciary through creating or causing a shortage of resources, without which courts cannot run efficiently or effectively.

The researcher agrees with the judges', interviewed, suggestion that they need sufficient financial resources to run their courts properly and to deliver their judgements on time. Some of the judges interviewed were of the opinion that they were insufficiently financed when compared with their American counterparts with regards to their infrastructure and their support, such as their secretaries, their researchers and their libraries. The judges admitted that, like any other organ of state, they receive their salaries from the South African Treasury, in terms of the Judges Remuneration and Conditions of Employment Act No 47 of 2001. This Act determines their salaries as well as their increases and the Department of Justice largely has control over these, to which they are opposed.

There is a difference of opinion amongst the judges interviewed, about their remuneration, benefits and their conditions of service. Some of them were of the opinion that their entire package is good, whilst others were of the opinion that the salaries were too low or inadequate and that the salaries have not increased substantially. They are of the opinion that their salaries should be doubled, to keep up with inflation and to avoid temptations such as corruption. A possible explanation for their difference of opinions could be attributed to their age. The older

judges, closer to retirement, appear to be more concerned with good retirement benefits, whereas the younger judges appear to be concerned with better income benefits.

The majority of the judges, interviewed are of the opinion that their salaries and the other benefits due to them have consistently failed to keep up with the rate of inflation and with comparable salaries of persons with similar status in other positions of government and in the private sector. One of the judges, interviewed, said that because judges do not act collectively, their personal interests are not being protected. Also, the judges interviewed were of the opinion that the six percent annual increase, which they are entitled, is below the inflation rate.

They were also opposed to the idea, that the Minister of Justice (executive) has the right to withhold retired judges' pensions if they are engaged in other activities whilst they are on pension.

They are also of the opinion that their working conditions have deteriorated and their workloads have increased. Their recesses have been reduced since 1989, which has resulted in high workload pressures and they feel that their salaries have not increased substantially.

5.11 An Evaluation of the Role of the Judicial Service Commission

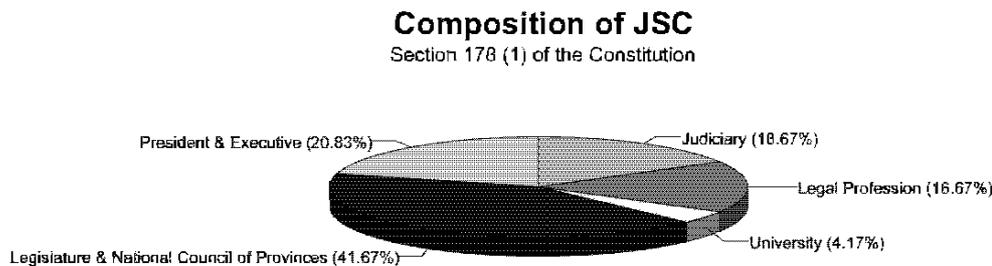
Overall, the judges interviewed felt that the Judicial Service Commission was a well-intended means of ensuring the independence of the judiciary concerning appointment and discipline of judges. They agreed that the Judicial Service Commission is better than the old system in theory, where the Minister of Justice recommended the appointments in consultation with the Judge President. However, they were concerned that the Judicial Service Commission had become over-politicized, as there were more political representatives on the Judicial Service Commission than representatives from the judiciary. They were also of the opinion that the politicians on the Judicial Service Commission have gone about selecting and disciplining candidates in the wrong fashion and that too much emphasis has been placed on colour and transformation and not enough on merit and professional superior court practice experience. Their concern is that the

Judicial Service Commission's composition has become skewed in favour of politicians, which potentially threatens the independence of judiciary as "yes men" judges could appointed who will decide in favour of the executive.

5.11.1. The Judiciary is Underrepresented on the Judicial Service Commission

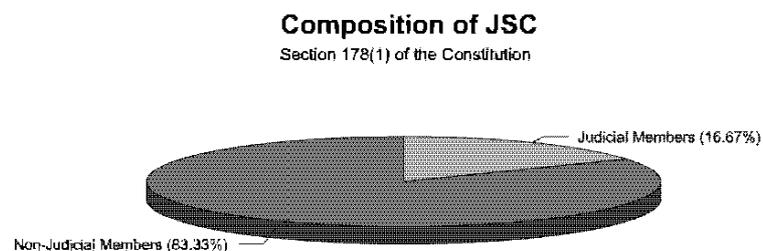
Although the judges were in favour of the Judicial Service Commission, they are concerned about its composition and the influence that the non-judicial members have on the decisions being taken, because the judiciary is outnumbered, (refer to Figures 5.11.1.1 and 5.11.1.2 below). They feel that the Judicial Service Commission has become loaded with politicians and they are of the opinion the Judicial Service Commission should only comprise members of the judiciary and the legal profession.

Figure 5.11.1.1 Composition of the Judicial Service Commission: Over Representivity of Members outside of the Judiciary



In terms of Section 178(1) of the Constitution of South Africa, 1996, the only judges on the Commission are the Chief Justice who chairs it, the President of the Supreme Court of Appeal, and the Judge President of the Province. The remaining members are from outside of the judiciary, such as politicians, premiers, legal profession and academics. The Law Society, the Bar Council, the Ministers' representatives and parliamentary representatives all make up the non-judicial members.

Figure 5.11.1.2 Composition of the Judicial Service Commission: Judicial Members and Non-Judicial Members



Politicians and non-lawyers are therefore in the majority on the Judicial Service Commission. The judges who were interviewed were concerned that because the numbers of the non-judicial representatives outweighed the number of judicial representatives, the will of the non-judicial representatives will prevail. They were also concerned that there may be too many people with other agendas when block voting takes place. Their concern was aptly expressed by one of the judges who said, “the Minister makes noises and the imperatives dictate”. In addition, they are of the opinion that because of the political imbalance (thirteen politicians as opposed to twelve non-politicians), some good appointments are made but others are not so good.

Consequently, the judges were also of the opinion that the best interests of society as well as of the judiciary do not always prevail when the Judicial Service Commission makes its recommendations to the President for judicial appointments. The researcher agrees with these judges that lawyers should have a veto. They were also of the opinion that the composition of the Judicial Service Commission should consist largely of or at least have one third of judges and retired judges, such as Judge CT Howie.

Nevertheless, some judges were happy with the present composition of the Judicial Service Commission. They felt that the political parties should play a role in the appointment of members of the judiciary and that it is therefore right for the Judicial Service Commission to be made up of politicians, lawyers, academics and judges. They were of the opinion that the Judicial Service Commission is more transparent in selecting judicial candidates, because the press is invited and

the whole country is told who will be interviewed. In addition to the press, the Bar Council, the Side Bar, the Black Lawyers Association and the National Association of Democratic Lawyers are also involved. In addition, the politicians are not only from the ruling party, but also the from opposition parties.

The judges who were in favour of the present composition felt that judges are there to serve the community. The community is largely represented by the political parties, which represent their expectations. The judges attribute the problem of the outnumbering of the judiciary to the situation of the legislature trying to accommodate every type of representative of the various political sections in the country. Nevertheless, the judges, interviewed were of the opinion that the Judicial Service Commission needs to be absolutely certain that the person appointed to the bench is acceptable to those to whom he or she will be accountable in terms of both conduct and performance.

5.11.2. The Judicial Service Commission's Role has primarily been With the Selection and Recommendation of Judicial Appointments

The Judicial Service Commission plays a major role in the selection of suitable candidates for judicial appointments and their recommendation to the President. There is no formal recruitment process. The names of nominees are put forward to Judicial Service Commission for consideration. The judges who were interviewed were critical of this process and have suggested that the heads of court should implement proactive measures and head hunt suitable candidates and put their names forward to be considered instead of relying on passive measures, such as waiting for nominations. The judges were nevertheless in favour of the selection process whereby the Judicial Service Commission shortlists the nominees, who are then interviewed in open, public hearings. The most suitable candidate is then selected and recommended to the President for a judicial appointment. In their selection they do however, take the recommendation of the Judge President of that division into account. His/her views are important and may be decisive at times.

Overall, the judges were in agreement that the Judicial Service Commission should continue to select and recommend judicial appointments as they concede that it has played a reasonably good role to date. Their concern however, was that the politicians are in the majority there is a strong political bias in the recommendation of which judges are appointed, they did however, concede that pre-1994 there had also been political interference with judicial appointments. Therefore, they did concede that judges may not be strongly independent and that they may be flawed by the period in which they are appointed. They also acknowledged that the Judicial Service Commission plays a critical role in the appointment of Constitutional Court judges.

Some of the judges felt that it is best left to the Judicial Service Commission to work out its own rules about the screening, short listing and interviewing process. Others felt that the Judicial Service Commission should be stripped of the political component. Others were of the opinion that the Judicial Service Commission has to get its consultation process right. The Commission should consult with judges and practitioners before who the nominees had previously appeared and against whom they have acted. They believed that lawyers are the best people to decide a judicial candidate's competence. They were also of the opinion that people who become judges should be people who have grown up in a robust court. They say that people with the right temperament need to be appointed.

5.11.3. The Judicial Service Commission is Not Involved with Judicial Education and Training

Judicial Service Commission presently does not play a role in training and it is submitted that neither should it. However, the judges are concerned about the independence of the training college proposed in the judicial Bills. As previously stated, the researcher submits that an independent judicial training college should be established within and under the control of the judiciary.

5.11.4. The Judicial Service Commission is Involved in the Disciplining of Judges

The judges, who participated in the interviews, were happier with the Judicial Service Commission's role in the selection process, than with their role in the judicial disciplinary process. They felt that, as a complaints body, it has been ineffective. However, some of them felt that the Judicial Service Commission just needed time to work out its disciplinary procedures. Since the Judicial Service Commission is the correct body for selecting and recommending a judicial appointment, they felt that it should also be held accountable by the populace for its recommendations and be involved in disciplinary matters. However, they felt very strongly that the Judicial Service Commission's disciplinary panel should only comprise members from the legal community, there should be no politicians involved, as this would constitute an interference with the independence of the judiciary. In any event, they are of the opinion that politicians have the final say through the impeachment process.

The interviewees were critical of how the Judicial Service Commission has dealt with judicial complaints. They are of the opinion that race is a sensitive issue, and that certain decisions that have been taken are not necessarily professional, but rather politically expedient. They are of the opinion that the recommendation of impeachment proceedings should be made in the appropriate circumstances, regardless of whether or not the judge against whom the finding of gross misconduct has been made is an affirmative action appointee. Some of the judges, interviewed were of the opinion that that selective inconsistent disciplining by the Judicial Service Commission has taken place. They also felt that there have been some blatant cases of judges who had complaints of dereliction of duty made against them who were not disciplined, as opposed to other instances when for example a judge who spoke too strongly on the death penalty was disciplined. Despite these issues, they agreed that with regard to the selection process, the Judicial Service Commission is a better system than the one that the Nationalist Government had. Although some of the judges interviewed were of the opinion that judges do not need a set of rules and that the common law and standards expected of a judge should suffice. If the breach is so serious, the judge should be impeached. They also felt that a judge must act responsibly. In their view a judge does not drive under the influence of liquor nor does he or she take bribes, as he or she knows that such behaviour will bring the judiciary into

disrepute. One of the judges said that the manner in which the Judicial Service Commission deals with Judge Hlope's case will determine whether or not it is effective.

5.11.5. Alternatives to the Judicial Service Commission

The respondents were to a large degree happy with the role of Judicial Service Commission in the selection process and have acknowledged that it is doing a good job under difficult circumstances. They say that the Judicial Service Commission meets the requirements of its task and that it is transparent in dealing with candidates. However, they are dissatisfied with the imbalance in the numbers. They are of the opinion that there should be judges and lawyers than politicians. They are of the opinion that politicians should have very little say and that there should be to equalization of judicial and political representatives, with lawyers having the veto. They say that if any of the other measures are relaxed the quality of the bench will be threatened, for example if the dissemination of information about candidates were to be discarded; or if interviews were to be conducted behind closed doors; or if the press was shut out of the selection interview proceedings.

They say that, unlike the previous regimes in which the ruling party took responsibility for appointments, the current system does not so they feel that since the Judicial Service Commission is the correct body for selecting and recommending a judicial appointment, it should also be held accountable by the populace for its recommendations and be involved in disciplinary matters. However, they were of the opinion that the Judicial Service Commission is ineffectual and that its disciplinary panel should be given more power to enable it to be more effective. Consequently, some of the judges, interviewed, were in favour of the Judicial Service Commission being involved in all the judicial personnel processes. They suggested that it could have separate subcommittees, one dealing with discipline, another with selection and another could also be involved in judicial training. Training, however, would fall under the control of the heads of court and the Chief Justice. Nevertheless, there has been a healthy development, there is more transparency, and more people give input. The judges feel that the Judicial Service

Commission should consist of a tier of judges (elected by judges for judges and that all judges should have a vote), in addition to heads of court and the Chief Justice.

Some of them suggested that an independent body, like a judicial ombudsman be established. Only a minority shared this view, since it was felt that if the disciplinary panel was internal and the complaint against a judge was heard behind closed doors, there was the danger that the public might perceive it to be that the judges protecting each other. It was suggested by some of the judges interviewed, suggested that the independent body needs to stand on its own. This independent body should receive complaints and process complaints. It should comprise of a collective of people, headed by a senior person of stature who need not be the presiding officer in all the cases. This person need not necessarily be a judge or a lawyer, but they should be somebody outstanding in society, for example Bishop Tutu. Nevertheless, other judges who were interviewed were opposed to the idea of a Judicial Ombudsman. They were of the opinion that it would be problematic and gave the example the press ombudsman, which the public has not bought into.

5.12 Chapter Summary

The focus of this study was limited to what the impact of interference with judicial personnel would be on the independence of the judiciary if the proposed judiciary Bills are implemented, it was found that the impact is actually more far reaching. It is submitted the proposed judiciary Bills not only threaten the independence of the judiciary (in terms of its personnel, its structures and its court administration) but they also will have an adverse impact on the South African Constitution and undermine the principle of separation of powers in South Africa. It is submitted that this in turn has negative adverse implications for the business community in South Africa, as such changes may undermine both local and foreign investor confidence in South Africa, the South African government and the South African economy.

The Chief Justice is the titular head of all courts. In a constitutional state, the Chief Justice is an important symbolic judicial figure. It is submitted that an independent body responsible for the administration of the courts should be created and situated in the office of the Chief Justice. This body should be overseen by the Chief Justice and by senior judges, which should be the administrative arm under the control of the Chief Justice, with a judicial manager administering the affairs of judiciary. Such a system of judicial management will increase productivity and reduce costs by enabling a judge to focus more on his or her judicial function.

Hence, the researcher agrees that the office of the Chief Justice should be created to manage the administration of the judiciary and submits that the Judicial Educational College should be under the control of the judiciary. The judicial training board should be situated in the office of the Chief Justice. As titular head, in consultation with the judiciary, he should decide how, where and when training should be conducted and which judges and retired judges should be appointed to conduct the training. The Chief Justice should also appoint a judge to administer the judiciary's funds. Parliament should give the judiciary an independent budget, the same as they do for the Ministers, under the control of the Chief Justice and he should have a number of financial people assisting him with the judiciary's budget. There should be a unified judiciary under the Chief Justice, provided that the same divisions of labour exist as in the present structures and that the heads of courts, the deputy judge presidents and the judge presidents should be appointed on merit and on seniority.

An analysis of the results provided an insight into the extent to which the executive has interfered with the judiciary and the negative impact this is having on the independence of the judiciary and its functioning. The case study results also showed that the Judicial Service Commission is over politicized and that there are inherent flaws with its recruitment and selection procedure. The case study results have also highlighted that the executive, namely the Department of Justice's control over the judiciary's finances and court administration have negatively impacted on the independence of the judiciary as well as on its efficiency and effectiveness.

Conclusions and recommendations will be presented in the following chapter. The conclusions and recommendations are based on the research findings as well as the literature review contained in Chapter Two. It is hoped that the recommendations will provide constructive answers to the critical questions asked in the case study.

CHAPTER SIX

RECOMMENDATIONS AND CONCLUSIONS

6.1 Introduction

The research was undertaken to establish what the impact and the effect of the management and control of judges by the executive would be on the independence of the judiciary. The researcher found no literature containing any prior comprehensive research on the topic, either locally or internationally. Although there is a lot of literature and research available on various aspects of the research topic covered, there was nothing which deals with the topic as comprehensively as the study conducted. This final chapter concludes by setting out the extent to which the study's objectives have been met. It will be shown that the research questions raised in Chapter One of this study have been answered. Recommendations are made based on the research findings of this study and recommendations for future research into this field of study are also made.

6.2 Implications of this Research

Although the Judicial Service Commission has played an important role in the transformation of the judiciary, its composition, recruitment and selection processes are flawed and as a result, the effective and efficient functioning of the judiciary has been undermined through placing inexperienced people on the bench and possibly even in judicial leadership positions. Despite this, the majority of the judges are in favour of the Judicial Service Commission being retained. They are in favour of the Judicial Service Commission continuing to play an important role in the recruitment and selection process for appointing judges as it is a more open and transparent process, provided however, that the composition as well as the flaws identified in its recruitment and selection procedures, are addressed. It is felt that the powers of the Judicial Service Commission should not have been extended to discipline judges. However, if it is the intention of the legislature that the Judicial Service Commission should also be involved in the complaint proceedings against members of the judiciary, then it is submitted that the Judicial Service

Commission should have two separate subcommittees. One should deal exclusively with the selection of suitable judicial appointments (this one can have some non-judicial members) and the other subcommittee dealing exclusively with disciplining members of the judiciary (this one should be only judicial members and legal professionals).

6.2.1 The Composition and Structure of the Judicial Service Commission, which Deals with the Selection of all Judicial Appointments, should be Changed so that the Judiciary are in the Majority

Ideally, judges should be appointed by a body of independent persons from the profession who are uninfluenced, in so far as it can be achieved, by political considerations. However, the Judicial Service Commission has been widely accepted, in South Africa, to be a suitable mechanism of selecting and recommending judicial appointments. Ideally, there should not be any politicians on the Judicial Service Commission as the danger is that politicians might not appoint or will remove judges who are not sympathetic to their political cause. Also, as previously stated, the composition of the Judicial Service Commission should change, so that it only comprises members of the judiciary for the selection, appointment and disciplining of judges. Some of the judges who were interviewed also expressed the opinion that the implementation of affirmative action policies had resulted in racial segregation, instead of there being equality before the law. They believe this is a direct result of politicians and non-judicial members outnumbering the members of the judiciary on the Judicial Service Commission. It is therefore proposed that there should be more judges and lawyers than politicians and that the politicians should have very little say in the selection and recommendation of a suitable person for a judicial appointment. If government intends to retain a political component to the Judicial Service Commission, then the political component should be reduced and the judicial component, comprising judges and or retired judges, should be increased so that they are in the majority. The researcher also agrees with the judge who said in his interview that the judicial component of the Judicial Service Commission should be made up of a tier of judges elected by judges for judges, in which all judges have a vote, in addition to Judge President, President of the Supreme Court of Appeal and the Chief Justice. He has also suggested (and the researcher

agrees) that at least one third of the Judicial Service Commission should be judges and or retired judges, the other third should be legal professions and universities and the last third should be the political component. Judicial vacancies should be advertised in the local newspapers, as well, as this would be more transparent. Nevertheless, the Judicial Service Commission has been a healthy development as there is more transparency and more people participate in the selection and discipline procedures.

The Judicial Service Commission needs to get their consultation process right so that their reforms will be more effective. They should consult as widely as possible and with the right people. For example, at present there is not much consultation with judges. They should obtain feedback from judges before whom the judicial nominees have appeared and practitioners against whom the judicial nominees have acted. All references need to be checked (there should be a process by which they can comment confidentially to the Judicial Service Commission, as the people on the Judicial Service Commission often do not know the judicial nominees or applicants personally). The judges have also suggested that the Judicial Service Commission should consult confidentially with them, and with senior judges of the division with regard to the appointments or promotions to senior leadership positions, such as Deputy Judge President and Judge President. The researcher agrees with this proposal. In addition, the judges are of the opinion that appointments or promotions to the Supreme Court of Appeal and the Constitutional Court affect the public and they have suggested that the Judicial Service Commission consult widely with as many people as possible, including senior judges, Deputy Judge Presidents and Judge Presidents.

6.2.2 Flaws Identified in the Judicial Service Commission's System for Selecting Judicial Appointments

The present recruitment and selection system has the potential for the wrong people to be nominated and appointed to the bench. As previously stated, if inexperienced and unqualified people are appointed to the judiciary, then the constitutional supremacy of South African law will be undermined. If the correct recruitment and selection process of judicial appointments is

implemented there will not be a problem with members of the judiciary and there will also not be a need or a lesser need to train, discipline or impeach judges. It is therefore crucial that the right judicial candidate, with many years of quality superior court practice experience (in excess of fifteen years), maturity of character, high levels of integrity, self-motivation and self-discipline, who is known and respected amongst his or her peers, is appointed.

A number of the judges interviewed by the researcher said that the Judicial Service Commission's recruitment process leaves a lot to be desired. They were of the opinion that people, who have judicial and political connections, get nominated rather than those with true ability. They also said that it is the first time in history that judges are being appointed from the ranks of attorneys. They therefore suggested that there should be a system of ranking amongst attorneys in the same way that advocates are ranked from junior, middle and senior to silk. They were of the opinion that, in terms of ranking, one would be able to determine whether the judicial nominee has adequate or sufficient experience as they felt that if judicial appointments were made on ability, the judiciary would get the best judges.

They also felt that judicial appointments should be the function of the Chief Justice in consultation with the Judicial Service Commission, as the Chief Justice should be in a position to evaluate prospective appointees. They said that for the Minister of Justice to make acting judicial appointments is not practically possible, even though it is generally done on the advice of the Judge President of the Division. They were of the opinion that the Minister of Justice does not know the cases, which need to be dealt with, or the expertise of the people needed to deal with a particular case.

The judges were of the opinion that acting appointments should be made by the Judiciary. The heads of court are responsible for getting the work done and if they are given an incompetent acting judicial appointment to do the work, it is the Judge President who is then saddled with the problem. To avoid this, they suggested that potential judicial appointments should be recruited from the bar, side bar, from the magistracy and from the universities. By asking these candidates to act as judges, their performance can then be evaluated while they are acting judges and suitable candidates can be nominated for consideration by the Judicial Service Commission and

recommended to the President for a permanent judicial appointment. They were therefore of the opinion that selections should be made from a pool of acting judges who have been identified as potentially suitable judicial appointments. They were also of the opinion the Minister of Justice is not in contact with the advocates and attorneys professions and therefore does not know who is available and who is competent.

A number of the judges interviewed by the researcher expressed their unhappiness with the manner in which the Judicial Service Commission is selecting academics for judicial appointments, especially if they lacked court experience as they felt that the judicial nominees needed to know what happens in courts and court procedure before they are appointed to sit as a judge. They were also concerned about magistrates who might be loyal to the executive, which was previously their employer.

The implications for government are that more black as well as more female legal professionals should be identified, with the assistance of the judiciary and the legal professions, for suitable judicial appointments. The government has started the affirmative action process by empowering black business. A strong black middle class is developing and there are large black-owned companies who are and should be instructing good black and female professionals (advocates and attorneys). This will result in the development of black and female advocates, who are briefed by big business and, having gone through the entire practical training process, if good enough, will eventually become black and female silks and eventually become good judges. It is essential for the South African judiciary to have judicial members who do their job with ethos, integrity, self-discipline, morality and who act in a judicial manner.

Wherever government departments or parastatals are involved in commercial disputes, which need the services of experienced counsel, junior black and or female counsel, and or attorney should be employed, at a reduced rate to give them experience. The General Counsel of the Bar and the Law Society of South Africa should compile a list of junior counsel and attorneys (with right of appearance in the high court) who need exposure to superior courts experience. They should be graded and instructed on a rotational basis so that they are given exposure to and are able to break into fields from which they have previously been excluded. In this manner, a pool

of potential judicial candidates can be created from which judge presidents can select suitable candidates. Government should also require that state and semi-state clients brief them as a matter of policy. It was suggested by one of the judges in their interviews that peer evaluations should be conducted on members of the side bar and magistracy before their names are put forward as nominations for judicial appointments.

That the researcher proposed that judges should continue to be appointed by the President on the recommendation of the Judicial Service Commission. The process should be properly constituted as suggested and should rely on the recommendation of the Judge President of the Division who should have a right to veto any judicial appointment in his division. It was also suggested by some of the judges interviewed by the researcher and with whom the researcher agrees, that the judiciary has already sufficiently transformed and that the selection emphasis should be less on transformation and more on merit. Further suggestions to attract the right people to the bench has been to drop the pressure of work by increasing the size of the bench and doubling the salaries so that better people make themselves available for judicial appointments.

The submission is that the individual judicial appointment process in South Africa has gone wrong. It is further felt that if the right persons with the right temperament and experience are appointed, there should not be a need to train or discipline.

6.2.3 Judicial Education and Training Should be under the Control of the Judiciary and not the Minister of Justice

As previously stated, the judges who were interviewed said that training starts from the day that an advocate or an attorney qualifies and that judicial training only comes through years and years of experience of appearing in Court. It is only in court that the judicial candidates are exposed to the preparation of cases, appearing in courts, the cuts and thrusts of cross-examination, forensic advocacy, arguing cases and being questioned by judges. The majority of the judges interviewed by the researcher said that a judge could not be trained in a classroom on how to make a credibility finding or a factual finding in a sea of conflicting facts or to find a principle of law to

which the facts are applied. They are of the opinion and the researcher agrees with them, that a judge is self-taught and he or she has already been trained through professional practice and gained experience and court experience. They did however, concede that that judges can be trained on certain aspects, such as preparation for motion court and drawing up checklists for default judgment. It is proposed in the judicial Bills that the Judicial Training College will be under the Department of Justice and that people who aspire to become judges will be trained through a mentoring process. However, the judges interviewed by the researcher and with whom the researcher agrees, were critical of people who are appointed to the bench who have never appeared in motion court and simply been trained at the Justice Training College, presiding over motion court and making decisions which affect the lives of all South Africans and impact on the economy.

It is therefore submitted that the judicial training institution should be situated within the judiciary and that the judiciary should conduct said training. It is also submitted that the judiciary should control its own training and annual training budget, possibly under the Office of the Chief Justice. This means that the Chief Justice and the heads of court should be in charge of and decide how the judiciary will use it and what training programmes are required. The judiciary should be more proactive in identifying and deciding what training is required and who conducts it. This would be done through the deputy judge presidents of each of the divisions appointing or electing, amongst the judges in their Divisions, and committees to deal with various training issues affecting the judiciary. The Judge President, as the head of the court of each of the divisions should identify the areas that the judges in each of their divisions need exposure to and, under the guise of continued legal education, should send them on training courses. One of the judges interviewed by the researcher and with whom the researcher agrees suggested that the heads of court should initiate and take stock of what the real training needs of the members of the judiciary are. He suggested that a record of who has received what training and what further training is needed should be kept and computerized to ensure that effective and relevant training is given to those members of the judiciary who need it. The judges interviewed by the researcher, also suggested that experienced senior judges, or retired judges should train judges, which is presently done by Judge Kriegler.

6.2.4 The Judicial Complaints Disciplinary Panel should be Situated within the Judiciary and only Consist of Members of the Judiciary

The judiciary should have its own internal disciplinary panel, a body of judicial peers, senior judges and the heads of court, which disciplines judges. Some of the judges, interviewed by the researcher, also said that the Judicial Service Commission's judicial disciplinary panel should only consist of lawyers. There should be no politicians, as they are of the opinion that politicians in any event have the final say when a serious complaint is referred to Parliament for a judge to be impeached. They also say that judges do not tolerate dishonesty and misconduct and that they are better overseers of incompetence, than politicians whom they fear will remove judges who are not sympathetic to their political cause. They were concerned that they would no longer be able to exercise judicial control without fear. The majority of judges, interviewed by the researcher and those who participated in forums on these issues (whose comments are included in the literature surveyed in Chapter Two), are opposed to any politicians sitting on a panel over which judges are adjudicated. They also say that judges are persons of honesty and integrity and they do not need a rulebook to decide such issues. One of the judges, in his interview with the researcher, also said that there were no judges prior to 1994 who would have survived the judicial scrutiny of allegations of judicial incompetence and ethical misconduct, which have been made post 1994. In addition, a number of the judges, interviewed by the researcher, suggested that the similar standards for striking off of legal practitioners and similar procedures, in which allegations of misconduct are made against legal practitioners and used to determine whether they are "a fit and proper person", can be applied to judges. They say that their peers, the Law Society's disciplinary panel, judge attorneys and advocates have similar peer proceedings, the bar council's disciplinary panel, by which they are judged. They are therefore of the opinion, and the researcher agrees, that their peers, a disciplinary panel of senior judges, should also in a similar way judge judges.

Some of the judges interviewed by the researcher, said that in the past, judges were disciplined from within the judiciary and that they had an unwritten code of ethics. They said that the heads of court met quarterly to discuss matters of mutual concern to the judiciary and they had input from other members of the judiciary. They say that judges soon knew amongst themselves

whether a judge has integrity or not, or if a judge misbehaves, is being incompetent or dishonest in his or her work. They then talk to their Judge President, who investigates the complaint informally. The more serious allegations are then investigated in a more formal manner, such as through the heads of court. Under the previous dispensation, the head of court would have made a recommendation to the Minister of Justice and to the President for the judge to be impeached. They acknowledged that the informal system has defects, that there is room for improvement. For instance, it should be formalized into a formal disciplinary committee, which comprises a panel of judges made up of court and senior judges. A formal enquiry would be held and the judge complained against would be provided with an opportunity to answer the serious allegations, whereafter a decision would be made and if it were found that the judge has acted dishonestly or was guilty of gross incompetence, a recommendation could be made for his or her removal.

As previously stated, some of the judges interviewed by the researcher were in favour of the Judicial Service Commission's disciplinary body, although they conceded that it is relatively new, especially in dealing with complaints against members of the judiciary who have acted in a manner unbecoming of a judge. They were also of the opinion that it is proper for the Judicial Service Commission, since it makes the recommendations to appoint judges, to also make recommendations in disciplinary matters, as they are more open, transparent and accountable. They suggested that a possible procedure, which could be adopted, is the one similar to motion court proceedings in civil trials, where there are founding affidavits which set out the complaint. The Respondent is then afforded an opportunity to respond in an opposing affidavit, and the complainant makes a replying affidavit to that. The Judicial Service Commission should also have the power to subpoena witnesses to testify. Someone will be needed to present the evidence of the complaint and the respondent judge (against whom the complaint has been made) should have the right to be represented. They also suggested that the Chief Justice or the President of the Supreme Court of Appeal should act as the chairperson of the judicial disciplinary panel. They proposed that the Judicial Service Commission's disciplinary panel should make its own rules on how to deal with complaints, which might differ from each other. The seriousness of complaints may vary, in that some could be dealt with more expeditiously on paper, whilst in others evidence would have to be led and cross-examination.

6.2.5 There Should only be Administrative Management of the Judiciary and only by the Heads of Court

The judges who were interviewed refer to their Judge President as “the first among equals”. They said that he is charged with the administrative functions of his division only, that he has no authority to tell judges what to decide. He is simply in charge of case flow management; he allocates the court roll for the week and decides who does what work, in terms of seniority, allocating the most difficult cases to the most senior judge on duty. He also decides which judge will be sitting in which court and on which circuit. It is proposed that is appropriate for the Judge President, and not the Minister of Justice, to make the acting appointments in his division, for the reasons previously set out.

South African judges are administratively managed but they are not controlled, as they should always be impartial and independent. In addition, judges’ performances are not formally appraised and it should remain that way to ensure their judicial independence. The appropriate time to decide whether a person is suitable to be a judge is when they are nominated and selected for a judicial appointment, is the appropriate time to ensure that there are stringent measures in place. The interviewers must satisfy themselves that they are appointing someone of integrity, who can manage themselves and who will be accountable so that there will be no need to constantly check that they are performing and encroach upon their impartiality and independence as a judge.

6.2.6 The Judiciary should Control the Administration of the Courts

The responsibility for the judicial budget and the administration of providing personnel and court infrastructure for the judiciary has always rested with the executive. The researcher submits that in order to ensure greater efficiency and effectiveness in the judiciary as well as greater functional independence of the judiciary, the judiciary should be given control over its administration and its budget. The judges interviewed by the researcher said that the Department

of Justice allocates the resources equally between all the divisions and does not take into account their individual needs. This results in the resources being allocated inefficiently and ineffectively with some divisions being over catered for whilst other divisions are under catered for. Not all high courts have the same circumstances. For example, the needs of the Northern Cape Division will differ from those of the Natal Provincial Division, the Transvaal Provincial Division or the Eastern Cape Division with large geographical areas, which are thinly populated, and the extent to which judges are removed from centres. The heads of court of each division should have budgetary independence and be responsible for their own support services. The court managers and their court management component should be directly responsible and accountable to them, so that they can cater for the particular needs of their courts, as the needs differ in each of the divisions. It has been suggested that there should be an independent body situated in the judiciary and overseen by the Chief Justice, the heads of court and senior judges that is responsible for the administration of the courts.

6.2.7 The Judiciary has been Sufficiently Transformed

The legislature's involvement is no longer necessary for judicial reform. Legislation should only outline the procedures not the methods and techniques. These aspects should be left to a responsible non-political Judicial Service Commission, in which experience and not potential is used as a guide. The judiciary has sufficiently transformed and the focus should therefore no longer be on race and gender but on court experience, integrity and on merit. It is also submitted that the persons best equipped to "reform" the judiciary are those professional peers and senior members of the professions, with court experience. These people are best equipped to understand, what work is involved, and what characteristics are required of a judge, in terms of ability.

6.2.8 There must be Financial, Personal and Functional Independence of the Judiciary

Judges should be financially independent, personally and in their courts, to ensure their functional independence. To ensure this, judges should be well paid, efficient and independent. It is suggested that the Independent Commission for the Remuneration of Office Bearers needs to look at restructuring the judges' salary structure to make them more market related. It has also been proposed that to attract the right people to the bench, the judges' work pressure needs to be reduced, their recesses increased and also the size of the bench should be increased and the judges' salaries should be doubled.

The judge, interviewed by the researcher complained about the registrar of court and the court manager's interference with the functioning of the judiciary. Issues such as judges' secretaries not being able to work overtime when required to by the judges and getting time off were mentioned. They are of the opinion that the Department of Justice should not interfere with the functioning of their courts and they complain the support staff appointments are not up to standard. These impact upon their ability to deliver properly.

It has been suggested that there should be an office of the Chief Justice to deal with judicial administration and that the judiciary should be in control of and look after all its own administrative and support functions. An independent judicial budget should be allocated to it by Parliament (directly by the Minister of Finance) and should fall under the control of the Chief Justice (same as with the ministers) who should have a number of financial people assisting him. The Chief Justice in turn should allocate a separate budget for each head of court, who should administer the budget for his court or division, with the assistance of the registrar of court and the court manager, who should be directly accountable to him. Consequently, to ensure the financial and functional independence of the judiciary, the court manager and the registrar of court of each court or division should also fall under the head of court or judge president for that court or division.

6.2.9 The Proposed Amendments, in the Judiciary Bills, if Passed will Increase the Executive's Powers to Interfere with the Judiciary

Although the judges were in favour of the Judicial Education Bill, they were of the opinion that it should fall under the Judiciary and not the Department of Justice. Although some of the judges favoured the idea of an Apex Court, other judges, interviewed by the researcher, suggested it would be wise to first conduct strength and weakness analysis to whether any existing weaknesses can be corrected before creating a new structure. They also said that it is not practically possible for Minister of Justice to make acting judicial appointments and that these should rather be made by the Judge President of the division in which acting appointment is required, usually an advocate from the local Bar Council.

6.3 Suggestions for Future Studies

Time constraints have not allowed for more research on this topic so this study has not explored all of the issues which have been identified in detail. Consequently, there is scope for further research, as follows:

- The current study was limited to members of the judiciary, who are generally a homogenous population, with similar backgrounds, levels of education and income. It is recommended that the study should be expanded to other members of the legal community, from which judges are selected. A truly representative sample would look at a heterogeneous population of sample comprising the members from the Department of Justice and the Judicial Service Commission, members of the South African magistracy, law academics and legal professionals from both legal professions, advocates and attorneys who practice in South Africa.

There are also a number of focus areas that this study was unable to examine and consequently the following topics would be suitable for future studies:

- A single Judiciary
- An Apex Court
- The Impact of the fragmentation of the Supreme Court of Appeal on the efficient and effective functioning of the Judiciary
- The role of the Registrar and the Court Manager in court administration and with the functioning of the judiciary
- The impact that the Department of Justice's of the judiciary's budget has had the efficient and effective functioning of the judiciary
- The impact of registrar and the court manager, being controlled by the Department of Justice on the efficient and effective functioning of the Judiciary. The Judiciary controlling its own budget and court administration. Office of the Chief Justice and court administration. Recruitment and Selection Strategies for Judicial Appointments. Revision of Selection Criteria used for the selection of Judicial Appointments (See Appendix 5). Revision of Judicial Training Programmes and Strategies (See Appendix 6). Evaluation of the effectiveness of Current Judicial Training Strategies. Computerized Record keeping of which judges have received training and what type of training and what type of further training is needed
- The effects on a country's economy, where there is a weak judicial system, the country disrespects the rule of law and bribery and corruption is rife amongst its state officials.

6.4 Chapter Summary

The primary objective of this case study was to establish what effect and impact executive and legislative interference with the judiciary has had on the independence of the judiciary. This study has revealed that the legislature and the executive have encroached onto the independence of the judiciary through the creation of the Judicial Service Commission, to bring about transformation of the judiciary. An evaluation of the role of the Judicial Service Commission has also revealed that the majority of the members on the Judicial Service Commission are non-judicial and political. Its primary role is the selection and recommendation of judicial appointments. It plays no role in the training of judges and it has played a limited role in the disciplining of judges.

However, it is submitted that the present composition of the Judicial Service Commission is problematic and that it, together with, the serious flaws identified in its recruitment and selection processes, have negatively impacted upon the efficiency and effectiveness of the judiciary. This has resulted in increased judicial criticism and increased demands being made for members of the judiciary to be trained and disciplined.

It is submitted that instead of supporting the judiciary, the executive and the legislature have added to the judicial criticisms and proposed the controversial legislative amendments, contained in the judicial Bills. Also, the executive and the legislature had previously focussed primarily on interfering with the selection and appointment of judicial personnel and with court administration. However, if the proposed judicial Bills are enacted and implemented, their powers to interfere with the impartiality and independence of the judiciary will increase dramatically. They will result in the fragmentation of the Supreme Court of Appeal and the creation of the proposed new judicial structures enabling them to exercise far greater control over judicial personnel and court administration. This will ensure a compliant judiciary, which it is submitted is not in the best interests of South Africans as it will not only undermine the independence of the judiciary, but also the South African Constitution and its Bill of Rights. It will also undermine foreign and local investor confidence in the South African government and in the South African economy.

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APPENDIX 1

UNIVERSITY OF KWAZULU-NATAL
GRADUATE SCHOOL OF BUSINESS

MBA Research Project

Researcher: A.J.C. Womack (Cell No. 0825780884)
Supervisor: Dr. Naveen Jumna (Cell No. 0828716296)
Co-Supervisor: Prof. W. Geach (Office No. (031)2607429)

Dear Honourable

Private Bag

Re : Request your permission to participate in an academic research project.

My name is Catharina Womack, I am currently studying towards an Masters in Business Administration degree at the Graduate School of Business at the University of KwaZulu-Natal Durban, South Africa. As a prerequisite for the completion of my degree. I have to write a research dissertation on a topic of my choice.

I have chosen to conduct exploratory qualitative research on "The effect, if any, that managing and controlling judges by the executive and the legislature will have on the Independence of the Judiciary".

I would like to invite you to participate in a research project, to study to what extent interference by the Executive and the Legislature with the functioning of the judiciary, through managing and controlling judges presently and in the future (through the proposed Judicial Bills and amendments to the Constitution), will undermine the independence of the judiciary in South Africa.

The results of this project will be for my mini dissertation. With your participation I hope to understand the present functioning of the judiciary and whether the judicial bills and amendments to the Constitution will improve the functioning of the judiciary or simply hamper and undermine it's independence in the future. I hope that the results of the survey will prove to be useful to all stakeholders, such as, Parliament, the Executive and the Judiciary of South Africa. I also hope to share my results by publishing them, possibly in the South African Law Journal.

I do not know of any risks to the judiciary, if you decide to participate in this survey, however I guarantee that your responses will not be identified with you personally. Your participation in this project is voluntary or optional. You can refuse to participate or withdraw from the project at any time with no negative consequence. I promise not to share any information that identifies you with

anyone outside my research group, which consists of my supervisor, my co-supervisor and me. You will not be required to put your name or any identifiers on the questionnaire. The Graduate School of Business, University of KwaZulu Natal, will maintain confidentiality and anonymity of records identifying you as participants for many years.

The survey should take you about thirty minutes to complete.

I hope you will agree to participate in this research and in the hope that you will agree; I am sending you my questionnaire to complete. Once completed if you could please place it in the self-addressed envelope and post it back to me.

Also, if you are amenable thereto, I humbly ask that you would permit me to interview you, as well. So that I may gather further qualitative data, which I may/may not have obtained in the survey questionnaire. In the hope that you will agree, I am also sending you a copy of my interview. Please let me know by mail, fax, email or telephone, if you consent thereto, your contact details and when/how I may contact you.

If you have any questions or concerns about the research, you may contact me on my cell 0825780884 or by email cat@cwomack.za.net or by fax 0312617462.

I humbly thank you for having taken the time to read this letter and I humbly look forward to receiving a favourable response from you.

Yours faithfully



CATHARINA WOMACK (MRS)
Student No. 841840251
P.O.Box 30985
Mayville
4058

APPENDIX 2

UNIVERSITY OF KWAZULU-NATAL GRADUATE SCHOOL OF BUSINESS

MBA Research Project

Researcher: A.J.C. Womack (Cell No. 0825780884)

Supervisor: Dr. Naveen Junna (Cell No. 0828716296)

Co-Supervisor: Prof. W. Geach (Office No. (031)260-7429)

The impact and the effect, of the management and control of judges by the executive on the independence of the judiciary.

The purpose of this survey is to solicit information from Judges, all over South Africa, regarding the extent to which the interference of the Executive and the Legislature with the functioning of the judiciary, through managing and controlling judges presently and in the future (through the proposed Judicial Bills and proposed amendments to the Constitution) will undermine the independence of the judiciary in South Africa. The information and ratings you provide us will go a long way in helping us identify these issues. The questionnaire should only take 15-20 minutes to complete. In this questionnaire, you are asked to indicate what is true for you, so there are no "right" or "wrong" answers to any question. Work as rapidly as you can. If you wish to make a comment please write it directly on the booklet itself. Make sure not to skip any questions. Thank you for participating!

HOW TO COMPLETE THE QUESTIONNAIRE

1. Please answer the questions as truthfully as you can. Also, please read and follow the directions for each part. If you do not follow the directions, it will be harder for me to do my research.
2. We are only asking you about things that you and your fellow colleagues should feel comfortable telling us about. If you don't feel comfortable answering a question, you can indicate that you do not want to answer it. For those questions that you do answer, your responses will be kept confidential.

3. You can mark each response by making a tick or a cross, or encircling each appropriate response with a PEN (not a pencil), or by filling in the required words or numbers.

PART 1: GENERAL PERSONAL PARTICULARS

Please tell me a little about yourself

Please mark only ONE option per question below.

My personal biographical details:

1. I am _____ years old.
2. I am a: female male
2. I am currently: a judge an acting judge retired judge
3. I grew up in: a rural area an urban area
4. I grew up: in South Africa abroad, please specify: _____
5. I am: African Colored Indian White
 Other, please specify _____
6. My highest Academic qualification is _____.
7. My highest Professional qualification is _____.
8. I was appointed as Judge: pre-1994 post-1994
9. I have been a judge for _____ years
10. I am currently a judge of _____ Court / Division
11. If retired from being a Judge, was it: pre 1994 or post-1994

PART 2: JUDICIAL ORGANIZATIONAL STRUCTURE:

12. The Judiciary is bureaucratized.
 I strongly agree I agree I am unsure
 I disagree I strongly disagree
13. Bureaucratization of the Judiciary is necessary.
 I strongly agree I agree I am unsure
 I disagree I strongly disagree
14. Bureaucratization of the Judiciary threatens the foundations of the judicial process.
 I strongly agree I agree I am unsure
 I disagree I strongly disagree
15. Judges should be autonomous.
 I strongly agree I agree I am unsure
 I disagree I strongly disagree
16. Individual responsibility needs to give way to corporate responsibility.
 I strongly agree I agree I am unsure
 I disagree I strongly disagree
17. Judicial power is exercised through a multitude of judges.
 I strongly agree I agree I am unsure
 I disagree I strongly disagree
18. The legal and managerial duties of judges should be separated.
 I strongly agree I agree I am unsure
 I disagree I strongly disagree
19. Good performance is secured by tight bureaucratic control and supervision
 I strongly agree I agree I am unsure
 I disagree I strongly disagree

20. Good performance is secured by self management, by relying on professional ethics and morality

- I strongly agree I agree I am unsure
 I disagree I strongly disagree

21. The Minister of Justice should make the appointments of Judges of all Higher Courts including the Constitutional Court.

- I strongly agree I agree I am unsure
 I disagree I strongly disagree

PART 3: EXECUTIVE AND LEGISLATIVE INTERFERENCE:

22. The Executive should have control over the way the Court functions

- I strongly agree I agree I am unsure
 I disagree I strongly disagree

23. The Executive should have a say but not control over the way the Court functions

- I strongly agree I agree I am unsure
 I disagree I strongly disagree

24. The Rules of Court should be made by the Minister of Justice

- I strongly agree I agree I am unsure
 I disagree I strongly disagree

25. Judicial Education should be placed under the control of the Minister of Justice

- I strongly agree I agree I am unsure
 I disagree I strongly disagree

26. The Minister of Justice should make the appointments of Acting Judges of all Higher Courts including the Constitutional Court.

- I strongly agree I agree I am unsure
 I disagree I strongly disagree

27. The Judiciary Bills hand over Judicial Control to the Minister of Justice.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree

28. The Minister of Justice should have financial control of the Judicial Budget.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree

PART 4: JUDICIAL CODE OF CONDUCT:

29. There should be a Judicial Code of Conduct.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree

30. There is a Judicial Code of Conduct.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree

31. The judiciary should hold its members accountable to the law and litigants through appellate review.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree

32. The judiciary should hold its members accountable to the law and litigants through inquisitorial proceedings.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree

33. Briefly explain in your own words how the judiciary holds its members accountable to the law and litigants in South Africa:

-
-
34. Disciplinary powers should be exercised over Judges.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree
35. Briefly explain in your own words whether and if so how disciplinary powers should be exercised over Judges in South Africa:
-
-
36. Disciplinary powers should be administered by Judges.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree
37. Disciplinary powers should be administered by a disciplinary panel.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree
38. Disciplinary panel should consist of judges and non-judges.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree
39. Judges should not be subjected to discipline, judicial review already holds judges sufficiently accountable.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree
40. Judicial discipline interferes with judicial impartiality.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree

PART 5: JUDICIAL EDUCATION AND TRAINING

41. There is a formal system of education for Judges in South Africa.
 I strongly agree I agree I am unsure
 I disagree I strongly disagree
42. Judges should conduct judicial education for Judges in South Africa.
 I strongly agree I agree I am unsure
 I disagree I strongly disagree
43. There should be a Judicial Studies Board which should control who should conduct judicial education for Judges in South Africa.
 I strongly agree I agree I am unsure
 I disagree I strongly disagree
44. The Minister of Justice should control who should conduct judicial education for Judges in South Africa.
 I strongly agree I agree I am unsure
 I disagree I strongly disagree
45. Training and Performance appraisals bring pressure to bear on the decisions of a judge in an individual case
 I strongly agree I agree I am unsure
 I disagree I strongly disagree
46. Training and Performance appraisals interfere with the impartiality of a judge in an individual case
 I strongly agree I agree I am unsure
 I disagree I strongly disagree
47. Assessing individual performance of judges impinges judicial independence.
 I strongly agree I agree I am unsure
 I disagree I strongly disagree

48. Judges should be free from internal interference.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree
49. A career ladder within the judiciary is desirable.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree
50. A career ladder through the prospects of promotion might influence a judge in his /her decision
- I strongly agree I agree I am unsure
 I disagree I strongly disagree
51. The philosophy of collective judicial action (emphasis on consistency and standardization) is reconcilable with the culture of autonomous decision-making.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree

PART 6: JUDICIAL INDEPENDENCE

52. Briefly explain in your own words what you think judicial independence is:
-
-
53. Briefly explain in your own words whether you think that judicial independence matters and if so why it should matter:
-
-
54. The Judiciary needs to be transformed.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree

55. Briefly explain in your own words how the judiciary should be transformed.

56. The administrative powers of the judiciary should be transferred to the Executive.

- I strongly agree I agree I am unsure
 I disagree I strongly disagree

57. There should be an independent body responsible for the administration of the courts.

- I strongly agree I agree I am unsure
 I disagree I strongly disagree

58. Briefly explain in your own words what and where this independent body should be.

59. The budgeting powers of the judiciary should be transferred to the Executive.

- I strongly agree I agree I am unsure
 I disagree I strongly disagree

PART 7: JUDICIAL SELF-GOVERNANCE

60. Judges should exercise authority over each other outside of the realm of appeals.

- I strongly agree I agree I am unsure
 I disagree I strongly disagree

61. Should Judges exercise authority over each other outside of the realm of appeals.

- I strongly agree I agree I am unsure
 I disagree I strongly disagree

62. Judges should be administratively independent.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree

63. There should be institutional accountability.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree

PART 8: THE PROPOSED JUDICIARY BILLS

64. Disciplinary procedures for judges are necessary and should be introduced.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree

65. A training college for Judges is necessary and should be established.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree

66. A register for financial interest is necessary.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree

67. The Judiciary bills interfere with the functional independence of the judiciary.
- I strongly agree I agree I am unsure
 I disagree I strongly disagree

68. How will the judicial bills interfere with the functional independence of the judiciary

PART 9: MANAGEMENT OF JUDGES

69. If you think that Judges in South Africa should be managed and controlled, please give brief reasons why you think so:

70. Judicial management increases productivity and reduces costs.

- I strongly agree I agree I am unsure
 I disagree I strongly disagree

71. Do you think that Judicial management will increase productivity and reduce costs, please give brief reasons as to why you think so:

PART 9: SELECTION AND APPOINTMENT OF JUDGES

72. Judges should be elected.

- I strongly agree I agree I am unsure
 I disagree I strongly disagree

73. Judges should be appointed.

I strongly agree

I agree

I am unsure

I disagree

I strongly disagree

By whom should Judges be appointed? _____

74. Briefly explain in your own words the recruitment process of Judges in South Africa, that is how and from where Judges are recruited in South Africa:

75. Briefly explain in your own words the selection process, that is how Judges are selected and appointed in South Africa:

PART 10: INSTITUTIONAL DIALOGUE / SPECIAL DIALOGUE OF JUDGES

76. Briefly explain in your own words what dialogue the legislature and the Courts participate in and what their aim is:

PART 11 TRANSFORMATION / RESTRUCTURING OF THE JUDICIARY

- 77 Legislature's involvement is necessary for judicial reform.
- I strongly agree I agree I am unsure
- I disagree I strongly disagree

Briefly explain in your own words why you agree or disagree:

- 78 Legislature's involvement is necessary for the effectiveness of various procedural rules, methods and techniques in order to achieve judicial reform.

- I strongly agree I agree I am unsure
- I disagree I strongly disagree

Briefly explain in your own words why you agree or disagree:

79 Those seeking to improve economic performance should not focus on judicial efficiency alone but on independence as well.

- I strongly agree I agree I am unsure
 I disagree I strongly disagree

Briefly explain in your own words why you agree or disagree:

PART 12 ADDITIONAL COMMENTS

Please feel free to comment on or add anything else which you feel is relevant which may not have been covered or adequately covered in this questionnaire:

Once again thank you so very much for agreeing to participate and completing this questionnaire.

Catharina Womack (Mrs)

MBA Research Project

Researcher: A.J.C. Womack (Cell No. 0825780884)

Supervisor: Dr. Naveen Jumna (Cell No. 0828716296)

Co-Supervisor: Prof. W. Geach (Office No. (031) 260-7429)

The impact and the effect, of the management and control of judges by the executive on the independence of the judiciary.

The purpose of this interview is to solicit more detailed qualitative information from Judges, all over South Africa, regarding the extent to which the Interference of the Executive and the Legislature with the functioning of the judiciary, through managing and controlling judges presently and in the future (through the proposed Judicial Bills and proposed amendments to the Constitution) will undermine the independence of the judiciary in South Africa. The information you provide us will go a long way in helping us identify these issues. The interview should only take an hour. Attached please find a list of questions, which I will be asking you in the interview.

Thank you once again for participating!

HOW TO ANSWER THE QUESTIONNAIRE

1. Please answer the questions as truthfully as you can and in as much detail as you can
2. We are only asking you about things that you and your fellow colleagues should feel comfortable telling us about. If you don't feel comfortable answering a question, you can indicate that you do not want to answer it. For those questions that you do answer, your responses will be kept confidential.

INTERVIEW QUESTIONS

1. Should Judges be managed and controlled?
2. Who should control and manage Judges?
3. How are Judges recruited, selected and appointed?
4. How and from where are Judges recruited, selected and appointed?
5. Who recruits, selects and appoints the judges in South Africa?
6. What selection and recruitment procedures are used? By whom?
7. What selection and recruitment procedures should the Judicial Service Commission adopt?
8. Which approach, professional or bureaucratic, should be used in selecting and recruiting judges?
9. Should judges appointed or elected? By whom?
10. What are the minimum education and training requirements, which have to be met in order for someone to be selected and appointed as a Judge?
11. To what extent and how precisely is the government's affirmative action policies being implemented within the judiciary (such as promotion, appointments, etc)?
12. How and to what extent, if any, is the job applicant's past participation in the ANC armed struggle recognized, when a candidate is recruited and / selected for a judicial appointment?
13. Do Judges need training? What type of training?

14. Who trains judges at present?
15. Who should train Judges and how should this be done?
16. Is the current training sufficient or do they require additional training?
17. If so, specifically what type of additional training do judges need?
18. Should the training be conducted internally or externally (that is within the Judiciary or outside of the Judiciary)?
19. To whom are judges accountable?
20. To whom should judges be accountable?
21. Should Judges be subjected to discipline? Why?
22. What are Judges disciplined for?
23. Who should have the power to discipline judges?
24. What is a suitable and acceptable mechanism to discipline judges for misconduct?
25. What is Judicial Service Commission's present role in the selection, recruitment, and training of judges and the disciplining of judges for misconduct?
26. Is this desirable? If not, what alternatives do you suggest?
27. What role, if any, should the executive and/or the legislature play in the processes of selection, recruitment, training of judges and the disciplining of judges for gross misconduct?
28. Should interference with the judiciary by other organs of government be allowed through the selection, recruitment, training and disciplining processes of judges?

29. Does it affect their Independence in deciding cases, if so how?
30. Who finances the Judges?
31. Who should finance the Judges?
32. Is financing the judiciary by the Executive a threat to Judicial Independence?
33. Does it affect their Independence in deciding cases, if so how?
34. What effect, if any, can the management and control of Judges have on the constitutional principle of judicial independence?
35. What is Judicial Independence?
36. How do you define Judicial Independence?
37. How do you assess Judicial Independence?
38. Does Judicial Independence still matter today?
39. What are the contemporary threats to Judicial Independence?
40. What are there structural threats to Judicial Independence?
41. How can the need for Judicial Control and Accountability be balanced with the need for Judicial Independence?
42. Are the Alternative Models for Judicial Control and Accountability?
What are they?

Code of Conduct for South African Judges

APPENDIX 4

After extensive debate within the judiciary as to its terms, a code of conduct – applicable to all judges – was adopted at a meeting of senior judges held at Pretoria on 3 April 2000. It deals with ethical issues which judges may confront during their careers. It is supported by the judiciary as a whole and is published to make known the standards set by the judiciary for the performance of their duties.

I Mahomed
Chief Justice

A Chaskalson
President Constitutional Court

JUDICIAL ETHICS IN SOUTH AFRICA

INTRODUCTION

The supremacy of the Constitution and the rule of law are foundational to the democracy established by the Constitution.¹ So too are the rights and freedoms enshrined in the Bill of Rights.² The protection of these fundamental values is entrusted to an Independent judiciary,³ whose members must on appointment take an oath or affirm that they will be:

"... faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear or prejudice, in accordance with the Constitution and the law."⁴

To fulfill that constitutional role the judiciary needs public acceptance of its moral authority and integrity, the real source of its power. Accordingly, the Constitution commands all organs of state to assist and protect the independence, impartiality, dignity, accessibility and effectiveness of the judiciary.⁵ But it is even more important that judges at all times seek to maintain, protect and enhance the status of the judiciary. To that end they should be sensitive to the ethical rules which govern their activities and behaviour both on and off the bench.

The guidelines which follow are intended to assist judges in dealing with ethical and professional issues which may confront them during their judicial careers. They are also intended to inform the public about the judicial ethos in this country. Much of what follows may seem straightforward and obvious to most

¹ Section 1(c) of the Constitution of the Republic of South Africa 1996.

² Ibid s 7(1).

³ Ibid s 165(1) and (2).

⁴ Ibid s 174(8) read with para 6(1) of schedule 2.

⁵ Ibid s 165(4).

lawyers. However the rules are often difficult to apply in practice and may require fine judgment.

In the preparation of these guidelines regard was had to the Constitution, our common law, case law, and international standards. Although the principles applied in comparable foreign countries are not necessarily applicable to South Africa, they are a useful source of reference. The views of the judiciary were also canvassed. It should be emphasized that professional ethical rules derive much of their binding nature from their general acceptance by members of the profession.

Ethical rules differ from legal rules in that they are seldom absolute. These guidelines are likewise not absolute but describe the high standards to which all judges should aspire. They are not to be interpreted as impinging on the constitutionally guaranteed independence of the judiciary or any judge. Nor does a breach of any particular rule or guideline necessarily warrant censure.⁶

On the one hand the Constitution enshrines judicial independence and embraces the doctrine of separation of powers: courts are independent and subject only to the Constitution and the law. On the other hand, it requires courts to apply the Constitution and the law impartially and without fear, favour or prejudice.⁷ The independence of the judiciary is for the protection of the freedom of individuals and the integrity of the Constitution and not for the benefit of judges. The underlying assumption is that judges act lawfully and ethically and the Constitution protects them by providing that a judge may be removed from office or suspended *only* if the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct.⁸

There is a tension between judicial independence and judicial responsibility. Judicial independence denotes freedom of conscience for judges and non-

⁶ Cf *Code of Conduct for United States Judges*: commentary to canon 1.

⁷ Section 165 (2) of the Constitution.

⁸ Section 177 of the Constitution. This reflects international accepted principles, eg, the UN's *Basic Principles on the Independence of the Judiciary* # 17, states that judges may be

interference in their decision-making; it is not concerned with judicial misbehaviour. Individual judges must be free from personal influence or private interest and the judiciary must be beyond the undue influence of the legislative or executive branches of government and removed from the direct influence of popular majorities.⁹ The rule of law and independence of the judiciary depend primarily upon public confidence; lapses or questionable conduct by judges tend to erode that confidence.¹⁰

The provisions of this document apply to all judges and, unless the context indicates otherwise, also to judges released from active service and who are liable to be called upon to perform judicial duties, and acting judges. The notes are in elucidation, often with reference to comparative codes. Most of the sources used are listed in the bibliography which follows at the end of these guidelines.

Similar guidelines in Canada are described as "principles of reason to be applied in the light of all the relevant circumstances and consistently with the requirements of judicial independence and the law. Setting out the best . . . does not preclude reasonable disagreement about their application or imply that departures from them warrant disapproval."¹¹ This is a commendable approach.

Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons.¹² Mr Dato' Param Kumaraswamy, the UN 's Special Rapporteur on the Independence of the Judiciary, in a submission during 1998 to the TRC¹³ explained the matter in these words:

removed or suspended "only for reasons of incapacity or behaviour that renders them unfit to discharge their duties."

⁹ Baker *The Good Judge* p20. *S v Makwanyane* 1995 (2) SACR 1 (CC) par 87 to 89.

¹⁰ "Deference to the judgments and rulings of courts depends upon confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favour" (*Code of Conduct for United States Judges*: commentary to canon 1).

¹¹ *Ethical principles for Judges*, Canadian Judicial Council p 3.

¹² *Ethical principles for Judges*, p 13.

¹³ Quoted by Prof D Zeffertt in 1999 *SA Law Journal* 668-669.

“... judicial accountability is not the same as the accountability of the executive or the legislature or any public institution. This is because of the independence and impartiality expected of the judicial organ... though judges are accountable, their accountability does not extend to their having to account to another institution for their judgments.”

This is similar to the views of the Council of Europe in *Independence, efficiency and the role of judges* (1995): the independence of the judiciary requires that *decisions* of judges should not be the subject of any revision outside appeal procedures as provided for by law [emphasis added].¹⁴ For this reason the US statute (28 US Code s 372 (3)) requires that complaints against judges that are “directly related to the merits of a decision or procedural ruling” must be dismissed at the outset. In *Petition of Lauer* 788 F.2d 135 (8th Circuit, 1985) the point is well made:

“While many people may agree or disagree with the sentence and the judge's reasons for imposing the sentence, it must be remembered that a judge has the authority and the power to be wrong as well as right. . . . Disenchanted litigants or other citizens should not be able to influence a judge about a judicial decision through the threat of disciplinary sanction.”

The guidelines which follow are in two groups, namely those which apply to judges in respect of their judicial duties and those which apply in respect of their extra-judicial activities.

¹⁴ The Center for Democracy *Summary Report of the 1999 International Judicial Conference* p6. See also Cappelletti *Who watches the Watchmen? A comparative study on judicial responsibility* 31 Am J of Comp Law 1.

GUIDELINES FOR JUDGES

A With Regard to Judicial Duties

1. A judge should uphold the independence of the judiciary and the authority of the courts, and should maintain an independence of mind in the performance of judicial duties. A judge should also take all reasonable steps to ensure that no person or organ of state interferes with the functioning of the courts.

S 165 of the Constitution. Cf *Merula Maniere van Procedereen* 1.6.3: a judge has to act fearlessly and according to his conscience. *Judges' Charter in Europe* # 2: "The judge is only accountable to the law. He pays no heed to political parties or pressure groups. He performs his professional duties free from outside influence and without undue delay." Cf Sir Matthew Hale's prayer: "That popular or court applause or distaste, have no influence... ." and "not to be solicitous what men will say or think, so long as I keep myself exactly to the rule of justice." Baker *The Good Judge* p 20: judges should be free from fear of retaliation for their decisions.

Code of Conduct for United States Judges # 1: "A judge shall uphold the integrity and independence of the judiciary."

This demands adherence to the rules of ethics and acceptance of the principle that, although they are independent, judges are pre-eminently obliged to comply with the law. It further implies that "a judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice" op cit canon 4(C). Cf the Canadian case of *Mac Keigan v Hickman* [1989] 2 SCR 796. The Canadian Judicial Council (*Ethical Principles for Judges*) p3 points out that ethical rules cannot and are not intended to restrict judicial independence.

Judicial independence is not a private right - or a principle for the benefit of judges as individuals (1996 *Austr LJ* 126) - but the cornerstone of impartiality and a constitutional right of every member of the public.¹⁵ Independence is both individual and collective or institutional.

It is wrong to believe that the adoption of constitutional proclamations of judicial independence automatically create or maintain an independent judiciary. Judicial independence must be

¹⁵ "... the provision for securing the independence of the judiciary were not created for the benefit of the judges, but for the benefit of the judged" (Kurland *The Constitution and the Tenure of Federal Judges* 1969 Univ of Chicago LR 665-6).

recognised, practised, and refined by all three branches of government.¹⁶ Organs of state are constitutionally mandated to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness (section 165(4)). The correlative is the right of every judge not to have his or her independence of mind disturbed by any person or organ of state.

2. A judge should always, not only in the discharge of official duties, act honourably and in a manner befitting the judicial office.¹⁷

A judge should therefore never act improperly or disgracefully. In the USA the requirement is that a judge should not engage in conduct prejudicial to the effective and expeditious administration of the business of the court (s 372(c)(1) of title 28 of the US Code).

This requirement is interpreted by the standard required of the office.¹⁸ Austria # 57(2): A judge should behave in his professional and private life in a proper manner and should refrain from any act that can affect the trust in or respect for the judiciary. Thomas p 40: The actions of a judge in a private capacity should not be such as to create any substantial risk of disorder, violation of law, public misunderstanding, or future embarrassment in performing judicial duties. The *Code of Conduct for United States Judges* # 2: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." *Code of Conduct for Magistrates* # 1: "A Magistrate is a person of integrity and acts accordingly. There are no degrees of integrity. Integrity is absolute." Par 4: "A magistrate acts at all times (also in his/her private capacity) in a manner which upholds and promotes the good name, dignity and esteem of the office of a magistrate and the administration of justice."

Judicial conduct is to be assessed objectively through the eyes of the reasonable person.

3. A judge should at all times comply with the laws of the land.¹⁹

This, obviously, includes both rules that are applicable to the judge's office and to the judge's extra-judicial conduct.²⁰

¹⁶ The Center for Democracy *Summary Report of the 1999 International Judicial Conference* p 4.

¹⁷ Huber 4.15.6.

¹⁸ Ibid.

¹⁹ Thomas Fuller (1654-1734): "Magistrates are to obey as well as execute laws." *Code of Conduct for Magistrates* # 5.

²⁰ Convictions of offences in circumstances involving moral turpitude are a ground for disciplinary steps in Israel. Cf *The Courts Law of Israel*.

4. In conducting judicial proceedings judges should themselves avoid and where necessary disassociate themselves from comments or conduct by any person subject to their control which are racist, sexist or otherwise manifest discrimination in violation of the equality guaranteed by the Constitution.²¹ In court and in chambers judges should also always act courteously and respect the dignity of all who have business there.

The rule is not only, or even so much, aimed at promoting courtesy but at ensuring that degree of decorum which is essential for maintaining and enhancing the dignity of the judiciary and its business.

5. In conducting judicial proceedings, a judge should give special attention to the right of equality before the law and the right of equal protection and benefit of the law. A judge should not in the performance of judicial duties manifest any bias or prejudice.

S 9(1) of the Constitution. Cf *Kersteman sv rechters*: (in the context of his time) no distinction is to be made between rich and poor, important and unimportant ('aanzienelyke of geringe'). In *Ethical principles for Judges* the Canadian Judicial Council # 5 points out that judges should strive to be aware of and understand the many differences between persons and should remain informed about changing social attitudes and values. Cf *ABA Model Code of Judicial Conduct* # 3B.

6. Judges should take reasonable steps to enhance the accessibility of the courts and improve public understanding of the judicial proceedings. Therefore judicial proceedings are ordinarily conducted and decisions are announced and motivated in open court.

The legitimacy of the judiciary depends in no small measure upon public understanding of and confidence in the judicial process. Likewise the educative and prophylactic function of the judiciary must fail if its proceedings are not understood. Unless there is comprehension, justice cannot to be seen to be done. Also, the corollary of judicial independence is accountability. The multi-cultural nature of South African society calls for special sensitivity for the perceptions and sensibilities of all who are affected by the proceedings of a court.

²¹ Cf Rule 5.4 of the *Ethical Principles for Judges*, Canadian Judicial Council.

Judges should be conscious of the desirability of complying with the spirit of the requirement that proceedings should take place in open court. They should therefore avoid unnecessary discussion with legal representatives in chambers in the absence of the parties.

7. A judge should resolve disputes by making findings of fact and applying the appropriate law²² in a fair hearing.²³ This includes –

1. observing the audi alteram partem rule,²⁴
2. remaining manifestly impartial,²⁵ and
3. giving adequate reasons for decisions.

European Charter on the Statute for Judges # 1.5: "Judges must show, in discharging their duties, availability, respect for individuals, and vigilance in maintaining the high level of competence which the decision of cases requires on every occasion - decisions on which depend the guarantee of individual rights and preserving the secrecy of information which is entrusted to them in the course of proceedings." The UN's *Basic Principles on the Independence of the Judiciary* # 6: "The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."

The duty to grant a party a fair hearing does not preclude the judge from keeping a firm hand. For instance, reasonable time limits may be laid down for argument which may be cut short when the judge is satisfied that more would not be of material assistance; and the examination of witnesses may be curtailed if it exceeds reasonable bounds.

Reasons for decisions ought to be clear, cogent, complete and succinct. A number of decisions do not necessarily require reasons, e.g. unopposed cases and interlocutory rulings, because the reasons are usually self evident.²⁶ If reasons in such cases are later reasonably required, they should be given.

An indispensable part of judicial independence is the right to write judgments in the style and manner the judge thinks best. At the heart of a judge's task is the necessity to make findings as to peoples' motives, credibility, honesty and competence. Even the most temperate will have occasion to express harsh views about people during the course of argument or in judgments, e.g. by using unflattering adjectives in regard to a recalcitrant or overzealous party, an

²² Cf Merula 1.6; Voet *Commentarius ad Pandectas* 5.1.51 (Gane's translation); Huber *Hedendaegse Rechtsgeleertheit* 4.15.12 (Gane's translation *Jurisprudence of my Time*).

²³ S 34 of the Constitution; *S v Tyebele* 1989 (2) SA 22 (A) 29.

²⁴ Voet 5.1.49

²⁵ Kersteman *ibid*; *Judges' Charter in Europe* # 3; *Ethical principles for Judges* # 6.

²⁶ *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC).

uncooperative lawyer, a foot dragging witness and the like. (Wording based upon an unreported complaint investigation from Rhode Island.) However, a judge who, under the guise of performing judicial functions, makes defamatory statements actuated by malice (personal spite, ill will, improper motive, unlawful motive or ulterior motive) may not only be civilly liable,²⁷ but will be guilty of judicial impropriety.

8. In conducting judicial proceedings, a judge should maintain order, act in accordance with commonly accepted decorum, remain patient and courteous to legal practitioners, parties and the public and require them to act likewise.

Code of Conduct for United States Judges # 3A. *Code of Conduct for Magistrates* # 3: "A magistrate executes his/her official duties objectively, competently and with dignity, courtesy and self-control" and in # 12: "A magistrate maintains good order in his/her court and requires dignified conduct ..."

Sir Matthew Hale (quoted by JB Thomas *Judicial Ethics in Australia*) prayed "that in the execution of justice, I carefully lay aside my own passions, and not give way to them however provoked." Lord Denning once said: "One thing a judge must never do. He must never lose his temper. However sorely tried."

9. A judge should recuse him/herself from a case if there is a conflict of interest or if there is a reasonable suspicion of bias based upon objective facts.²⁸ However, a judge should not recuse him/herself on insubstantial grounds.²⁹

In all respects the common law and case law on this issue are well developed. The interest of the judge need not be financial before he or she is disqualified: *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (no 2)* [1999] 1 All ER 577 (HL). A judge should hear and decide cases allocated, unless disqualified. Super-sensitivity, distaste for the litigation or annoyance at the suggestion to recuse are not grounds for recusal. A judge's ruling on an application for recusal and the reasons for the ruling should be stated in open court.

²⁷ *May v Udwin* 1981 (1) SA 1 (A) 19A-B.

²⁸ e. g. *Council of Review SADF v Monnig* 1992 (3) SA 482 (A); *BTR Industries SA (Pty) Ltd v Metal & Allied Workers' Union* 1992 (3) SA 673 (A); *President of the RSA v SA Rugby Football Union* 1999 (4) SA 147 (CC).

²⁹ It is unfair to the other party and the other judges. *S v Radebe* 1973 (1) SA 796 (A) 812; Voet 5.1.46; *SA Motor Acceptances Corp Bpk v Oberhalzer* 1974 (4) SA 808 (T); *S v Suliman* 1969 (2) SA 385 (A) 391; *R v T* 1953 (2) SA 479 (A) 483; *R v Milne and Erleigh* (6) 1951 (1) SA 1 (A) 11-12. *President of the RSA v SA Rugby Football Union* supra

If a judge is of the view that there are no grounds for recusal, but believes that there are facts which, if known to a party, might result in an application for his or her recusal, those facts should be made known timeously to the parties, either by informing counsel in chambers or in open court and the parties should be given adequate time to consider the matter. But asking the parties' or their lawyers' approval whether to remain in a particular case is fraught with potential coercive elements and may often be an undesirable practice.

10. A judge should attend chambers and court in such a manner and at such times as necessary and appropriate to perform all official duties properly, timeously and in an orderly manner.³⁰

Although the rule is straight forward and obvious, its application in practice requires common sense and good judgment. The views of the head of the relevant court should be respected.

11. A judge should perform all properly assigned judicial duties diligently,³¹ investigate the matter at hand thoroughly³² and dispose of the business of the court promptly in an efficient and businesslike manner.³³ A judge should not engage in conduct that is prejudicial to the effective and expeditious administration of justice or the business of the court, should avoid any personality issues and should seek to foster collegiality.

Unnecessary postponements, point taking, undue formality and the like should be avoided. A pattern of intemperate, abusive and intimidating treatment of lawyers and others, was held to be prejudicial to the effective administration of justice (Judicial Conference of the USA: *In the matter of Judge McBryde*, 1997). So, too, a continuing pattern of conduct evidencing arbitrariness and abusiveness.

12. A judge should take reasonable steps to maintain the necessary level of professional competence in the law.

ABA Model Code for Judicial Conduct # 3B. In Canada the duty is said to be to take reasonable steps to maintain and enhance knowledge, skills and personal qualities. Also Huber 5.15.9,10; Merula 1.6.4,5.

³⁰ Cf Austria # 60.

³¹ *Ethical Principles for Judges* Canadian Judicial Council 4.10.

³² Merula 1.6.4; Kersteman *sv rechters*. Both use the word 'naarstig'. Cf *Code of Conduct for Magistrates* # 11.

³³ Cf *Code of Conduct for United States Judges* # 3.

13. A judge should not exert undue influence in order to promote a settlement or obtain a concession from any party. In this regard, a judge usually refrains from expressing views about the merits or demerits of the case.

This does not mean that in an appropriate case a judge should not advise the parties to consider a settlement of a case; nor does it mean that a judge should not put a provisional view to counsel in the course of argument. Indeed, justice may require that a party be afforded the opportunity to deal with such view.

14. A judge should give judgment or any ruling in a case promptly and without undue delay.³⁴

Litigants are entitled to judgment as soon as reasonably possible. The ideal is to deliver all reserved judgments before the end of term, failing which shortly after the beginning of the next term.

15. Upon appointment, a judge should sever all professional links and recover speedily all fees and other amounts outstanding³⁵ and organise his/her personal and business affairs to minimize the potential for conflict of interest.³⁶ A judge previously in private practice should not sit in any case in which the judge or the judge's former firm is or was directly involved as either attorney of record or in any other capacity before the judge's appointment. Such a judge should not sit in any case in which the former firm is involved until all indebtedness between the judge and the firm has been settled.

16. An acting judge who is a practising attorney should not sit in any case in which the acting judge's firm is or was involved as attorney of record or in any other capacity.

It is better to err on the side of prudence, for it is not only actual bias that is to be avoided but its mere appearance.

17. Upon resignation, ceasing to be on active service or expiry of an acting appointment, a judge is obliged to complete all part-heard cases and to deliver

³⁴ Cf Voet 5.1.53.

³⁵ Cf Thomas p 44.

³⁶ Cf par 10 supra.

all reserved judgments as soon as possible and to do such work at the applicable rate.

Ordinarily such uncompleted work is foreseeable and can be avoided or minimised by prudent precautions. If there is no prescribed rate, the remuneration may not exceed that of an acting appointment taking into account the time involved.

18. A judge should in respect of judicial activity refrain from any conduct that may be interpreted as personal advancement.

There is an obvious tension between the right of the public to be informed by the media about legal proceedings and the right to a fair trial. The actions of the media ought not to interfere with the functioning of the court in a manner which could affect the fairness of the proceedings or the decorum of the court. There is as yet no single practice as to whether, and to what extent, courts should cooperate with the media, e.g. by allowing cameras into court or by issuing press statements.

The SCA and the CC permit the handing down of judgments to be televised. The CC goes further, providing the media with explanatory statements on pending cases and with summaries of judgments being delivered.

The salutary rule in the High Court is that judges should not permit a hearing in court to be photographed, televised or broadcast, or to be taped in order to be televised or broadcast. Unless in exceptional cases the public interest requires otherwise, a judge who fails to abide by this rule will probably be in breach of rule 18.

The Code of Conduct for Magistrates # 13 contains a general prohibition, also extended to recesses and immediately prior to or after the court session as do a number of states in the USA, such as Michigan.

19. A judge should respect the confidences of colleagues.

The UN's *Basic Principles on the Independence of the Judiciary # 15*: "The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings"

Obviously, formal deliberations among judges are and must remain confidential, but the rule goes further. Private consultation and debate are inherent in the functioning of a judge; and

often a mere sounding board is helpful. It goes without saying that confidentiality is also essential for this benefit of collegiality to function.

20. A judge should inform the relevant professional body or a Director of Public Prosecutions of any conduct on the part of a legal practitioner or public prosecutor which may be unprofessional.³⁷

The judge ought to have clear and reliable evidence of serious misconduct or gross incompetence and should usually await the conclusion of the proceedings before acting. A judge should not assume the role of prosecutor and is not a policeman. When a judge decides to take action in response to perceived misconduct, the reference to the appropriate authority should be made in a neutral fashion.³⁸

Before commenting in a judgment or in public on the conduct of a particular practitioner or prosecutor, the judge should give that person the opportunity to deal with the allegation.

21. A judge who reasonably believes that a colleague has been acting in a manner which is unbecoming of the judicial office, should raise the matter with that colleague or with the head of the court concerned.

"If a judge is aware of evidence which, in the judge's view, is reliable and indicates a strong likelihood of unprofessional conduct by another judge, serious consideration should be given as to how best to ensure that appropriate action is taken having regard to the public interest in the due administration of justice. This may involve counselling, making inquiries of colleagues, or informing the chief justice . . . of the court" (*Ethical Principles for Judges* p 15). The *ABA Model Code for Judicial Conduct* # 3B(3) requires of a judge also to initiate appropriate disciplinary measures against another judge for unprofessional conduct.

B With Regard to Extra-Judicial Activities

22. A judge may not, without the consent of the Minister of Justice, accept, hold or perform any other office of profit, or receive in respect of any service any fees, emoluments or other remuneration apart from the salary and any allowances payable to the judge in a judicial capacity.

³⁷ Cf *Code of Conduct for Magistrates* # 14.

Although the statutory prohibition refers to "supreme court" judges only (s 11 read with s 10 of the Supreme Court Act 59 of 1959) the ethical rule applies to all judges on active service. Acting judges should take note that the prohibition applies to them during the term of their appointment. There is a statutory exception in relation to service on the SA Law Commission. For a judge not on active service to sit as an arbitrator is acceptable.

Royalties and the like are not covered by the general prohibition nor is there any objection to judges writing or editing books or journals. They may also deliver public lectures on appropriate subjects or teach at academic institutions. Any payment therefore, of course, is subject to the consent of the Minister of Justice. However, this does not include subsistence and travel allowances and payments by way of reimbursement for such expenditure.

23. A judge should not directly or indirectly accept any gift, advantage or privilege³⁸ that can reasonably be perceived as being intended to influence the judge in the performance of judicial duties or to serve as a reward therefor.⁴⁰

The rule is obviously not aimed at preventing corruption, for that need hardly be mentioned here. The point here is that judges should avoid any semblance of impropriety. No hard and fast line can be drawn, but judges will be well advised to err on the side of conservatism.

24. While judges should be available to use their judicial skill and impartiality to further the public interest, they should remain mindful of the separation of powers and the independence of the judiciary when considering a request to perform non-judicial functions for or on the behalf of the State. A judge should not accept an appointment that is likely to affect or be seen to affect the independence of the judiciary, or which could undermine the separation of powers.

The problem may arise with regard to appointments as commissioners of inquiry and the like. The question has been the subject of debate in South Africa and elsewhere.⁴¹

³⁸ *Guide to Judiciary Policies and Procedures* Administrative Office of the US Courts, June 1999 Chapter V-1.

³⁹ Kersteman *ibid*.

⁴⁰ ABA Model Code for Judicial Conduct # 4D(4).

⁴¹ See Prof Ellison Kahn: *Extra-judicial Activities of Judges* 1980 De Jure 188. See also *Bell v Van Rensburg* 1971 (3) SA 693 (C), Middleton 1986 CILSA 257. Of special interest are Lord Denning's Report in the *Profumo* matter (CMND 2512) and the Salmon Report (*Royal Commission on Tribunals of Inquiry*, 1966) and the *Position of the Canadian Judicial Council on the Appointment of Federally-Appointed Judges to Commissions of Inquiry*.

25. A judge's judicial duties should take precedence over all other activities.⁴²

In the case of judges on active service the rule is self-evident. Judges who are not on active service but are liable to be called upon to perform judicial duties should arrange their affairs so as to be reasonably available for such duties as they may be called upon to perform.

26. A judge may not act as advocate, attorney or legal adviser but may give informal legal advice to family members, friends, charitable organisations and the like without compensation.⁴³

Reticence is nevertheless advisable lest the judge's status be abused by the recipient thereof.

27. A judge may not be involved in any undertaking, business, fundraising or other activity that may affect the status, independence or impartiality of the judge.⁴⁴

The principle is well put in the *European Charter on the Statute for Judges* # 4.2: Judges may carry on activities outside their judicial mandate including those which are embodied in their rights as citizens unless such outside activities are incompatible with the confidence in, or the impartiality or the independence of the judge or the judge's availability to deal attentively and within a reasonable time with matters put before him or her.

The UN's *Basic Principles on the Independence of the Judiciary* # 8: members of the judiciary are, like other citizens, entitled to freedom of expression, belief, association and assembly, provided that in exercising these rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

Code of Conduct for United States Judges # 4: "A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations." Canon 4D: "A judge shall not engage in financial and business dealings that may reasonably be perceived to exploit the judge's judicial position"

⁴² *Code of Conduct for United States Judges* canon 3A.

⁴³ Cf *Code of Conduct for United States Judges* # 4G.

⁴⁴ Cf Austria # 63.

Serving on University councils or governing bodies or boards of trustees of charitable institutions and the like is fairly common in South Africa, also in Canada and Australia.

28. A judge should not belong to any political party or secret organisation. Except insofar as necessary for the discharge of the judicial office, a judge should not become involved in any political controversy or activity.⁴⁵

Judges should not attend political meetings. *Code of Conduct for Magistrates # 15*: "A magistrate shall refrain from express support for any political party or grouping." In Canada all partisan political activity is expected to cease upon appointment and judges are advised to refrain from membership in political parties and fund raising. *Code of Conduct for Magistrates # 6*: "A magistrate does not associate with any individual or body to the extent that he/she becomes obligated to such person or body in the execution of his/her official duties or creates the semblance thereof"

29. A judge should not take part in the activities of any organisation that practises discrimination inconsistent with the Constitution.

ABA Model Code for Judicial Conduct # 2C: "A judge shall not hold membership in any organisation that practices invidious discrimination"

30. A judge should not lend the prestige of the judicial office to advance the private interests of the judge or others.⁴⁶

An example is the use of official letterheads to influence someone. *ABA Model Code for Judicial Conduct # 2B*. Colloquially put, a judge does not misuse or abuse official trappings.

31. Save in the discharge of judicial office, a judge should refrain from commenting on the merits of any case pending before that judge or in any other court.⁴⁷ Unless necessary for or in judicial proceedings, a judge should refrain from public criticism of another judge or branch of the judiciary.⁴⁸

The *Code of Conduct for United States Judges # 3A(6)* states that a judge should avoid public comment on the merits of a pending or impending action, unless made in the course of official

⁴⁵ Cf *Code of Conduct for United States Judges # 7*.

⁴⁶ Thomas p 25, 44.

⁴⁷ Austria # 58(5).

⁴⁸ Cf Thomas p18.

duties, to explain court procedures or to a scholarly presentation made for legal education purposes. The admonition applies until the completion of any appellate process. *ABA Model Code for Judicial Conduct* # 3B(9): "A judge shall not, while a proceeding is pending or impending in the court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing."

A judge ought not to enter into a public debate about a case in which the judge was involved, irrespective of criticism levelled against the judgment.⁴⁹ If comment is required, the head of the part of the judiciary concerned should in that capacity react in order to protect the judiciary as a whole. This does not prevent an academic debate or a discussion of the legal issues that arose in the case. If the head of the court fails to act, the judge concerned may, under very special circumstances, issue a statement - preferably in open court - to clarify any issue.

The Judicial Council of the 1st Circuit in the matter of Judge Lagueux (July 1992) said this: "Difficult as it may be for judges not to respond to what they perceive as unfair public criticism, we believe that judges usually serve themselves and their court best by remaining outside of and above public disputes of a rancorous nature, relying upon others who are not constrained by judicial office to champion their cause. But if response is deemed necessary, it should be in a reasoned, dignified manner."

Criticising another judge and criticising another judgment are separate matters.

32. A judge ought to refrain from any action which may be construed as a device to stifle legitimate criticism of that or any other judge.

Judges ought to resort to instituting defamation actions or to contempt⁵⁰ proceedings in exceptional circumstances only.

33. A judge, while free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, should refrain from expressing views in a manner which may undermine the standing and integrity of the judiciary.⁵¹

⁴⁹ Cf Thomas p23.

⁵⁰ A useful study by the Canadian Judicial Council on the subject is *Some Guidelines on the Use of Contempt Powers*, 1996. It makes the point that contempt of court powers do not exist for the protection of the personal dignity, honour or personal reputation of judges, but only for courts and for judges as judges (p 3).

⁵¹ *Code of Conduct for Magistrates* # 9.

As a general rule judges should be slow to participate in public debate for, although they may express themselves in temperate language, others may not be so restrained.

34. A judge should not disclose or use, for any purpose unrelated to judicial duties, non-public information acquired in a judicial capacity.⁵²

Code of Conduct for Magistrates # 10: "A magistrate shall not divulge any confidential information which has come to his/her knowledge in his/her official capacity, except in so far as it is necessary in the execution of his/her duties." The rule applies at all times and for all time.

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Copies of most of the material referred to in this document can be obtained from The Librarian, Supreme Court of Appeal, PO Box 258, Bloemfontein 9300. Email: suprappeallibbfm@intekom.co.za . Fax 051-4478098. Tel 051-4472631. (Attention Mrs Street.)

⁵² ABA Model Code for Judicial Conduct # 3B(11). A similar rule applies in Austria.

APPENDIX 5

SUGGESTED SELECTION CRITERIA CHECKLIST – CHARACTERISTICS OF A GOOD JUDGE

1 AGE

2 BACKGROUND - experience - in court practice

- 2.1 Peer Evaluation
- 2.2 Submission of quality judgements

3 CAPABILITIES

- 3.1 ability to write
- 3.2 efficient
- 3.3 whether able to meet the demands of the position
- 3.4 ability to deal with complex matters

4 HEALTH

5 PERSONAL LIFE

- 5.1 soeial responsibility
- 5.2 what done in the past
- 5.3 track record

6 PERSONALITY

- 6.1 Ethical- know how to behave
 - 6.1.1 integrity
 - 6.1.2 spirit of aaccountability - self-diseipline
 - 6.1.3 trustworthy
- 6.2 Work ethic
 - 6.2.1 hard working
 - 6.2.2 the call of duty
- 6.3 Maturity
 - 6.3.1 right temperament.
 - 6.3.2 level of sensitivity
 - 6.3.3 humility
 - 6.3.4 not cause particular problems
 - 6.3.5 patience

-
- 6.3.6 tolerance
 - 6.3.7 think about problems
 - 6.3.8 willingness to work at problems

6.4 Mindset

- 6.4.1 Autonomous decision-making
- 6.4.2 Freedom of thought
- 6.4.3 Impartial
- 6.4.4 Independent
- 6.4.5 Insight
- 6.4.6 Know realities of life
- 6.4.7 Think logically
- 6.4.8 Be objective
- 6.4.9 Be open-minded
- 6.4.10 Views on certain matters
- 6.4.11 Whether is rational in his/her thoughts

7 MINIMUM EDUCATION AND TRAINING REQUIRED

- 7.1 Postgraduate LLB
- 7.2 15-20 Years litigation experienced either practised at the Bar or Side Bar
- 7.3 Received training to be an Acting Judge
- 7.4 Sat as an Acting Judge

APPENDIX 6

TYPES OF TRAINING NEEDED REQUIRED

- 1 Orientation**
- 2 On the job training**
 - 2.1 Mentorship**
 - 2.2 Discussing matters with colleagues informally**
 - 2.3 Sharing of experiences informally**
- 3 Off the job training**
 - 3.1 Colloquiums**
 - 3.2 Seminars - courses on new pieces of legislation & keep abreast with developments of the law**
 - 3.2.1 Sharpening of skills to ensure judicial process**
 - 3.2.2 Refresher training**

RECOMMENDATIONS TO REMEDY FLAWS SO AS TO PROVIDE FOR EFFECTIVE TRAINING

- 1 Identify what the real training needs are – conduct a needs analysis**
- 2 Identify who has received training and what training they have received**
- 3 Take cognisance of feedback to improve quality of training**
- 4 Computerisation of:**
 - 4.1 Training needs identified**
 - 4.2 Training courses offered**
 - 4.3 Record of who has attended training and what training courses**
 - 4.4 Record of who has not received training or been overlooked**
 - 4.5 Feedback received from the trainees about training received and suggestions made**



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7 MARCH 2008

MRS. AJC WOMACK (841840251)
GRADUATE SCHOOL OF BUSINESS

Dear Mrs. Womack

ETHICAL CLEARANCE APPROVAL NUMBER: HSS/0731/07M

I wish to confirm that ethical clearance has been granted for the following project:

“The impact and the effect, of the management and control of Judges by the executive on the Independence of the Judiciary”

PLEASE NOTE: Research data should be securely stored in the school/department for a period of 5 years

Yours faithfully

Phumelele Ximba

MS. PHUMELELE XIMBA

cc: Supervisor (Dr. B Juma)
cc: Prof. W Geach
cc: Christel Haddon