

JUDICIAL INDEPENDENCE IN SOUTH AFRICA: A CONSTITUTIONAL PERSPECTIVE

by

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DECLARATION

I, Lunga Khanya Siyo, registration number 209509051, hereby declare that the dissertation entitled “**Judicial Independence in South Africa: A Constitutional Perspective**” is the result of my own unaided research and has not been previously submitted in part or in full for any other degree or to any other University.

Signature:

Date:

DEDICATION

This dissertation is dedicated to my parents, Milile Mpambaniso and Ncedeka Siyo.

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I am indebted to a number of people who have directly and indirectly assisted me in writing this dissertation. I'd like to thank my parents, who taught me that there is no substitution for hard work and dedication. I thank them for their wisdom, guidance and support. I am nothing without them.

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SUMMARY

This dissertation seeks to explore the judiciary as an independent and separate arm of government. In doing so, this dissertation attempts to provide a holistic analysis of the constitutional and legislative framework that has been established to protect both individual and institutional independence of the judiciary in South Africa. The question that will be asked is whether such mechanisms are consistent with the section 165 of the Constitution. Central to this analysis is whether the system of court administration that was inherited from apartheid is appropriate for the purposes that courts now have to perform under South Africa's constitutional democracy.

Chapter one lays the foundation by providing an introduction to the topic under discussion. In doing so, this chapter also provides the research question, literature review, and an explanation of the research methodology. Lastly, this chapter attempts to trace the historical foundation of the principle of judicial independence. It is concluded that judicial independence is linked with the development of the rule of law and seeks to counter unfettered power.

In an attempt to provide a conceptual definition for judicial independence, chapter two draws from international law instruments. This definition focuses on the distinction between independence and impartiality; individual and institutional independence. It is then concluded that judicial independence is vital for good governance, administration, accountability and the protection of the public from the arbitrary and abusive exercise of power by the state.

Chapter three focuses on the independence of judges in South Africa, in other words, individual independence. This chapter contains an analysis of legislative mechanisms adopted in South Africa to protect the judges from improper influence in their adjudicatory tasks. Further, this chapter also analyses jurisprudence relating to impartiality and bias. It is concluded that the constitutional and legislative framework adopted in South Africa sufficiently insulates judges from improper influence. As far as impartiality is concerned, it is concluded that in terms of South African jurisprudence, the presumption is that judges are impartial. The burden of proof falls on the party alleging bias.

Chapter four focuses on court administration. This chapter gives an overview of the structure of courts and the current system of court administration in South Africa. Further, this section discusses how the doctrine of separation of powers relates to court administration. This section also discusses reforms to the current system of court administration that have been proposed by the Department of Justice and Constitutional Development. It is concluded that the current system of court administration is inconsistent with the Constitution and the doctrine of separation of powers as it permits the executive to encroach upon the independent functioning of the courts.

Chapter five seeks to discuss some of the challenges that threaten judicial independence in South Africa. This chapter begins by providing a cursory overview of some of the main incidents which have threatened the independence of South Africa's judiciary. The main focus of this chapter is the alleged attempt by the Cape Judge President Hlophe to improperly influence judges of the Constitutional court in their adjudicatory tasks. Moreover, this chapter discusses the manner in which the complaint against Judge Hlophe was dealt with by the Judicial Service Commission. It is concluded that in dismissing the complaint against Judge Hlophe without a thorough examination, the Judicial Service Commission abdicated its constitutional duty. It is also concluded that the unresolved complaint against Judge Hlophe casts a shadow of doubt over the impartiality and independent functioning of the judiciary in South Africa.

The main conclusion in chapter six is that the protection of independence in South Africa suffers from contradictory elements which leave the judiciary under executive control, which constitutes an insidious erosion of the doctrine of separation of powers. Therefore the status of the judiciary as an equal arm of government in South Africa is weak. Thus, while South Africa's judiciary is impartial and contains strong elements of individual independence, it is not independent. The essence of the recommendations relate to the functioning of the Judicial Service Commission, the application of section 175 (2) of the Constitution, the tenure of judges, the administration of courts, the complaint against Judge Hlophe and the Superior Courts

Bill.

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CHAPTER 1: INTRODUCTION AND BACKGROUND

The maxim *ubi ius ubi remedium* expresses an important principle of law. It means that “where there is a right there is a remedy.” In other words, “the existence of a legal rule implies the existence of an authority with the power to grant a remedy if that rule is infringed. A legal rule will be deficient if there is no remedy for enforcing it and if no sanction attaches to a breach of that rule.” It is therefore of fundamental importance to any constitutional system that it makes provision for an institution that will decide whether a legal rule has been broken, and if so, what remedy to provide or what sanction to impose. It is required that such an institution is independent and is not party to the dispute. In South Africa, the principal institution tasked with this responsibility is the judiciary.¹ In this regard, the term judiciary shall be used interchangeably to mean judges, magistrates and the court support staff.

Although much has been written on this topic, judicial independence remains an elusive principle. The Constitution of South Africa² sets the foundation for this by including constitutional supremacy and the “rule of law.”³ The “independence of the judiciary is a constitutional principle widely regarded as an essential component of any democratic system of government, consistently with this, the Constitution vests the judicial power in the courts and declares that they are independent and subject only to the Constitution and the law.”⁴

South Africa’s constitutional democracy embraces the principle of separation of powers, where the power is divided between the three arms of government, namely the executive, legislature and the judiciary. It is often said that the judiciary is the weakest arm of government as, unlike parliament and the executive, the judiciary lacks the power of the purse and of the sword.⁵ Thus, the vigorous protection of its independence from interference

¹ I Currie and J de Waal *The New Constitutional and Administrative Law* (2001) 268.

² Section 1 (c) of Constitution of the Republic of South Africa.

³ R.E Michener (ed) *AV Dicey: Introduction to the Study of the Law of the Constitution* (1982) Dicey’s defines the “rule of law” to mean “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government”

⁴ Ibid Section 165 (1) and A Chaskalson “Judicial independence and Sustaining the Confidence of the Public in the Judiciary” (July 2011 Speech) available at http://www.justice.gov.za/access-to-justice-conference-2011/20110708_ajc_chaskalson.pdf accessed on 5 May 2012

⁵ A Hamilton, *Federalist* No. 78 in *Hamilton, Madison & Jay, The Federalist Papers* (1968) 465-466. Available at <http://www.foundingfathers.info/federalistpapers/fedindex.htm> accessed on 4 June 2012

is of utmost importance. The purpose of this protection “is to ensure fairness and impartiality in the judicial process and to that end to enable judges to discharge their duties without fear or favour.”⁶ Flowing from this, it is required that the judiciary is both individually and institutionally independent from any form of interference, regardless of whether this interference stems from the government, private actors or even from within the judiciary itself. Moreover, judicial independence doesn’t only exist for the protection of judges, but also for the protection the public from arbitrary executive action.⁷

1.1 Research Question

This dissertation seeks to explore the judiciary as an independent and separate arm of government. There are two broad questions to be responded to. The first question is whether legal mechanisms adequately protect judicial independence in South Africa? The second question is what are the current threats to judicial independence in South Africa? In responding to these two broad questions, the following preliminary questions ought to be addressed:

a) What is the history of the judicial independence? In order to develop a deeper and holistic understanding of issues to be discussed in subsequent sections, this section will attempt to analyse the historical context and the material conditions that gave rise to the principle of judicial independence.

b) What is judicial independence? The definition of judicial independence shall be viewed through the prism of international law. In defining the concept regard will be given to international legal instruments and foreign cases to provide a practical understanding. This definition will concentrate on the distinction between independence and impartiality; individual and institutional independence. Having addressed the issues of individual and institutional independence, and the distinction between impartiality and independence, this section will be concluded with an attempt to respond to the following two questions:

⁶ A Chaskalson (note 4 above)

⁷ Z Motale “Independence of the Judiciary, Prospects and Limitations of Judicial Review In terms of the United States Model in a New South African Order: Towards an alternative Judicial Structure” *Albany Law Review* Vol. 55 367

i) Independent from who, and

ii) Independence for what purpose.

c) This chapter attempts to provide a holistic analysis of the legal measures that have been taken in order to protect the independence of the judiciary in South Africa. The question that will be asked is whether such mechanisms are consistent with section 165 of the Constitution which establishes the independence of the judiciary. Thus, in doing so, there will be a discussion on the following:

i) The constitutional and legislative framework protecting judicial independence, covering both individual and institutional independence;

ii) How the doctrine of separation of powers as entrenched in the South African Constitution relates to judicial independence. A question that also needs to be addressed is whether the system of court administration that was inherited from the apartheid state is appropriate for the functions that courts now have to perform under South Africa's constitutional dispensation.

d) What are the current threats to judicial independence in South Africa? The issue of judicial independence in South Africa has been the subject of intense debate in recent years. This section will address some of the major threats to judicial independence. Consequently, this section will address the following issue:

i) The failure of the Judicial Service Commission, a constitutionally mandated body, to decisively dispose of the "Hlophe Saga"⁸.

e) Prospects and recommendations. The section will conclude with a discussion on measures that may be taken in order to strengthen judicial independence in South Africa.

⁸ The term "Hlophe Saga" is a generic term used by the author to describe a series of events which begin with the Constitutional Court Justices claiming that the Cape Judge President John Hlophe tried to improperly influence two Justices, namely Justice Nkabinde and Justice Jafta to rule in favour of Jacob Zuma (now the President of South Africa) who was facing corruption charges at the time.

1.2 Literature Review

The materials that were used in this dissertation consist of a combination between primary and secondary sources of law. The primary sources include international, regional and national legal instruments; judicial decisions by national, regional and international courts; resolutions, statements, reports and observations of the United Nations and regional bodies. The secondary sources that were consulted, examined and analysed include books, journal articles, papers and reports presented at seminars and workshops, newspapers and periodicals, commission reports, press releases and internet sources. Reviewing all the literature that has been written on the judiciary and its independence is almost impossible. Having said that, what follows is a cursory view of some of the most important literature dealing with the top.

Francis Hargrave gives an historical account of one of the oldest and most courageous defences of judicial independence in the *Case of Commendams*⁹. The case essentially relates to King James I right to grant commendams. It illustrates the relentless and fearless defence of the independence of the judiciary in the face of intrusive behaviour by the monarch. This case also highlights how easily judicial independence may be eroded if it is not jealously guarded, not only by the legal framework, but also by the judges themselves. Before judgment was handed down in the matter, King James I wanted to arrange a meeting with the judges who presided over the matter to discuss the case. Sir Edward Coke, who was the Chief Justice, doubted the legality of this request and therefore refused to consult with the King.¹⁰ Sir Edward Coke's valiant efforts in defending the judiciary raised the King's ire and he was subsequently unceremoniously removed from his positions. This case sets a precedent for what would become a norm in centuries to come.

In 1982, Justice G.G Hoexter, chaired the "*Hoexter Commission of Inquiry Into The Structure and Function of the Courts.*"¹¹ The terms of reference of the inquiry stated that the Commission ought to inquire into the structure and the functioning of courts of law in the Republic of South Africa. The commission made telling findings regarding the structuring of the courts at the time. However, it must be remembered that these findings were made before the advent of the Constitution and the establishment of judicial independence as a

⁹ F Hargrave "Consisting Tracts Relative to the Law and Constitution of England" (1791)

¹⁰ See also: <http://faculty.history.wisc.edu/sommerville/367/367-044.htm> accessed on 10 November.

¹¹ Part A Commission of Inquiry into *The Structure and Functioning of Courts* Vol 1 (1982)

constitutional principle. These findings may be inconsistent with the current existing principles. The findings do however provide a good base for the analysis of the South African court structure.

Hugh Corder analyses the impact the Constitution has had on the functioning of the courts. In doing so, he juxtaposes the role of the courts under the old and the new dispensation. The article also discusses the principal features of the judiciary under the Constitution and finds that there has been a departure from the old system. In doing so, the article also identifies inherited weaknesses such as court administration. Moreover, Corder goes further to discuss ways in which public confidence in the courts may be generated.¹²

The book titled “*The Judicial Institution in Southern Africa: A Comparative Study of Common Law Jurisdictions*” (2006) accounts for a study conducted by the Democratic Governance and Rights Unit. The focus of the study is to critically assess the protection of judicial independence in Southern African, with reference to, amongst others, constitutional and statutory provisions affecting the judiciary. The study also seeks to analyse the procedures adopted in the appointment of judges, their security of tenure and conditions of employment. The study provides insight into the functioning of the judiciary in various states and also identifies strengths, weaknesses, and challenges faced by each state.

1.3 Research Methodology

Due to the theoretical orientation of the topic, the methodology employed has been primarily through library research. No empirical studies, surveys, questionnaires or interviews were used. The research methodology included an analysis of legislative and other measures taken to protect the independence and impartiality of the courts. In the main, this was adopted to point out the inconsistencies between the existing legislation and proposed legislation with the Constitution. Further, this was also intended to suggest measures which can be adopted in order to strengthen the independence of the judiciary. International legal instruments, basic principles and judgments from foreign jurisdictions are also consulted in order identify accepted international norms and standards relating to the independence of the judiciary.

¹² H Corder “Judicial Authority in a Changing South Africa “ (2006) *SLS*

1.4 History of Judicial Independence

Historically, “the independence of the judiciary is linked with the development of the rule of law.”¹³ This section will consider the material conditions that informed the development of the principle of judicial independence.

One of the oldest traces of judicial independence were found in England in the latter part of the seventeenth century.¹⁴ A discussion about the historical development of judicial independence would be incomplete without making mention of Sir Edward Coke, or Lord Coke (hereinafter Lord Coke) as he was known. The famous *Case of Commendams*¹⁵ (1616), related to the Kings authority to grant ecclesiastical office. During the proceedings of the matter but before judgment was handed down, King James I summoned the judges who presided over the matter to his palace. The King was furious as the judges had defied his request for a stay proceedings of the matter. The reason given by the judges for their refusal was captured in a letter which was penned by the Chief Justice, Lord Coke. Essentially, the judges stated that they couldn’t accede to the Kings request because their “oaths of office compelled them to go ahead with the trial.” When confronted by the King, in fear for their lives, all the judges, with the exception of Lord Coke, reneged on the sentiment they had previously expressed in the letter. They also confessed that the “form” of their letter had been wrong. Throughout this time, Lord Coke remained unshaken and true to his convictions. Addressing the King, he said “the stay required by your Majesty was a delay of justice and therefore contrary to law and the Judges’ oath.”“Angrily, the King then asked the judges what they would if the King ever again made a request for stay in proceedings. All the judges were unanimous in their response, they all replied “as his majesty commanded”. When the King posed this question to Lord Coke, he responded by saying “I would do that should be fit for a

¹³ R.R. Mzikamanda “The Place of the Independence of the Judiciary and the Rule of Law in Democratic Sub-Saharan Africa” 1 available at http://www.saifac.org.za/docs/2007/mzikamanda_paper.pdf accessed on 4 May 2012

¹⁴ J McClellan *Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government* (2000) 503-504 available at <http://oll.libertyfund.org/title/679/68542> accessed 4 May 2012

¹⁵ A commendam is a royal decree that allows an ecclesiastical officeholder, such as a Bishop, to be appointed to another ecclesiastical office

judge to do.” Due to his unsatisfactory response, Lord Coke was subsequently removed from office. However, in time, Lord Coke would be vindicated.¹⁶

The French jurist Montesquieu, following attempts by Aristotle¹⁷ and John Locke¹⁸, provided a theoretical framework in his “doctrine of separation of powers.”¹⁹ He was concerned with the preservation of political liberty. He recognized that power has a tendency to be abused; therefore, government should be checked internally by the creation of autonomous centres of power. He conceived that there are three main classes of government functions: the “legislative, the executive, and the judicial.” Therefore, there should be three main organs of government: “the legislature, the executive, and the judiciary, each of which performs a specific function.” The role of the legislature is to enact laws, of the executive to ensure security and make provisions against invasion²⁰, and of the judiciary simply to pass judgment upon disputes. Furthermore, Montesquieu was also of the view “that the concentration of power in one organ of state would threaten individual liberty.” On the role of the judiciary, Montesquieu concluded that: “There is no liberty, if the power to judge is not separated from the legislative and executive powers. Where the judicial power joined to the legislative, the life and liberty of citizens would be subject to arbitrary power. For the judge would then be the legislator. Where the judicial power joined to the executive, the judge would acquire enough strength to become an oppressor.”²¹

Therefore, historically, it can be said that judicial independence is a product of the tyranny of absolutism and seeks to counter unfettered power.²² Thus, what can be gleaned from the historical development of the principle of judicial independence is that, from a theoretical

¹⁶ F Hargrave (note 9 above) 13-15

¹⁷ Aristotle, *Politics* XXX Book IV (B. Jowett trans. 1955). Aristotle expressed ideas on the distinct functions of a state, although he did not suggest that those functions should be administered by different bodies. As quoted in V Yash “The Independence of the Judiciary: A Third World Perspective” (1992) *Third World Legal Studies*: Vol. 11, Article 6. 127 Available at: <http://scholar.valpo.edu/twls/vol11/iss1/6>

¹⁸ Locke *Two Treatises of Government* 382-92 (P. Laslett ed. 1970). Locke recognised three functions of a government, namely legislative, executive and federative. The federative function according to him was to conduct foreign affairs. The separation of the executive and legislative powers from the judicial is not found in Locke. As quoted in Y Vyas Ibid 127

¹⁹ M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) As quoted in Y Vyas Ibid 127

²⁰ Montesquieu had not defined the executive power as that of carrying out the laws.

²¹ Y Vyas (note 17 above) 127

²² J Diescho “The paradigm of an independent judiciary: Its history, implications and limitations in Africa” 6 available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/diescho.pdf accessed on 27 November 2012

perspective, “judicial independence is related to dispute resolution by an objective third party who is not involved in the dispute;” in other words, an “independent third party who is designated to settle disputes after considering the facts and their relation to the law.”²³ This type of independence has been referred to as “party detachment,” “or the idea that a dispute should be decided by a judge who has no relation to the litigants and no direct interest in the outcome of the case.”²⁴ Theorists have noted that this ideal is indispensable and is at the root of the “social logic” of courts.²⁵ Judicial independence as adjudication by a “neutral third” is deemed important for two primary reasons. Ideally, judges should not “have interest in the issues of the case and no bias toward either of the parties. All citizens - rich, poor, strong, and weak - are put on an equal footing before the law and are able to protect their rights and security against encroachment by others.”²⁶ Independent judges, after all, are supposed to decide cases based upon the objective principles of the law, and not the social or political standing of the disputants. Thus, dominant members of the populace are not able to manipulate the law to serve their own ends, as any aggrieved citizen can obtain relief by presenting his or her case to an independent judge.²⁷

Secondly, judicial independence becomes even more important when the government is amongst the litigants in a particular matter. If the enforcement of this principle is to be entrusted to the courts, then it is absolutely essential that judges not be biased in favour of the government. “The rule of law is not secure when the body for its enforcement is composed of judges who either fear challenging the government or are already predisposed toward declaring its deeds legal.”²⁸

In its earliest conception, the principle of judicial independence simply referred to impartial adjudication. However, with the emergence of the modern state and democratisation, the principle was developed further to also include institutional independence as an arm of government. This sought to ensure that the judiciary is insulated from state interference and

²³ M Shapiro, “Courts: A Comparative and Political Analysis” (1981) 1-8. As quoted in C.M. Larkins “Judicial Independence and Democratization: A Theoretical and Conceptual Analysis” *The American Journal of Comparative Law*, Vol. 44, No. 4 (1996) 608

²⁴ Fiss, ‘The Limits of Judicial Independence’ 25 *U. Miami Inter-Am. L. Rev.* 58 (1993). As quoted in C.M. Larkins (note 23 above) 608

²⁵ *Ibid*

²⁶ *Ibid*

²⁷ *Ibid*

²⁸ *Ibid*

the interference of other external sources. Under this dispensation, judicial independence also sought to counter unfettered legislative and executive power. Thus, it will become apparent that the principle of judicial independence has developed quite significantly over time.

CHAPTER 2: INTERNATIONAL LAW PERSPECTIVES: JUDICIAL INDEPENDENCE DEFINED

Although the principle of judicial independence has received wide coverage by academics and jurists alike, it remains a notoriously difficult concept to define. Conceptually, judicial independence has been defined in various ways by legal theorists and philosophers. Admittedly, the principle of judicial independence is vast and complicated; this in itself creates enormous definitional difficulties. Thus, what follows is an attempt to define this seemingly illusive principle. In doing so, regard shall be given to international legal instruments and foreign cases where necessary. This definition shall concentrate on the distinction between independence and impartiality; individual and institutional independence. DS Law is of the view that any comprehensive and coherent definition of judicial independence must address the following questions: Independence from whom independence for what purpose?²⁹ Therefore, having addressed the issues of individual and institutional independence, and the distinction between impartiality and independence, this section shall be concluded with an attempt to respond to the questions identified above.

Black's Law dictionary defines the word "independence" as

"the state or condition of being free from dependence, subjection, or control. Political independence is the attribute of a nation or state which is entirely autonomous, and not subject to the government, control, or dictation of any exterior power."³⁰

Moreover, Black's Law dictionary defines the word "judiciary" as

"that branch of government vested with the judicial power; the system of court in a country; that branch of government which is intended to interpret, construe and apply the law."³¹

Therefore, from this strict definition, judicial independence may be defined as that branch of

²⁹ D.S Law "Judicial Independence" *Revista Forumul Judecatorilor* (2011) 39

³⁰ *Black's Law Dictionary*, West Publishing Co. 693 (1979)

³¹ *Ibid* 762

government vested with judicial power to autonomously, without being subjected to control or dictation by internal or external forces, interpret, construe and apply the law. Verner briefly defines judicial independence as

“the ability to decide cases on the basis of established law and the merits of the case, without substantial interference from other political or governmental agents.”³²

Rosenn, has also ventured a definition; he opines that judicial independence is

“the degree to which judges actually decide cases in accordance with their own determinations of the evidence, the law and justice, free from the coercion, blandishments, interference, or threats from governmental authorities or private citizens.”³³

With respect, it is submitted that these two definitions are rather narrow as they heavily concentrate on the individual aspect of judicial independence, ignoring the institutional aspects of the definition. Conversely, Ajibola J of Nigeria is of the view that judicial independence broadly refers to

“the performance by the judiciary of their judicial functions in an environment where they are free from direction, control or dictation, be it from any quarters.”³⁴

The former judge of the Supreme Court of Nigeria, Eso, offers a slightly more elaborate definition: He submits that

“The concept of an independent judiciary implies, first, that the powers exercised by the court in the adjudication of disputes is independent of legislative and executive power, so as to make it usurpation to attempt to exercise it either directly by legislation, as by a bill of attainder, or by vesting any part of it in a body which is not a court; secondly, that the personnel of the

³² J Verner, “The Independence of Supreme Courts in Latin America: A Review of the Literature” 16 *Journal of Latin American Studies* (1984) 463.

³³ Rosenn, *The Protection of Judicial Independence in Latin America* (1987) 9

³⁴ B. Ajibola D. Van Zyl *The Judiciary in Africa* (1998) 38 as quote in Letsebe Piet Lesirela *Providing For the Independence of the Judiciary in Africa: A Quest For the Protection of Human Rights* (LLM Dissertation, Univeristy of Pretoria, 2003) 27

court are independent of the legislature and the executive as regards their appointment, removal and other conditions of service.”³⁵

The common thread that runs through these definitions is an acknowledgment that judicial independence exists at two levels, firstly, at an individual level, that is the ability of a judge to impartially and independently apply his or her mind to a matter without undue influence. The second level is at an institutional level, that is, the ability of the judiciary to control the administration and appointment of court staff.

The principle of judicial independence is a fundamental element of democracy. There are hardly any states in the world that don’t cherish the ideal of a judiciary that is independent from other organs of state. As a result, judicial independence features quite prominently in many international legal instruments. Chief amongst these instruments is the Universal Declaration of Human Rights³⁶ (UDHR). Section 10 of the UDHR states that

“everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

However, the UDHR does not oblige compliance. Section 14 of the International Convention on Civil and Political Rights³⁷ (ICCPR) states

“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

Moreover, article 6(1) of the European Convention on Human Rights³⁸ (ECHR) provides that

³⁵ Esso “*Judicial Independence in the Post-Colonial Era*” as quoted *ibid*

³⁶ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948 available at <http://www.unhcr.org/refworld/docid/3ae6b3712c.html> accessed 2 August 2012

³⁷ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966 available at <http://www2.ohchr.org/english/law/ccpr.htm> accessed on 7 August 2012

³⁸ Council of Europe, The European Convention on Human Rights, 4 November 1950 available at <http://www.hri.org/docs/ECHR50.html> accessed on 7 August 2012

“In the determination of his civil rights and his obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Furthermore, under the Inter-American system, article 25(1) the American Convention on Human Rights³⁹ (ACHR) clearly provides that

“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”

Similarly, Article 26 of the African Charter⁴⁰ declares that

“State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.”

Judicial independence also finds expression in the Arab states. For example, article 65 of the Egyptian Constitution⁴¹ states:

“the independence and immunity of the judiciary are two basic guarantees to safeguard rights and liberties.”

Further, article 165 states that “the judiciary is independent...” Moreover, article 166 further states that

³⁹ Inter-American Specialized Conference on Human Rights, American Convention on Human Rights, 22 November 1969 available at www.hrcr.org/docs/American_Convention/oashr.html accessed on 7 August 2012

⁴⁰ OAU, African Charter on Human and Peoples Rights, Adopted 27 June 1981 and entered into force 21 October 1986 available at http://www.africaunion.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf accessed on 7 August 2012.

⁴¹ The Constitution of The Arab Republic of Egypt 1971 (as Amended to 2007)

“judges are independent. In their performance, they are subject to no authority but that of the law. No authority can interfere in cases or judicial affairs.”

Further afield, article 97 of Jordan’s Constitution⁴² provides that

“Judges are independent, and in the exercise of their judicial functions they are subject to no authority other than that of the law.”

Another Arab state that recognises judicial independence is Kuwait. Article 163 of Kuwait’s Constitution⁴³ states

“In administering justice, judges are not subject to any authority. No interference whatsoever is allowed with the conduct of justice. The law shall guarantee the independence of the judiciary and state the guarantees and provisions relating to judges and the conditions of their removability.”

Article 82 of the Moroccan Constitution is simple and direct:

“The judiciary shall be independent from the legislative and executive branches.”⁴⁴

The doctrine of judicial independence has also received attention in Asia. The Asia-Pacific Region has done so by its adoption of the Beijing Statement of Principles of the Independence of the Judiciary⁴⁵ (The Beijing Principles). “The Beijing Principles reflect an agreement between the Chief Justices from a range of countries throughout the Asia-Pacific Region on the minimum standards necessary to secure judicial independence in their respective countries.”⁴⁶ Needless to say, judicial independence features quite prominently in this document. Therefore, it becomes apparent that the principle of judicial independence has received universal acceptance. This is evidenced by the fact that the principle is recognised

⁴² The Constitution of The Hashemite Kingdom of Jordan 1952 (as Amended 1984)

⁴³ Kuwaiti Constitution 1963

⁴⁴ AO Sherif and NJ Brown “Judicial Independence in the Arab World: A study presented to the Program of Arab Governance of the United Nations Development Program” (2002) 7

⁴⁵ Beijing Statement of Principles of the Independence of the Judiciary 6th Biennial Conferences of Chief Justices of Asia and the Pacific, held in Beijing in 1995 and was signed by (19) Chief Justices of the region. Available at <http://lawasia.asn.au/beijing-statement.htm> accessed on 6 August 2012

⁴⁶ DK Malcolm “The independence of the judiciary in the Asia-Pacific region.” Paper presented at the 10th Conference of the Chief Justices of Asia and the Pacific. Tokyo, Japan, 31 August - 5 September, 2003. Available at http://researchonline.nd.edu.au/law_conference/5/ accessed on 20 August 2012

not only in United Nations⁴⁷ (UN) a legal instrument, such as the UDHR and the ICCPR, but it's also recognised in regional legal instruments. Moreover, South Africa is signatory to the UDHR⁴⁸, ICCPR⁴⁹ and the African Charter on Human and Peoples Rights⁵⁰; it is therefore bound by the provisions of the aforementioned international legal instruments.

Lastly, the case of *Canada v Beauregard*⁵¹ appropriately summarises the essence of judicial independence and its meaning. The court concluded that:

“the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider, be it government, pressure group, individual or even another judge should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.”⁵²

The court went on to further state that:

“the ability of individual judges to make decisions on concrete cases free from external interference or influence continues... to be an important and necessary component of the principle.”⁵³

At this juncture, it is imperative to turn to two questions asked at the beginning of this chapter which are firstly, independence from whom, and secondly, independence for what purpose? In addressing the first question, as it has previously been stated, the doctrine of separation of powers dictates that government ought to be divided into three arms; the executive, legislature and the judiciary. All three arms of government ought to function independently of one another in order to ensure that power isn't concentrated in one arm of government and to

⁴⁷ The United Nations is an international organization founded in 1945 after the Second World War by 51 countries committed to maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights. Available at <http://www.un.org/en/aboutun/index.shtml>

⁴⁸ <http://www.ohchr.org/en/udhr/pages/language.aspx?langid=eng> accessed on 7 August 2012

⁴⁹ http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en accessed on 7 August 2012

⁵⁰ <http://www.africaunion.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf> accessed on 7 August 2012

⁵¹ (1986) 30 DLR (4th)

⁵² Ibid 481

⁵³ Ibid 491

guard against abuse. Moreover, the judiciary is entrusted with adjudicatory responsibilities as an objective third party in a dispute of a legal nature. Therefore, independence is to ensure that the judiciary is free from interference and undue influence from other arms of government, namely the executive and the legislature, and any other private parties who may also seek to unduly influence the judiciary in its adjudication function. Over and above this, independence seeks to guard against internal interference and undue influence. In other words, it seeks to ensure that all matters that come before a particular judge are determined independently, on their merits. Therefore, it becomes clear that the judiciary ought to be independent of the executive, the legislature, individual entities and from internal influence.

Secondly, what is the purpose of independence? In his address at the The Fifth Young Leaders' Symposium of the General Council of the Bar of South Africa⁵⁴, Justice Edwin Cameron, while quoting his then colleague, Justice Nugent, stated:

“the independence of the judiciary is not something judges insist on selfishly for themselves. It is not a perk or a benefit of service, like their cars or their pensions. It is a political principle that exists for the benefit of good governance in any complex modern state. In this sense judges are bound by the principle that they are independent as much as anyone else is: it is the profoundest tenet by which they are obliged to live their professional lives.”⁵⁵

In addition to this, in the United State case of *Segars-Andrews v. Judicial Merit Selection Comm'n*⁵⁶, the court held that

“Judicial independence is not for the protection of judges, although it is often thought of in that context today. The principle of judicial independence is designed to protect our system of justice and the rule of law, and thus maintain public trust and confidence in the courts. With judicial independence, the winners are everyone.”⁵⁷

Moreover, the court in *Canada v Beaugard*⁵⁸ concluded that:

⁵⁴ Available at <http://www.sabar.co.za/law-journals/2010/april/2010-april-vol023-no1-pp04-05.pdf> accessed on 5 June 2012

⁵⁵ Ibid 2

⁵⁶ 387 S.C. 109, 691 S.E.2d 453 (S.C. 2010)

⁵⁷ 387 S.C. 109, 691 S.E.2d 453 (S.C. 2010) 11

⁵⁸ (note 51 above)

“Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial.”⁵⁹

Therefore, it is submitted that judicial independence may be defined as the ability of a judge to make a decision without undue influence and interference from internal and external forces. Moreover, the judges must have security of tenure and financial security in order to guard against bribery and any such interference and corrupt conduct. Further, the judiciary must manage its own administrative functions and activities. In essence, a judiciary that does not have individual and institutional independence falls short of the core requirements of judicial independence.

2.1 Independence and Impartiality

The Bangalore Principles on Judicial Conduct⁶⁰ stipulates “that the concepts of independence and impartiality are closely related, yet separate and distinct.” “Impartiality” refers to “a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case.” The word “impartial connotes absence of bias, actual or perceived. The word independence reflects or embodies the traditional constitutional value of independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees.”⁶¹

The seminal Canadian Supreme Court of Appeal case of *Valiente v. The Queen*⁶², clearly distinguishes between the notion of independence and impartiality. It was held that

⁵⁹ (note 51 above) 172-3

⁶⁰ Commentary on The Bangalore Principles of Judicial Conduct, United Nations Office on Drugs and Crime, September 2007 available at http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf

⁶¹ *Ibid* Value 1 (24)

⁶² *Valente v. The Queen* 673 (1985) 2.S.C.R. as quoted in “Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers”, Chapter 4 <http://www.ohchr.org/Documents/Publications/training9Titleen.pdf>, 119

“independence reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees. Judicial independence involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government”.

The UN Human Rights Committee held “impartiality implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”.⁶³ Therefore, it is submitted that impartiality addresses the subjective state of mind of the judge, that is, the judge must be free from all forms of prejudice and bias in the adjudication process. Independence on the other hand addresses the issue of institutional buffers that seek to ensure the protection of the judiciary from executive, legislative and any other form of interference from internal and external parties.

2.2 Institutional Independence

The issue of institutional independence is structural and deals purely with operational matters. Principle 1 of the “Basic Principles on the Independence of the Judiciary”⁶⁴ requires governments to ensure the independence of the judiciary through the implementation of the principles in the domestic justice systems Moreover, Principle 7 of the Basic Principles states that

“It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.”⁶⁵

⁶³ Communication No. 387/1989, *Arvo O. Karttunen v. Finland* (Views adopted on 23 October 1992), in UN doc. GAOR, A/48/40 (vol. II), 120, para. 7.2.

⁶⁴ UN Basic Principles on The Independence of The Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 available at <http://www2.ohchr.org/english/law/indjudiciary.htm> accessed on 3 April 2012

⁶⁵ UN Basic Principles on the Independence of the Judiciary (note 54 above)

Thus, when read together, these two sections not only compel governments to ensure the independence of the judiciary through implementation in domestic legal systems, they also impose the additional duty of ensuring adequate financial resources are provided in order to support the functioning of these institutions.

The court in the case of *Valente v The Queen*⁶⁶ was of the view that “institutional independence is concerned with defining the relationships between the judiciary and others, particularly the other branches of government, so as to assure both the reality and the appearance of independence. If the court over which a judge presides is not independent of the other branches of government in what is essential to its functions, the judge cannot be said to be independent.”⁶⁷ This view was echoed in the UN Human Rights Committee case of *Olo Bahamonde v Equatorial Guinea*⁶⁸ where it was observed that failure to separate the functions of the judiciary from those of the executive, and the executive control of the judiciary, all fell foul of the spirit of article 14(1) of the ICCPR.⁶⁹ It becomes evident from these pronouncements that in order to secure true judicial independence, it is imperative that the judiciary is institutionally independent. This ideal is best achieved through constitutional and legislative measures.

2.2.1 Administrative Independence

Principle 1.5 of the Basic Principles on the Independence of the Judiciary stipulates that

“a judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary”.

This point is clarified by The International Bar Association in its Minimum Standards handbook, where it is submitted that

⁶⁶ *Valente v The Queen* (note 62 above)

⁶⁷ *Valente v The Queen* (note 62 above) 53

⁶⁸ *Olo Bahamonde v Equatorial Guinea* UN Doc ICCPR/C/49/D/468/1991 (1993). As quoted in Letsebe Piet Lesirela 18 (note 34 above)

⁶⁹ *Ibid* 18

“Judicial matters are exclusively within the responsibility of the judiciary, both in central judicial administration and in court level judicial administration.”⁷⁰

Therefore, a judiciary that does not manage its own administrative affairs cannot be said to be independent as one of the most crucial areas of effective functioning is managed by another arm of government. This severely compromises independence as it creates potential for interference.

2.2.2 Financial Independence

Principle 7 of the Basic Principles on Independence of the Judiciary supports the view that the “judiciary must be granted sufficient funds to properly perform its functions. Without adequate funds, the Judiciary will not only be unable to perform its functions efficiently, but may also become vulnerable to undue outside pressures and corruption.” Therefore, “there must be some kind of judicial involvement in the preparation of court budgets. However, when it comes to administrative and financial issues, independence may not always be total given that the three branches of government, although in principle are independent of each other, are also by nature in some respects dependent on each other, for instance with respect to the appropriation of resources. While this inherent tension is probably inevitable in a system based on the separation of powers, it is essential that in situations where, for instance, Parliament controls the budget of the judiciary, this power is not used to undermine the efficient working of the latter.”⁷¹

2.3 Individual Independence

In essence, individual independence ensures that the judiciary is insulated from undue internal and external influences. This ensures that the judiciary is free to carry out its professional duties independently, without fear or favour. There are a number of ways in

⁷⁰ Section 8, *International Bar Association Minimum Standards on Judicial Independence*, 1982 available at www.ibanet.org/Document/Default.aspx?DocumentUid...52b1 accessed on 30 April 2012

⁷¹ For a discussion of this issue and others, as regards the system in the United States of America, see ‘An Independent Judiciary, Report of the American Bar Association Commission on Separation of Powers and Judicial Independence’, published on: <http://www.abanet.org/govaffairs/judiciary/report.html>.

which individual independence may be secured, what follows is a discussion of the most important elements contained in international legal instruments.

2.3.1 Appointment

Principle 10 of the Basic Principles on the Independence of the Judiciary state

“Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.”

Academics seem to suggest that although “international law does not provide any details as to how judges should be appointed, this principle means that irrespective of the method of selection of judges, candidates’ professional qualifications and their personal integrity must constitute the sole criteria for selection. Consequently, judges cannot lawfully be appointed or elected because of political views they hold or because, they profess certain religious beliefs. Such appointments would seriously undermine the independence both of the individual judge and of the judiciary as a whole. This would inevitably undermine public confidence in the judiciary.”⁷²

There are a number of judgments, recommendations and opinions by various judicial bodies and tribunals which have sought to shed light on the issues of appointment of judges and what is desirable. For instance, the Human Rights Committee has “expressed concern that the judiciary in Sudan isn’t truly independent, in that judges can be subjected to pressure through the supervisory authority exercised by the government, and that very few non-Muslims or women occupy judicial positions at all levels”. It was recommended that

⁷² Manual on Human Rights for Judges (note 62 above) 123

“measures should be taken to improve the independence and technical competence of the judiciary, including the appointment of qualified judges from among women and members of minorities”.⁷³

In *Media Rights v. Nigeria*, it was held “that the selection of serving military officers, with little or no knowledge of law as members of the Tribunal was in contravention of Principle 10 of the Basic Principles on the Independence of the Judiciary.”⁷⁴ In the case of *Aguirre Roca, Rey Terry and Revorado Marsano v. Peru*⁷⁵ the Inter-American Court held that judicial independence dictates that an adequate appointment process of appointment with guarantees against external pressures.⁷⁶

What may be gleaned from the above is that although international legal instruments are silent on the actual procedure in the appointment of judges, the process chosen must guard against appointments for improper motives. By implication, this would connote that an independent body is constituted to facilitate such proceedings. Secondly, persons selected must be properly qualified, with the relevant experience. Thirdly, persons appointed to the judiciary must be people of integrity and ability. In other words, their reputations must be unquestionable and beyond reproach.

2.3.2. Security of Tenure

Principle 11 of the Basic Principles on the Independence of the Judiciary provides that “the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and age of retirement shall be adequately secured by law”. Principle 12 goes further to state that “judges, whether elected or appointed, shall have guaranteed tenure until a mandatory retirement age, or the expiry of their term of office, where such exists”.

⁷³ UN doc. GAOR, A/53/40 (vol. I), para. 132. As quoted in Manual on Human Rights for Judges (note 62 above) 123

⁷⁴ *Media Rights v. Nigeria*, Communication No. 224/98 ACHPR available at <http://www1.umn.edu/humanrts/africa/comcases/224-98.html>. Accessed on 25 July 2012, 60

⁷⁵ 35I-A Court HR, Constitutional Court Case Aguirre Roca, Rey Terry and Revorado Marsano v. Peru 75 judgment of 31 January 2001 available at http://www.corteidh.or.cr/serie_c/C_71_ESP.html accessed on 29 May 2012

⁷⁶ Ibid 75

In Kyrgyzstan, the UN Human Rights Committee noted that “the requirement of re-evaluation every seven years; the low level of salaries and the uncertain tenure of judges may encourage corruption and bribery”.⁷⁷ It has also been documented that, “in some countries judges may be obliged to go through a recertification procedure at certain intervals in order to be authorized to continue in office.” The UN Human Rights Committee noted that “the requirement that judges retire at the expiration of seven years and require recertification for reappointment is a practice which tends to affect the independence of the judiciary by denying security of tenure”. The Committee therefore recommended to the Government that “the requirement for judges to be recertified be reviewed and replaced by a system of secure tenure and independent judicial supervision”.⁷⁸

Simply put, this means that a judge’s remuneration, conditions of employment, pension and age of retirement should be adequately determined by law and not arbitrarily by the executive. Secondly, it means that a judge’s term of office ought to be predetermined and not subject to whimsical recertification. This ensures that judges are able to act and make legal determinations objectively without the fear that their pronouncements may have an impact on their term of employment. It is therefore submitted that it is a requirement of the security of tenure that the term of office of a judge is fixed, whether it is for life, or until the age of retirement. Moreover, jurisprudence around this point also seems to suggest that re-evaluation and recertification for reappointment once the term of office of a judge has expired undermines independence and encourages corruption and bribery. In closing, the importance of security of tenure cannot be overstated. It allows the judiciary to discharge its duties honestly and with integrity, without any form of inhibition or the fear of reprisal from either the executive or any other external entities.

2.3.3. Disciplinary Proceeding against Judges

Closely related to security of tenure is the issue of discipline, suspension and the removal of judges from office. The question that arises in this instance is: what are the appropriate procedures to be followed? Secondly, under what circumstances may a judge be removed?

⁷⁷ UN doc. GAOR, A/55/40 (vol. I), para. 405. As quoted in Manual on Human Rights for Judges (note 62 above) 124.

⁷⁸ UN doc. GAOR, A/51/40, para. 352. As quoted in Manual on Human Rights for Judges (note 62 above) 127

These issues are dealt with in the Basic Principles for Judicial Conduct. Principle 17 states:

“A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.”

Further, Principle 18 states:

“Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.”

Moreover, Principle 19 stipulates that:

“All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.”

The International Bar Association in its Minimum Standards handbook also makes a number of pronouncements on this issue. Article 27 states:

“The proceedings for discipline and removal of judges should ensure fairness to the judge and adequate opportunity for hearing.”

Furthermore, Article 29(a) states:

“The grounds for removal of judges shall be fixed by law and shall be clearly defined.”

And 29 (b) stipulates:

“All disciplinary actions shall be based upon standards of judicial conduct promulgated by law or in established rules of court.”

Article 30 states:

“A judge shall not be subject to removal unless by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity he/she has shown himself/herself manifestly unfit to hold the position of judge.”

Lastly, Article 31 states:

“In systems where the power to discipline and remove judges is vested in an institution other than the Legislature the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.”

Thus, in responding to the question relating to procedure that ought to be followed in disciplining a judge, it seems apparent that due process ought to be followed. Due process would mean that a judge must be entitled to fair treatment in terms of established judicial standards. Furthermore, the grounds for removal of judges must be determined legally and clearly defined. It is submitted that this requirement seeks to guard against arbitrary action against a judge. Moreover, the body that is tasked with the disciplinary proceedings must be independent and impartial, free of any form of executive influence. It should also be noted that the tribunal tasked with the disciplinary responsibility ought to be predominantly composed of members of the judiciary. Moreover, the Basic Principles state that a judge should be removed from office “only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.” Unfortunately, the Basic Principles don’t define what constitutes “incapacity” or “behaviour that renders them unfit to discharge their duties”. However, Blacks Law Dictionary defines “incapacity” as “physical or mental inability to do something or to manage one's affairs”. Thus, if a judge finds himself/herself physically unable to discharge his/her duties by account of physical or mental inability, such would constitute incapacity and legitimate grounds for removal. Moreover, it is submitted that criminal findings, amongst others, against a judge constitutes behaviour that renders a judge unfit to discharge their duties.

2.4 Conclusion

This chapter essentially sought to use international perspectives to define judicial independence and identify internationally accepted norms and standards as far as judicial independence is concerned. In doing so, guidance has been sought from international and regional legal instruments, while also utilising foreign judgments and the opinions of various regional tribunals to provide elaboration.

It may be concluded that judicial independence is important for the following reasons. Firstly, judicial independence is important for good governance, administration and accountability within a state. The judiciary function independently from other arms of government. Secondly, judicial independence doesn't only exist for the protection of judges, but also the protection of the public from arbitrary and abusive state behaviour, the justice system and the rule of law which are central to the functioning of any state. Thirdly, judicial independence is also important in maintaining public confidence in the judiciary and the administration of justice, which are critical. The three themes that emanate from the above analysis are interlinked as good governance, administration and accountability lead to an efficient and effective justice system which jealousy guards any infringement against the rule of law, which leads to greater public confidence in the judiciary.

CHAPTER 3: INDEPENDENCE OF JUDGES

This section is dedicated to discussing the independence of judges. From a conceptual perspective, this addresses individual independence. The question to be responded to is whether legislative mechanisms adopted sufficiently protect the impartiality of the bench and insulate judges from improper influence in their adjudicatory tasks consistently with section 165(4) of the Constitution. In responding to this question, the following issues will be discussed:

- i) the impartiality of judges
- ii) the appointment of judges
- iii) security of tenure
- iv) complaints, disciplinary proceedings and removal of judges and
- v) remuneration

3.1 Impartiality

Impartiality is generally understood to refer to the “state of mind or attitude of a judge or tribunal in relation to the issue and parties in a particular case. Central to the concept of impartiality is the absence of bias, whether it is actual or perceived.”⁷⁹ The opposite of impartiality is bias. The question which therefore arises is how bias determined? In *S v Collier*⁸⁰ the “accused insisted that he be tried by a black magistrate. The white magistrate who presided over the matter refused to recuse himself.” The decision was appealed. On appeal, it was held:

“Equally, the apparent prejudice argument must not be taken too far; it must relate directly to the issue at hand in such a manner that it could prevent the decision-maker from reaching a fair decision... Professor Baxter gives a commonly cited example, namely the mere fact that a

⁷⁹ *Valente v The Queen* (note 62 above) 169 – 70

⁸⁰ 1995 (2) SACR 648

decision-maker is a member of the SPCA does not necessarily disqualify him from adjudicating upon a matter involving alleged cruelty to animals. By the same token, the mere fact that the presiding officer is white does not necessarily disqualify him from adjudicating upon a matter involving a non-white accused. The converse is equally true. Otherwise no black magistrate or Judge could ever administer justice fairly and even handily in a matter involving white accused. For the reasons set out above, the argument that the white magistrate erred in refusing to recuse himself upon being asked to do so at the appellant's trial is both unfortunate and untenable. The fact that he is a white person, does not disqualify him from presiding in a case involving an accused belonging to a different race.”⁸¹

In essence, the court was signalling for an objective determinant for bias which goes beyond frivolous characteristics. Thus, what must be determined is the objective state of mind or attitude that an adjudicator has towards a particular matter. However, it is equally important that a balance is struck between recusal on the grounds of bias and a judge’s obligation to dispense justice. For example, the courts have observed:

“Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.”⁸²

In developing the test for bias, the Constitutional court held that

“the correct approach to recusal is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to the persuasion by the evidence and submissions of counsel. Central to the assessment of reasonable apprehension is that the

⁸¹ 1995 (2) SACR 648 650 E-H

⁸² *Re J.R.L.:Ex parte C.J.L.* (1986) 161 CLR 342 352

reasonableness of the apprehension must be assessed in light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience.”⁸³

Thus, from the above, the test to determine bias may be summarised as follows a) there must be a “reasonable apprehension” b) the “reasonable apprehension” ought to be held by an objective and well informed person c) the apprehension must be that the judge will not be impartial in adjudicating the matter d) this “apprehension must be made in light of the oath of office taken by the judges.” The presumption is that a judge is impartial in its adjudicative responsibility; hence the person who alleges the bias must prove it in terms of established jurisprudence. The objective test is exacting on the person who wishes to prove it. Actual bias or the suspicion thereof impugns negatively on the administration of justice and may affect public confidence on the justice system, thus, litigants should not be allowed to use bias as a fishing expedition.

3.2. Judicial Appointments

Historically speaking, judges were traditionally drawn from the senior ranks of the Bar. “The Judge President of the court concerned would assess the needs of the division, identify a possible candidate with the requisite qualities, and make a recommendation to the Minister of Justice. If the Minister concurred, the recommendation would be forwarded to the President for endorsement.”⁸⁴ However, this position has significantly changed. The process to be followed in the appointment of judges is now prescribed by the Constitution.

The body tasked with the responsibility of facilitating the appointment of judges is the Judicial Service Commission (JSC). The JSC is established in terms of section 178 of the Constitution and the Judicial Service Commission Act.⁸⁵ The JSC consists of the “Chief

⁸³ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (7) BCLR 725 (CC) 48

⁸⁴ Van De Vijver (ed) *The Judicial Institution in Southern Africa: A Comparative Study of Common Law Jurisdictions* (2006) 122

⁸⁵ Act 9 of 1994

Justice;”⁸⁶ the “President of the Supreme Court of Appeal;”⁸⁷ “one Judge President designated by the Judge Presidents;”⁸⁸ the “Minister of Justice or an alternative designated by the Minister;”⁸⁹ “two practising advocates nominated from within the advocates” profession and appointed by the President;”⁹⁰ “two practising attorneys nominated from within the attorneys profession and appointed by the President;”⁹¹ “one teacher of law designated by teachers of law at South African universities;”⁹² “six members of the National Assembly chosen by it, of whom at least three are members of opposition parties represented in the National Assembly;”⁹³ “four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of six provinces;”⁹⁴ and “four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly.”⁹⁵ Additionally, “when considering matters relating to a specific High Court, the Commission is joined by the Judge President of that court and also by the Premier of the Province concerned.”⁹⁶ In *Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province*⁹⁷, the Western Cape Premier challenged the validity of JSC proceedings which culminated in the following decisions being taken:

“i) That the evidence in respect of the complaint did not justify a finding that the Judge President (Hlophe) was guilty of gross misconduct and that the matter was accordingly finalised; and

ii) that the evidence in support of the counter-complaint did not support a finding that the Constitutional Court justices were guilty of gross misconduct and that the matter was accordingly finalised; and

⁸⁶ Section 178(1)(a) of The Constitution (note 2 above)

⁸⁷ Section 178(1)(b) of The Constitution (note 2 above)

⁸⁸ Section 178(1)(c) of The Constitution (note 2 above)

⁸⁹ Section 178(1)(d) of The Constitution (note 2 above)

⁹⁰ Section 178(1)(e) of The Constitution (note 2 above)

⁹¹ Section 178(1)(f) of The Constitution (note 2 above)

⁹² Section 178(1)(g) of The Constitution (note 2 above)

⁹³ Section 178(1)(h) of The Constitution (note 2 above)

⁹⁴ Section 178(1) (i) of The Constitution (note 2 above)

⁹⁵ Section 178(1)(j) of The Constitution (note 2 above)

⁹⁶ Section 178(1)(j) of The Constitution (note 2 above)

⁹⁷ (2011 (3) SA 538 (SCA)

iii) that none of the judges against whom complaints had been lodged was guilty of gross misconduct.”⁹⁸

The Premier’s challenge was based on three issues, namely that when the JSC convened and took the relevant decision, “firstly, she was not present because the JSC had not notified her when and where the meetings were to take place, and she was accordingly unable to comply with her obligation to attend as required by section 178(1)(k) of the Constitution, secondly, only ten members of the JSC participated when on the JSC’s own interpretation of section 178(1)(k), the JSC should have been composed of 13 members and thirdly, the decisions of the JSC were not supported by a majority of the members of the JSC, as required by section 178(6) of the Constitution.” With regards to section 178(1)(k) of the Constitution, the court endorsed the views of the court a quo, and held:

“I can find no justification for concluding that the Constitution does not mean what it says when it includes members of the executive branch of National Government (the Minister and the President through his nominees) and Provincial Government (the Premiers) as members of the JSC in matters involving the High Court of the province in question.”⁹⁹

In other words, “the Premier of the province forms part of JSC in terms of section 178(1)(k) when complaints against high court judges of the province are considered.” Thus, the Premier of the Western Cape ought to have been invited when the JSC convened over the complaint about the Western Cape Judge President, Judge Hlophe. As far as section 178(6) is concerned, it was held “that decisions must be supported by a majority of the members of the JSC.” Therefore, majority of members in terms of “section 178(6) means majority of members entitled to be present, not majority of the members present.”¹⁰⁰ This therefore means that the JSC was not properly constituted when it took such decisions, which consequently nullified prior decisions made. The court was left with no other option but to set aside the decisions of JSC.

Provision is made for the Chief Justice and the President of the Supreme Court Appeal to be represented by their deputies if necessary. Provision is also made for alternate nominations for the representative of the Judge President, the advocates, attorneys’ professions, and the

⁹⁸ Ibid 3

⁹⁹ Ibid 18

¹⁰⁰ Ibid 20

teachers of law. The JSC is therefore a body of 23 permanent members and in some instances 25 persons. While the body is diverse, in that it consists of members of a wide spectrum from within the legal profession, it is also heavily composed of political nominees. Critics have raised this as a concern. However, it is noted that there is nothing unconstitutional about this position. It is submitted that one needs to make a distinction between being nominated to implement an independent task, with being “appointed to act in accordance with the dictates of the executive.”¹⁰¹ It is submitted that the former rings true as far as being a political nominee in the JSC. It is also important to note that democratic processes dictate that the “executive participates in the appointment of judges as they represent the electorate who have a vested interest in the appointment of judges.” “The drafters of the Constitution sought to ensure that persons from diverse political, social and cultural backgrounds, representing varying interest groups, would participate in the deliberations of the JSC.”¹⁰² What is also to be noted is that „checks and balances“ allow for intrusion into another arm of government so as to ensure that there isn’t an over concentration of power in one arm of government. Thus, the composition of the JSC envisages cooperation between all three arms of government, including other stakeholders such as the legal profession and academia, in the appointment of judges.

The appointment of judges is vested in the President as head of the national executive. “The President appoints the Chief Justice and the Deputy Chief Justice after consultation with the JSC, which interviews the nominees for these positions, and the leaders of parties represented in the National Assembly. He consults the JSC before appointing the President and Deputy President of the Supreme Court of Appeal.”¹⁰³ “The President appoints the judges of the Constitutional Court, after consultation with the Chief Justice and the leaders of parties represented in the National Assembly, from a list prepared by the JSC. The list must have three names more than the number of vacancies to be filled. The President must advise the JSC if any of the nominees are unacceptable and must give reasons. The JSC then supplements the list with further nominees and the President must make the remaining appointments from the list so supplemented.”¹⁰⁴ At all times, the Constitutional Court “must

¹⁰¹ *S v Van Rooyen* 2002 (5) SA 246

¹⁰² *Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)* (818/11) [2012] ZASCA 115

¹⁰³ Section 174(3) of The Constitution (note 2 above)

¹⁰⁴ Section 174(4) of The Constitution (note 2 above)

have at least four members who were serving as judges at the time of their elevation to the court.”¹⁰⁵ Appointments to the “Supreme Court of Appeal and the High Court, including the Judges President of High Court divisions, are made on the advice of the JSC.”¹⁰⁶

Section 174 (1) of the Constitution states that “any appropriately qualified woman or man may be appointed as a judicial officer”, this statement is qualified by section 174 (2) which stipulates that “the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed”. Although the courts have yet to pronounce on the meaning of this section, it has been suggested that “this section was included in the Constitution in an attempt to correct the imbalances in the composition of the judiciary.”¹⁰⁷ In expressing the importance of diversity in the judiciary, the JSC has stated that it “is a quality without which the Court is unlikely to be able to do justice to all the citizens of the country. The court will not be competent to do justice unless, as a collegial whole, it can relate fully to the experience of all who seek its protection”. As a result of section 174 (2) of the Constitution, the racial and gender composition of the judiciary has been radically changed. For example the Department of Justice and Constitutional Development has revealed that “in 1994 there were only three black people and nine women serving as judges. By 2011 there were 136 black people and 61 women out of 225 judges.”¹⁰⁸

On the face of it, section 174 (2) appears to be achieving its purpose in ensuring the judiciary is “broadly reflective of the gender and racial composition of South Africa.” Despite the seeming benevolent intentions of the section and progress that has been made, section 174 (2) has been the subject of intense criticism and debate. For example, the JSC has been criticised over its failure to appoint enough women candidates.¹⁰⁹ Some of these debates have also been

¹⁰⁵ Section 174(5) of The Constitution (note 2 above)

¹⁰⁶ Section 174(6) of The Constitution (note 2 above)

¹⁰⁷ AfriMAP and Open Society Foundation for South Africa “South Africa Justice Sector and the Rule of Law: A discussion document” (2005) 92 available at <http://www.afriMAP.org/english/images/report/sa-eng-part-2-chapter-4.pdf>

¹⁰⁸ Andries Nel, Deputy Minister of Justice and Constitutional Development “We must look into our national soul to make sure it lives forever” Sunday Independent, Sunday, 4 March 2012 available at <http://www.justice.gov.za/docs/articles/20120304-dm-transformation.html> accessed 19 November 2012

¹⁰⁹ Adila Hassim “JSC: A few good women needed” Mail & Guardian 30 November 2012 available at <http://mg.co.za/article/2012-11-30-00-jsc-a-few-good-women-needed> accessed on 3 December 2012

occasioned by the JSC's failure to appoint certain experienced white candidates¹¹⁰ while preferring to appoint less experienced black candidates. These omissions have raised concerns that the "JSC is giving too much weight to race and not enough to whether candidates are fit, proper and appropriately qualified."¹¹¹ The question that still remains is whether section 174 (2) seeks demographical representation of the judiciary or whether it only represents a guide in the appointment process. In an attempt to elucidate on how this section ought to be interpreted, the former Constitutional court judge, Justice Krigler has submitted that:

"The constitutional mandate instructs the Judicial Service Commission in section 174(1) to appoint people that are appropriately qualified. That's a precondition. That's a mandatory requirement. And then subsection (2), as a rider to that, says: and in doing that, have regard to the racial and gender balance on the Bench. And it's for obvious reasons that the Constitution, while mentioning the transformational criterion in subsection (2), demands in subsection (1) as the primary and essential requirement that appointees be appropriately qualified. Now these two essential factors, the one absolute and the other discretionary, have been turned on their heads."¹¹²

Thus, what can be gleaned from this statement is that Justice Krigler's favoured interpretation is that section 174 (2) of the Constitution is merely a guide and not a prerequisite for appointment. Justice Krigler's interpretation is narrow. Black people and women are previously disadvantaged, it stands to reason that section 174 (2) cannot be read in isolation of section 9(2) of the Constitution and the Employment Equity Act¹¹³ which seek to address the imbalances of the past through affirmative action measures. Therefore, section 174 (2) embraces the principle of substantive equality, which has been described as "equality of outcome as it requires a consideration of the actual social and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld."¹¹⁴ The Constitutional court has described the notion of substantive equality to mean

¹¹⁰ Steven Budlender SC in 2004 and Jeremy Gauntlett SC in 2012

¹¹¹ D Steward "Criteria for the appointment of Judges" available at http://www.fwdeklerk.org/cgi-bin/giga.cgi?cmd=print_article&news_id=116265&cause_id=2137 accessed 8 December 2012

¹¹² *ibid*

¹¹³ Act 55 of 1998

¹¹⁴ C Gevers "Equality 2011(1)" Class notes

“This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.”¹¹⁵

Thus, section 174 (2) ought to be viewed as a measures seeking “remedial or restitutionary equality”¹¹⁶ within the judiciary and enjoins the JSC in the appointment process of judges. Thus, it is submitted that from this perspective, section 174 (1) and section 174 (2) are both absolute terms, in other words, they ought to be read together. Thus, while section 174 (1) of the Constitution requires that candidates for appointment are appropriately qualified and fit and proper, section 174 (2) seeks to ensure that previously disadvantaged persons are given the opportunity if they are adequately qualified and are fit and proper. Moreover, it is submitted that a judiciary that is broadly reflective of the gender and the racial composition of society bodes well for the public confidence in the judiciary.

In the case of *JSC v Cape Bar Council*¹¹⁷ the court was ceased with two substantive issues, the first was “whether the JSC was properly constituted when it interviewed candidates for vacancies in the Western Cape High Court, and if not, whether that resulted in the invalidity of the decisions taken at the meeting.” The second issue was “whether in the circumstances, the decision of the JSC not to recommend any of the candidates to fill in the two remaining vacancies was irrational and therefore unconstitutional.”¹¹⁸ Regarding the first issue: In reaching its conclusion, the court was bound by its previous pronouncement in the case of *Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province*¹¹⁹, where it held that the JSC cannot take valid decisions in matters that relate to a court in a particular province without the presence of the Premier. The court was of the view that the “position can be no different with matters that relate to the “absence of the President of the Supreme Court of Appeal or his deputy.”¹²⁰ The court therefore held that the absence of the President of the Supreme Court of Appeal” or, alternatively, his deputy rendered the

¹¹⁵ *Minister of Finance & Others v Van Heerden* 2004 6 SA 121 CC 27.

¹¹⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 CC 60.

¹¹⁷ *JSC v Cape Bar Council* (note 102 above).

¹¹⁸ *JSC v Cape Bar Council* (note 102 above) 10.

¹¹⁹ (note 97 above)

¹²⁰ *JSC v Cape Bar Council* (note 102 above) 30.

decisions taken on the day regarding six unsuccessful candidates invalid as the JSC was not properly constituted.¹²¹ Regarding the second issue: the court had the following to say:

“(a) since the JSC is under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend candidates for judicial appointment, it follows that, as a matter of general principle, it is obliged to give reasons for its decision not to do so; (b) the response that the particular candidate did not garner enough votes, does not meet that general obligation, because it amounts to no reason at all; (c) in a case such as this, where the undisputed facts gave rise to a *prima facie* inference that the decision not to recommend any of the suitable candidates was irrational, the failure by the JSC to adhere to its general duty to give reasons inevitably leads to confirmation of that *prima facie* inference. In the event, I agree with the finding by the court a quo that the failure by the JSC on 12 April 2011 not to fill any of the two vacancies on the bench of the WCHC was irrational and unlawful.”¹²²

There are two very important pronouncements made by the court in this case which related to the operation of the JSC. The first is that the JSC ought to be properly constituted when it makes decisions. The composition of the JSC shall be determined by the purpose for which it has convened. Secondly, the JSC ought to act rationally and lawfully. Rationality encompasses giving reasons to an unsuccessful candidate. This is because the “JSC is under a constitutional obligation not to act in an irrational and arbitrary manner, the importance of reasons is that they assist to rationalise the exercise of power and decision making and provides the aggrieved party an opportunity to rebut the defence of the decision maker.”¹²³ Therefore, in terms of this judgment, the JSC is under an obligation to “give reasons for its decision not to recommend a particular candidate if properly called upon to do so.”¹²⁴

As far as vacancies and temporary absence from the Constitutional court are concerned, “the President may appoint a man or a woman to be an acting judge for the Constitutional Court. The appointment must be made on the recommendation of the Minister of Justice and Constitutional development acting with the concurrence of the Chief Justice.”¹²⁵ “The Cabinet member responsible for the administration of justice must appoint acting judges to

¹²¹ *JSC v Cape Bar Council* (note 102 above) 36.

¹²² *JSC v Cape Bar Council* (note 102 above) 51

¹²³ *JSC v Cape Bar Council* (note 99 above) 44

¹²⁴ *JSC v Cape Bar Council* (note 99 above) 45

¹²⁵ Section 175 (1) of The Constitution (note 2 above)

other courts after consulting the senior judge of the court on which the acting judge will serve.”¹²⁶

The appointment of judges is crucial to the independence of the judiciary. By stipulating clear procedures to be followed in the appointment of judges, the Constitution ensures that appointments to the bench are done in a transparent manner and for the correct reason. The process also seeks to ensure that judges who are appointed are people of ability who are fit and proper. Moreover, the appointment processes also ensure that the constitutional imperatives of transformation are taken into account in the appointment of judges. The constitution, through the JSC therefore ensures that judges aren’t appointed arbitrarily for whimsical reasons. This becomes particularly important in a constitutional democracy such as South Africa’s as judges are the guardians of the Constitution.

3.3 Security of tenure

Another important feature of judicial independence is the security of tenure. The Constitution provides that “a judge of the Constitutional Court holds office for a non-renewable term of 12 years or until reaching the age of 70 years, whichever one comes first.”¹²⁷ Judges of other courts “hold office until they are discharged from active service in terms of an Act of parliament.”¹²⁸ The Judges Remuneration and Conditions of Employment Act¹²⁹ governs this position. Section 3 of the Act is similar to section 176(1) of the Constitution in providing that a judge of the Constitutional Court is to be discharged from active service either on reaching the “age of 70 years or after completing a 12 year term of office on the Constitutional Court, whichever occurs first.”¹³⁰ Further, the it also provides that the President may discharge a judge from active service on the Constitutional Court for incapacity through ill health or at the judges own request for a reason the President deems sufficient.¹³¹

¹²⁶ Section 175(2) of The Constitution (note 2 above)

¹²⁷ Section 176(1) of The Constitution (note 2 above)

¹²⁸ Section 176(2) of The Constitution (note 2 above)

¹²⁹ Act 47 of 2001

¹³⁰ Ibid Section 3(1)(a)

¹³¹ Ibid Section 3(1)(b) and (c)

Thus, if at the “end of the 12 year term on the Constitutional Court the judge has not completed a total of 15 years” active service, the judges term is extended until 15 years” active service has been completed.”¹³² If at the age of 70 years the judge has not completed 15 years of active service, then the term on the Constitutional Court is extended until either the 15 year mark has been reached or the judge is 75 years of age, whichever occurs first.¹³³ Section 3(2)(a) provides for a “discharge from active service on reaching the age of 70 years, or on completion of 10 years of active service, whichever comes first.” Section 4(4) qualifies this and permits the judge to continue in active service until “completion of 15 years” active service or the age of 75 years, whichever comes first.” The discretion in this regard is left to the judge. A judge who has reached the age of 65 years and has completed 15 years” active service and who wishes not to continue may notify the Minister accordingly and be discharged by the President.¹³⁴

In the case of *Justice Alliance of South Africa v President of South Africa*¹³⁵ the Constitutional Court had to determine “whether section 8(a) of the Judges Remuneration and Conditions of Employment Act was consistent with section 176(1) of the Constitution.” This required the court to consider “a) whether section 8(a) of the Act delegates the power to extend to the President; if so, whether delegation is permitted by section 176(1) of the Constitution; and, if so, whether the delegation was validly done; b) whether section 176(1) authorises a differentiation of terms of office of judges of the Constitutional Court.”¹³⁶

In addressing the first issue which related to delegation, the court held that “section 8(a) grants the President an executive discretion to extend or not extend the term of office of the Chief Justice who is approaching the end of his or her term. In doing this, Parliament granted the President an executive discretion whether or not to extend the term.”¹³⁷ Furthermore, the court held, “section 176(1) explicitly states that an Act of Parliament must extend the term. Thus, the extension by the President does not qualify as an Act of Parliament as required by the Constitution as it lacks the specific features of an Act of Parliament.”¹³⁸ Therefore, the

¹³² Ibid Section 4 (1)

¹³³ Ibid Section 4 (1)

¹³⁴ Ibid Section 3(2)(b)

¹³⁵ 2011 (5) SA 388 (CC)

¹³⁶ Ibid 41

¹³⁷ Ibid 52

¹³⁸ Ibid 58

court was of the view that “had it been contemplated that the power in section 176(1) be delegable, the intention to do so would have been made clear by the drafters of the Constitution.” The court also held that what is also quite problematic about section 8(a) is that “it usurps the legislative power granted only to Parliament which therefore constitutes an unlawful delegation.”¹³⁹ Moreover, another important consideration to be made in assessing the constitutional compliancy of delegation, the court held, “is the constitutional imperative of judicial independence.”¹⁴⁰ The court was of the view that the open-ended discretion in section 8(a) “may raise a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the executive.”¹⁴¹ The court therefore concluded that the “provisions of section 8(a) amount to an impermissible delegation and are invalid because they are inconsistent with the provisions of section 176(1) of the Constitution.”

As far as the issue of whether section 176(1) authorises a differentiation of terms of office of judges of the Constitutional Court is concerned, the court held that “non-renewability is the bedrock of security of tenure and a protective mechanism against judicial favour in passing judgment.” Amongst others, the importance of non-renewability is that it “fosters public confidence in the institution of the judiciary as a whole as its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal.”¹⁴² The court also held that the “singling out of the Chief Justice alone, amongst the members of the Constitutional Court is incompatible with section 176(1)¹⁴³ as this section does not permit singling out of anyone Constitutional Court judge on the basis of his or her individual identity or position within the court.”¹⁴⁴ The court also pointed out that “incumbency of the office of the Chief Justice or Deputy Chief Justice makes no difference and confers no special entitlement to extension¹⁴⁵ as to create a special category for the extension of the term of office of the Chief Justice or Deputy Chief Justice would be to single out one judge.” There the court was of the view that “incumbency of an office is irrelevant to the delineation of the

¹³⁹ Ibid 62

¹⁴⁰ Ibid 66

¹⁴¹ Ibid 68

¹⁴² Ibid 73

¹⁴³ Ibid 77

¹⁴⁴ Ibid 85

¹⁴⁵ Ibid 94

members of the Constitutional Court in section 176(1).” Therefore, the court concluded that “section 8(a) is invalid on the basis of the differentiation it effects.”¹⁴⁶

This judgment highlights the importance of the non renewability. In essence, the principled position taken by the court in this judgment is that the terms of office of Constitutional court judges should be fixed in order provide stability and consistency in the functioning of the court and to prevent any perception of bias or a lack of independence in the judiciary.

3.4 Complaints, Disciplinary Proceeding and Removal of Judges

This section seeks to discuss three sensitive issues, namely the complaints, disciplinary and the removal procedure of judges. These issues are discussed together as they are intrinsically interrelated. Their sensitivity stems from the general view that any complaints, disciplinary action and removal of judges ought to be dealt with in terms of a clear legislative framework. What gives rise to this view is the desire to insulate any such proceedings from abuse or manipulations, be it political or otherwise. Thus it becomes important to ensure that clear objective standards are established. In the South African context, section 180 of the Constitution states that “national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including procedures for dealing with complaints about judicial officers.”

The complaints procedure against judges is governed by the Judicial Service Commission Act (Act).¹⁴⁷ “The preamble of the Act states that the purpose of the Act, amongst others, is to provide procedures for dealing with complaints about judges; to provide for the establishment of a Judicial Conduct Tribunal (Tribunal) to inquire into and report allegations of incapacity; gross incompetence or gross misconduct against judges; and to provide for matters connected therewith.” Section 14 (1) of the Act further states that “any person may lodge a complaint against a judge. The grounds upon which a complaint against a judge may be lodged are incapacity giving rise to judge’s inability to perform the functions of judicial office in accordance with prevailing standards.” “Gross incompetence, or gross misconduct, as envisaged in s177(1)(a) of the Constitution, includes but not limited to, any wilful or grossly

¹⁴⁶ Ibid 95

¹⁴⁷ (note 82 above)

negligent breach of the Code of Judicial Conduct, wilful or grossly negligent conduct that is incompatible with or unbecoming the holding of judicial office, including any conduct that is prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts.”¹⁴⁸ The Act also recognises the existence of “lesser complaints.”¹⁴⁹ Section 15(2) of the Act stipulates that a complaint that “does not fall within the parameters of any of the listed grounds, and that is solely related to the merits of a judgement or order, that is frivolous or lacking in substance or that is hypothetical may be dismissed.”

Section 17(2) of the Act states that an inquiry into serious, but non-impeachable complaints “must be conducted in an inquisitorial manner and there is no onus on any person to prove or disprove any fact during such investigation.” And section 17(3) (a) of the Act states that the respondent in such a matter must be invited to “respond in writing or any other manner specified and within a specified period to the allegations.” Subsequently, the complainant “must be provided with an opportunity to comment on the response of the respondent, within a specified period of time.”¹⁵⁰ If it’s found “that there is no reasonable likelihood that a formal hearing on the matter will contribute to determining the merits of the complaint”, Section 17(4)(a) of the Act dictates that the complaint must be dismissed, or it must be found “that the complaint has been established and that the respondent has behaved in a manner unbecoming of a judge and impose remedial steps”¹⁵¹ or it must be “recommended to the Committee, to recommend to the Commission that the complaint should be investigated by a Tribunal.”¹⁵² Conversely, Section 17(5) (a) of the Act stipulates that if it is found “that a formal hearing is required in order to determine the merits of the complaint, a time and a place for a formal hearing and written notice of the hearing must, within a reasonable time be given to the complainant and respondent.” Upon the conclusion of the formal hearing Section 17(5) (c) (i) of the Act states that the “finding of fact, including the cogency and sufficiency of the evidence and the demeanour and credibility of any witnesses must be recorded.” According to Section 17(5) (c) (ii) of the Act, the complaint must either be dismissed or, it must be “found that the complaint has established that the respondent has behaved in an unbecoming manner for a judge and impose remedial relief referred to in terms of the Act or

¹⁴⁸ Ibid Section 14(2); (3) and (4)

¹⁴⁹ Ibid Section 15

¹⁵⁰ Ibid Section 17(3)(c)

¹⁵¹ Ibid Section 17(4)(b)

¹⁵² Ibid Section 17(4)(c)

recommend to the Committee to recommend to the Commission that the complaint should be investigated by a Tribunal.”¹⁵³ Section 17(8)(a) – (g) of the Act contemplates that anyone “or a combination of the following remedial steps may be imposed in respect of the respondent including; apologising to the complainant, in a manner specified, a reprimand, a written warning, any form of compensation, appropriate counselling, attendance of a specified training course, any other corrective measure.”

Impeachable complaints are conducted in terms of Section 16 (1), the Act stipulates “that a committee may recommend the appointment of a Tribunal if it is satisfied that, it is likely to lead to a finding by the Commission that the respondent suffers from incapacity, is grossly incompetent or is guilty of gross misconduct.” Under such circumstances, Section 16 (1) (a) of the Act stipulates that the complaint must be referred to the “Committee in order to consider whether it should recommend to the Commission that the complaint should be investigated and reported on by a Tribunal, and inform the respondent of the complaint. The Committee must consider whether the complaint, if established, will prima facie indicate incapacity, gross incompetence or gross misconduct by the respondent.”¹⁵⁴ Once such a determination is made, the Committee must inform the complainant, the respondent and the Commission in writing of any decision taken and the reasons thereof.

In terms of section 26 (1) (a) of the Act, “the body tasked with the responsibility to inquire into allegations of incapacity, gross incompetence or gross misconduct against a judge is the Tribunal.” The objectives of the Tribunal in terms of Section 26 (1) (a) of the Act are to “collect evidence; conduct a formal hearing; make findings of fact; making a determination on the merits of the allegations; and to submit a report containing its findings to the Judicial Service Commission.”¹⁵⁵ Section 26 (2) of the Act directs the Tribunal to conduct its enquiry “in an inquisitorial manner and there is no onus on any person to prove or disprove any fact before a Tribunal.”¹⁵⁶ It’s also important to note that “when considering the merits of any allegations against a judge, the Tribunal must make its determinations on a balance of possibilities”¹⁵⁷ and it must keep a record of its proceedings.¹⁵⁸ Section 21 (1) of the Act

¹⁵³ Ibid Section 17(5)(c)(iii)

¹⁵⁴ Ibid Section 16 (4)

¹⁵⁵ Ibid Section 26 (1) (b)

¹⁵⁶ Ibid Section 26 (2)

¹⁵⁷ Ibid Section 26 (3)

states that the Tribunal must be appointed by the Chief Justice whenever requested to do so by the Commission. The Act stipulates that the Tribunal comprises of “two judges, one of whom must be designated by the Chief Justice as the Tribunal President and one other person who is not a judicial officer.”¹⁵⁹ Before commencing his or her functions, the non judicial member of the Tribunal is required to “take an oath or make solemn affirmation that he or she will administer justice to all persons alike, without fear, favour or prejudice in accordance with the law and customs of South Africa to a matter concerned.”¹⁶⁰ Further, “at least one member of every tribunal must be a woman.”¹⁶¹

The removal of a judge is captured in unequivocal terms by the Constitution. Section 177 states that “a judge may be removed from office only if the JSC finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct¹⁶² and the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.”¹⁶³ Thus, “the President must remove a judge from office once such a resolution to remove a judge is adopted.”¹⁶⁴ Therefore, the body tasked with making a finding that a judge is guilty of incapacity, gross incompetence or gross negligence is the Judicial Conduct Tribunal.

In conclusion, the Act creates a clear legislative framework that ought to be followed in matters pertaining to complaints, disciplinary procedures and the removal of judges. As far as complaints are concerned, the Act distinguishes between serious but non impeachable complaints and impeachable complaints and establishes different procedures to be followed in each instance. Whether the serious but non impeachable complaint procedure or the impeachable complaint procedure is followed, the Act places no burden of proof on either party in the dispute to prove or disprove any allegation made. The Tribunal is tasked with the investigation of impeachable complaints; it must make its findings on a balance of probabilities. Furthermore, a judge can only be removed from office by the President after a

¹⁵⁸ Ibid Section 26 (4)

¹⁵⁹ Ibid Section 21 (1)(a)(b)

¹⁶⁰ No. R. 864 Rules Made In Terms Of Section 25(1) of the Judicial Service Commission Act (note 85 above), To Regulate Proceedings Before Judicial Conduct Tribunals

¹⁶¹ Section 22 (2) The Constitution (note 2 above)

¹⁶² Section 177 (1)(a) The Constitution (note 2 above)

¹⁶³ Section 177 (1)(b) The Constitution (note 2 above)

¹⁶⁴ Section 177 (2) The Constitution (note 2 above)

two thirds majority resolution adopted by the National Assembly. In other words, until such a resolution is adopted by the National Assembly, a judge may not be removed from office despite an adverse finding by the Tribunal. It is to be noted that the establishment of the Tribunal by the Act closes a lacuna as the task of disciplining judges lay with the JSC, without any clear procedures established as to how complaints ought to be dealt with. It is submitted that the possible reason for the onerous two thirds majority vote in the National Assembly are, firstly, the principle of security of tenure which is premised on the principle that a judge's tenure is secure and may only be removed in exceptional circumstances. Secondly, this is consistent with the principle of checks and balances, in other words, ensuring that the power to remove judges doesn't solely rest with the judiciary. The importance of this is that it creates insulation against over concentration of power in the judiciary in the removal of judges.

3.5 Remuneration of judges

In terms of the Constitution, "the salaries, allowances and benefits of judges may not be reduced."¹⁶⁵ The Judges Remuneration and Conditions of Employment Act¹⁶⁶ deals "with the salaries, allowances and benefits of judges and acting judges." Ultimately, the President determines the annual salary of judges, parliament has the right to debate and reject the terms of the Presidents proclamation.¹⁶⁷ Currently, the remuneration of judges is as follows: It's also interesting to note that, once discharged from active service, a judge is entitled to a life-time salary, which is adjusted "in terms of the Judges" Remuneration and Conditions of Employment Act. This depends on the judges" manner of discharge and period of service.¹⁶⁸ Moreover, in addition to the lifetime salary, a gratuity is also received on retirement."¹⁶⁹

¹⁶⁵ Section 176(3) The Constitution (note 2 above)

¹⁶⁶ (note 129 above)

¹⁶⁷ Section 2(1) and 2(2) (note 129 above). For judges salaries as of 1 April 2012 see: Proc 60/GG 35744 of 1 April 2012

¹⁶⁸ According to section 5 the amount of the life-time salary is calculated according to the formula $A/B = C$, where A = the annual salary applicable to the highest office held in a permanent capacity during the said active service. This amount is adjusted according to the annual increase. B = 15 and C = the judge's years of active service. (note 129 above)

¹⁶⁹ According to section 6 the amount of gratuity is calculated according to the formula $D \times 2 \times E/15$, where D = annual salary which at the time of the judges discharge from active service was applicable to the office concerned. (note 129 above)

As a principle, it is important that judges are well remunerated. The importance of this lies in the fact that if judges are not well remunerated; they may become susceptible to illicit financial inducements from parties who may want to influence a judge in a particular manner. Thus, ensuring that judges are well remunerated seeks to protect judges from corrupt behaviour. A well paid judge may find it easier to confidently resist any such attempts.¹⁷⁰ Secondly, in order to attract the best candidates to the judiciary, it is imperative that they are remunerated competitively. And lastly, the reason for the general principle that judges' salaries should not be reduced lies in guarding against the possibility of judges being put under pressure by the government through their salaries.

3.6 Conclusion

This chapter essentially sought to discuss the independence of judges. There was an analysis of constitutional and legislative measures which seek to insulate judges from improper influence. It may be concluded that, firstly, in terms of South African jurisprudence, the presumption is that a judge is impartial. The burden of proof then falls on the party alleging bias to prove it. Secondly, the Constitution establishes a body to oversee the appointment of judicial officers through the JSC and stipulates clear procedures to be followed in the appointment of judges. The importance of the JSC in this process is to ensure that judges are appointed in terms of the objective criteria stipulated in terms of the Constitution. Thirdly, the legislative framework adopted to ensure a judges security of tenure provides that a judges term of office is predetermined and is non-renewable. Fourthly, the legislative framework adopted in terms of complaints, disciplinary proceeding and the removal of judges is quite elaborate. It also establishes Tribunal whose responsibility is to deal with any such complaints. The legislative framework also distinguishes between serious but non-impeachable complaints, impeachable complaints and the removal of judges. Fifthly, the legislative framework relating to the remuneration of judges is agreeable to the general principle that judges ought to be well paid and that their salaries may not be reduced. Lastly, in response to the question asked at the beginning of this chapter, generally speaking, it may be concluded that the constitutional and legislative framework adopted by South Africa sufficiently insulates judges from improper influence.

¹⁷⁰ *De Lange v Smuts NO and Another* 1998 (3) SA 785(CC) 72

CHAPTER 4: COURT ADMINISTRATION AND JUDICIAL INDEPENDENCE

Administration is important to the operation of the court system in the same manner that it is important to the operational success and profitability of both public and private corporations. “Self-administration of courts is one of the most important means in achieving the highest level of independence for the courts.”¹⁷¹ This section seeks to discuss whether the current South African system of court administration is consistent with section 165(4) of the Constitution. This importance of this chapter is that it is an interface between the judiciary and executive. In discussing this, there shall be regard to the following

- i) Structure of courts
- ii) System of court administration
- iii) Is the current system consistent with the Constitution?
- iv) If the current system isn’t consistent with the Constitution, how can this defect be remedied?

4.1 Structure of Courts

In performing their functions, “the judiciary must not be constrained by other arms of government. Courts must be, and be seen to be, independent.”¹⁷² In terms of the Constitution, “the judicial authority is vested in the courts. The courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice.”¹⁷³ Further, in terms of the Constitution, “no person or organ of state may interfere with the functioning of the courts.”¹⁷⁴ Moreover, the Constitution “places a burden on organs of state, through legislative and other measures to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness of the courts.”¹⁷⁵

¹⁷¹ Justice Ngcobo *Delivery of Justice: Agenda For Change* National Judges' Symposium (2003) *S. African L.J.* 678, 694

¹⁷² A Chaskalson (note 4 above) 3 see also H Corder (note 12 above) 261

¹⁷³ Section 165 (1)(2) The Constitution (note 2 above)

¹⁷⁴ Section 165 (3) of The Constitution (note 2 above)

¹⁷⁵ Section 165 (4) of The Constitution (note 2 above)

Section 166 of the Constitution states that the courts are:

- “a) The Constitutional Court;
- b) The Supreme Court of Appeal
- c) The High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Court.
- d). The Magistrates Court and e). Any other court established or recognised in terms of an Act of Parliament, including any court of status similar to either the High Court or Magistrates Courts.”

Thus, the Constitution makes provision for a Constitutional Court and a Supreme Court of Appeal (SCA). The Supreme Court of Appeal is effectively the former Appellate Division with a new name.¹⁷⁶ “The Constitutional Court hears constitutional appeals and the SCA hears both constitutional and non-constitutional appeals.”¹⁷⁷ In terms of section 167 (6) (a) of the Constitution, the Constitutional court may in certain circumstances “function as a court of first instance in constitutional matters.” Section 167 (5) of the Constitution, the Constitutional Court “must confirm certain orders of constitutional invalidity made by other courts.” The Constitution also creates a number of High Courts. These are created from the “former provincial and local divisions of the Supreme Court and from various superior courts of the former Transkei, Bophuthatswana, Venda and the Ciskei (TBVC) states.”¹⁷⁸ The High Court’s function “as superior courts and have a geographically limited jurisdiction.”¹⁷⁹ The statutes governing the higher courts are the Supreme Court Act¹⁸⁰ and the Constitutional

¹⁷⁶ Item 16 of Schedule 6 The Constitution (note 2 above)

¹⁷⁷ Section 167(3) and section 168(3) of The Constitution (note 2 above)

¹⁷⁸ Item 4 (a) of Schedule 6 The Constitution (note 2 above)

¹⁷⁹ Currie and Dewaal (note 1 above) 278. Why did the 1996 Constitution change the names of the courts? The Constitutional Assembly had to find a way of merging the former Supreme Court of South Africa (which included the Appellate Division) with the superior courts of the former TBVC states (which had their own appeal courts). It chose to do this by making each division of the former Supreme Court and each TBVC superior court an individual High Court, with jurisdiction over a particular geographical area. The court of appeal of each High Court is the Supreme Court of Appeal (and, in constitutional matters, the Constitutional Court). The old TBVC appeal courts were abolished in 1994 by the Constitution of the Republic of South Africa Third Amendment Act 13 of 1994.

¹⁸⁰ Act 59 of 1959

Court Complementary Act¹⁸¹, which specifically governs the functioning of the Constitutional Court.

The Magistrates Court is governed by the Magistrates Act and the Magistrates Court Act . In the case of *S v Van Rooyen*¹⁸², the Constitutional Court held that

“the most rigorous and elaborate conditions of judicial independence need not be applied to all courts, and it is permissible for the essential conditions for independence to bear some relationship to the variety of courts that exist within the judicial system.”¹⁸³

Essentially, the court was acknowledging the hierarchical structure of the courts in South Africa. In other words, while the Constitution affords all courts protection, it doesn’t follow that the lower courts “are entitled to have their independence protected in the same way as higher courts; this view was endorsed by the Constitutional court in the *Certification Judgment*.”¹⁸⁴ The reasons given by the court are two pronged. Firstly, it was held, “Magistrate courts are courts of first instance and their judgments are subject to appeal and review. Thus the higher courts have the ability not only to protect the lower courts against interference with their independence, but also to supervise the manner in which Magistrates court discharge their functions. These are controls that are relevant to the institutional independence of the lower courts.”¹⁸⁵ The second reason tendered by the court is that “district and regional magistrate courts do not have jurisdiction to deal with administrative reviews or constitutional matters where the legislation or conduct of the government is disputed. The court was of the view that these are the most sensitive areas of tension between the legislature, the executive and the judiciary. Measures considered appropriate and necessary to protect the institutional independence of courts dealing with such matters, are not necessarily essential to protect the independence of courts that do not perform such functions.”¹⁸⁶

Thus, the functioning of the Magistrates Court ought to be viewed against this backdrop. While section 165 of the Constitution entrenches independence for all courts, it is also

¹⁸¹ Act 13 of 1995

¹⁸² (note 101 above)

¹⁸³ (note 101 above)27

¹⁸⁴ 1996 (4) SA 744 (CC) 80

¹⁸⁵ *Ibid* 24

¹⁸⁶ *Ibid* 25

important to bear in mind that the need for such independence must be reflective of the variety of functions a court performs. In this instance, Magistrates courts are the court of first instance which means that their decisions may be subject to appeal and review. Secondly, due to the fact that Magistrates courts don't have jurisdiction over "administrative reviews or constitutional matters where the legislation or conduct of the government is disputed", it is not necessary to afford them independence as vigorous as that of higher courts. For these reasons, the focus of this chapter will only be on higher courts.

4.2 System of Court Administration in South Africa

South Africa embraces two separate systems of court administration. These systems are governed by the Constitutional Court Complimentary Act which governs the functioning of the Constitutional court and the Supreme Court Act of 1959 which governs the functioning of High Courts and Supreme Court of Appeal. Section 14(1) of the Constitutional Court Complimentary Act states that:

"The Minister shall, subject to the laws governing the public service, on the request of and in consultation with the President of the Court, appoint for the Court a registrar, assistant registrars and other officers and staff whenever they may be required for the administration of justice or the execution of the powers and authorities of the Court."

While subsection 2(a) provides that:

"The President of the Court may, in consultation with the Minister, from time to time appoint for the Court one or more persons to undertake such research or perform such other duties as the President of the Court may determine."

Section 15(2) of the Constitutional Complimentary Act provides for procedures to be followed in the determination of the judicial budget. It provides as follows:

“Requests for the funds needed for the administration and functioning of the Court, as determined by the President of the Court after consultation with the Minister, shall be addressed to Parliament by the Minister in the manner prescribed for the budgetary processes of departments of state.”

These provisions suggest that the President of the Constitutional Court, who is now known as the Chief Justice, is responsible for determining the needs of the Constitutional Court. Once the Chief Justice has determined what the needs of the court are, he or she is required to discuss with the Minister as to what funds may be utilised to meet the courts needs. It also becomes clear that court staff are managed by the Chief Justice and report to him or her. In other words, administration of the Constitutional court and matters incidental thereto reside with the court through the Chief Justice. This legislative framework has made it possible for the Constitutional court to create its own management team which is tasked with the responsibility of the administrative affairs of the court. The management team is headed by the Director of the Constitutional Court and comprises of the following departments: i). Strategic & Administrative Leadership ii) Case Flow Management iii) Financial and Supply Chain Management iv)Administrative and Auxiliarily Management v) Information/Knowledge/Library Management vi) Information Technology Management.¹⁸⁷ The management team reports to the Chief Justice as the head of the court. Prioritising court administration and creating a department that focuses on this aspect undoubtedly provides the Constitutional court with greater control of its daily operations and efficiency. The benefit that arises from this arrangement is that the independence of the Constitutional court is strengthened.¹⁸⁸

The administration of the higher courts remains “under the control of the Minister of Justice as stipulated under section 34 of the Supreme Court Act.” This is consistent with Schedule 6 of the Constitution which states that, “every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial

¹⁸⁷ The Constitutional Court of South Africa: Strategic Plan (2009 – 2012) 22

¹⁸⁸ The Constitutional Court of South Africa: Annual Report (2010/11) 5

officer continues to hold office in terms of the legislation applicable to that office. This is subject to amendment, repeal or consistency with the new Constitution.”¹⁸⁹

The court administration system inherited from the apartheid regime gives control to the executive and continues to be operational. This system was founded upon the political governance principle of parliamentary sovereignty and imposed upon the current constitutional dispensation. This begs the question of whether section 34 of the Supreme Court Act is consistent with section 165 of the Constitution in that it denies the judiciary its institutional independence as it places the administrative functions of high courts within the executive. Secondly, this also begs the question of whether this arrangement is consistent with the principle of separation of powers. The authority to administer the courts ought to be seen in light of the Constitution. Section 165(2) of the Constitution provides:

“The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”

Section 165(3) provides that “No person or organ of state may interfere with the functioning of the courts.” Lastly, section 165(4) provides that:

“Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.”

Therefore, the Constitution establishes the independence of the judiciary and protects such independence by prohibiting “any interference with the functioning of the courts, imposing an obligation on state organs to assist and protect the courts to ensure their independence and impartiality.” The Constitution therefore not only recognises the independence and impartiality of our courts, but also provides important institutional protection.¹⁹⁰ The problem with executive control of court administration is that it poses the potential of manipulation, intentionally or unintentionally, of the independence of the judiciary and lends itself to abuse. In other words, this relegates the judiciary to a subordinate of the executive, as opposed to being an equal arm of government.

¹⁸⁹ Schedule 6 (16)(1)(a)(b) The Constitution (note 2 above)

¹⁹⁰ Justice Ngcobo (note 171 above) 696

4.3 Separation of Powers and the Judiciary

The doctrine of separation of powers is central to the independent functioning of the judiciary, for without the separation of powers, the principle of judicial independence would not exist. Therefore, the purpose of this section is to discuss the doctrine of separation of powers insofar as it relates to judicial independence. Paying particular attention to how South African courts have developed this doctrine and its practical implications on the independent functioning of the courts.

“Constitutional Principle VI, of the constitutional principles negotiated at the multi-party negotiating process in the early 1990s and annexed to the Interim Constitution”¹⁹¹, provided that: “There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.” In certifying the 1996 Constitution, the Constitutional court “had to consider whether the new Constitution did indeed comply with this principle.” In addressing this issue, the Constitutional court held:

“There is no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute... The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. In Justice Frankfurter’s words, ‘[t]he areas are partly interacting, not wholly disjointed.’”¹⁹²

Moreover, the court was of the view “that there is no fixed or rigid constitutional doctrine of separation of powers. The doctrine was rather to be found in the provisions outlining the functions and structure of various organs of state and their respective independence and

¹⁹¹ Interim Constitution of the Republic of South Africa 200 of 1993.

¹⁹² *Certification Judgment* (note 184 above) 108-109

interdependence.”¹⁹³ The Constitutional Court further elaborated on this doctrine in the *TAC* case when it pronounced on the principle of pre-eminent domain. The following was held:

“although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to *and* respect this separation.”¹⁹⁴

Therefore, the rejection of a strict separation between the three branches of government has not prevented the Constitutional Court from acknowledging that each branch has a specific mandate. The principle of pre-eminent domain signifies that there are “certain functions and powers that fall squarely within the domain of one or the other branch of government.”¹⁹⁵ The court has never defined the boundaries of each domain; however, Seedorf and Sibanda are of the view that a „pre-eminent domain“ is a core area of exclusive competence defined from a functional point of view.¹⁹⁶ Seedorf and Sibanda further submit that when dealing with the „exclusive competence“ of the executive, legislature or judiciary, the court looks at the distinctive function of that particular branch of government in its relation to the other branches.¹⁹⁷

In *South African Association of Personal Injury Lawyers v Heath*¹⁹⁸, “the Constitutional court further elaborated on the doctrine of separation of powers.” The court articulated the doctrine as follows:

“The separation of the Judiciary from other branches of government is an important aspect of the separation of powers required by the Constitution and is essential to the role of the courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implementing the laws thus made, but have no law-making power other than that is vested in them by the legislatures. Under the Constitution it is the duty of

¹⁹³ *Certification Judgment* (note 184 above) 111

¹⁹⁴ 2002 (5) SA 721 (CC) 98

¹⁹⁵ S Seedorf & S Sibanda ‘*Separation of Powers*’ in S Woolman (ed) *Constitutional Law of South Africa* (2008) Vol 1 at 12-39

¹⁹⁶ *Ibid*

¹⁹⁷ *Ibid*

¹⁹⁸ 2001 (1) SA 883 (CC)

courts to ensure that the limits on the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.”¹⁹⁹

In the *First Certification judgment*, the court identified “what the doctrine of separation of powers required of the judiciary”, the court held:

“an essential part of the separation of powers is that there be an independent judiciary... what is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive.”²⁰⁰

Moreover, the “court has highlighted the importance of separation of powers in ensuring that the courts are able to discharge their constitutional duty of ensuring the legitimate exercise of public power”, stating that:

“the separation required by the Constitution is between the Legislature and Executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution, will be undermined.”²⁰¹

An examination of separation of powers is incomplete without a discussion on the principle of „checks and balances“. For instance, the Constitutional court has held “that the South African constitutional model of separation of powers is one that”:

“embodies a system of checks and balances to prevent an over-concentration of power in any one arm of government; it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another; this engenders interaction, but does so in a way which avoids diffusing power so completely that government is unable to take timely measures in the public interest.”²⁰²

¹⁹⁹ Ibid 25

²⁰⁰ *Certification Judgment* (note 184 above) 123

²⁰¹ *South African Personal Injury Lawyers v Heath* (note 198 above) 26.

²⁰² *S v Dodo 2001* (3) SA 382 (CC) 22

However, in the *SANRAL*²⁰³ case the court warned that:

“Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.”²⁰⁴

The judiciary is accepted to be one of the co-equal arms of government. The Constitution of South Africa also embraces the principle of separation of powers, checks and balances and the concept of pre-eminent domain. However, effectively speaking, in terms of section 34 of the Supreme Court Act, matters within the pre-eminent domain of the courts such as the employment of administrative staff, court budgeting and other matters incidental thereto are administered by the executive. These functions are important as they relate directly and immediately to judicial functioning. Clearly, giving the executive authority over court administration leads to an absurdity which is irreconcilable with the Constitution. Simply put, the current system of court administration appears to be inconsistent with the provisions of section 165 of the Constitution and the doctrine of separation of powers as it permits the executive to encroach upon the independent functioning of the courts.

4.4 Superior Courts Bills and the Constitutional Amendment Bill: A sustainable remedy?

Schedule 6 of the Constitution stipulates that “as soon as is practical after the new Constitution comes into effect all courts, including their structure, composition, functioning and jurisdiction , and all relevant legislation, must be rationalised with a view to establishing

²⁰³ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* (CCT 38/12) [2012] ZACC 18

²⁰⁴ *Ibid* 63

a judicial system suited to the requirements of the new Constitution.”²⁰⁵ For several years, the Department of Justice and Constitutional Development, has been engaged in attempts to rationalise the current court structure in a manner that is consistent with the prescripts of the Constitution thereby giving effect to the provisions of schedule 6. These attempts have culminated in the drafting of a number of Bills which collective became known as the “Justice Bills.”²⁰⁶

Of relevance for court administrative purposes is the Superior Courts Bill²⁰⁷ (Bill). The preamble of this Bill, states that “the purpose of the Bill is to make provision for the administration of the judicial functions of all courts, to make provision for administrative and budgetary matters relating to the Superior Courts and to provide for matters incidental thereto.” Section 11(1) (a) of the Bill states “that the Minister must appoint for the Constitutional Court, the Supreme Court of Appeal and each Division a court manager, one or more assistant court managers, a registrar, assistant registrar and other officers and staff whenever they may be required for the administration of justice or the execution of powers and authorities of the said court.” Further, section 11 (1) (b) (i) states that any such appointment “must be made at the request of an in consultation with the head of court.” In terms of the prescripts of section 11(1) (c), the person appointed in terms of this section is in the employ of the Department of Justice and Constitutional Development (Department). In other words, such a person reports to the Minister and not the head of court to which her or she is appointed to. Section 10(2) of the Bill relates to finance and accountability, it states that the “Minister must address requests for funds needed for the administration and functioning of the Superior Courts as determined by the Chief Justice after consultation with other heads of court.”

In justification of the Bill, Clause 1 of the Memorandum on the objectives of the Bill stipulate that the “Bill aims to rationalise, consolidate and amend laws relating to the Constitutional Court, Supreme Court of Appeal and High Courts in a single Act of Parliament; to unite the various high courts into a single High Court of South Africa”; and to “make provision for

²⁰⁵ Schedule 6 (16)(6)(a) The Constitution (note 2 above) see also Department of Justice and Constitutional Development: *Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental State* available at <http://www.info.gov.za/view/DownloadFileAction?id=161854>

²⁰⁶ Constitutional Seventeenth Amendment Bill Notice Number 33216 of 2010; South African Judicial Education Institute Bill, 4 of 2007; Superior Courts Bill Notice Number 33216 of 2010

²⁰⁷ Ibid

administrative and budgetary matters incidental to the functioning of the courts.” The Department of Justice and Constitutional Development has argued that “placing administrative tasks in the judiciary is a breach of the doctrine of the separation of powers as any form of administration is considered a task of the executive.”²⁰⁸ Juxtaposing the provisions relating to the administrative and budgetary matters contained in the Bill with those contained in the Constitutional Court Complementary Act reveals an anomaly. Whereas in terms of the Constitutional Court Complementary Act, administrative matters are controlled by the court through the Chief Justice, the Superior Courts Bill seems to have taken a retrogressive step as far as strengthening the institutional independence of courts. Thus, the Bill appears to make serious incursion into the independence of the judiciary.

The other noticeable attempt to secure the institutional independence of the judiciary has been the establishment of the Office of the Chief Justice by Proclamation 44 of 2010²⁰⁹ in terms section 7(5) (a) of the Public Service Act²¹⁰ “which stipulates that the President may by proclamation in the *Gazette*, on the advice of the Minister amend Schedule 1 so as to establish or abolish any national department.” The establishment of such a national department is in anticipation of the Nineteenth Constitution Amendment Bill (Amendment) which seeks to add the following subsection to section 165 of the Constitution:

“The Chief Justice is the head of the Judiciary and exercises responsibility and monitoring of norms and standards for the exercise of the judicial functions of all courts.”

The Department of Justice and Constitutional Development redrafted the Constitution Amendment Bill and the Superior Courts Bill in order to accommodate the views of the judiciary which emanated from the Judges Conference which was held in July 2009.²¹¹ What follows is a critical discussion on the two Bills and proclamation, asking the question whether they can withstand constitutional scrutiny and find a sustainable solution to the impasse.

²⁰⁸ International Bar Association. “Beyond Polokwane: Safeguarding South Africa’s Judicial Independence” available at www.ibanet.org/Document/Default.aspx?DocumentUid=4c7e8c0f accessed on 20 October 2012

²⁰⁹ PR 44/GG 33500/03-09-2010 10 September 2010

²¹⁰ 103 of 1994

²¹¹ <http://www.info.gov.za/aboutgovt/justice/system.htm>

The Bill has come under criticism for various reasons. The focus for purposes of this discussion the focus will only be on administrative and budgetary issues. The International Bar Association (IBA) submits that it“s concerned that the effect of section 10 and 11 of the Bill may be to “deprive the courts of the responsibility it should have regarding administrative and budgetary issues.” The IBA further submitted that this is an “attempt to create a rigid divide and exclude the judiciary from administrative and budgetary matters” that relate to the courts. The IBA goes further to submit that the effect of this is that the judiciary is confined to “dealing judicial functions only, while the Minister effectively has the sole authority” in administrative and budgetary matters.²¹²

The General Council of the Bar (GCB) of South Africa submitted that “Administrative necessities and their attendant financial requirements such as appointing interpreters, operating the general office of each division, recording of proceedings, filing systems and many others are all essential parts of the judicial system and cannot be distinguished from judicial functions, therefore of the view that in the absence of being able to control these functions, the judiciary cannot properly perform its tasks.”²¹³ Moreover, the GCB submitted that “placing the sole control of the administration of the courts“ budgets in the hands of the executive constitutes an unreasonable intrusion on the separation of powers, accordingly, the submission went, the judiciary cannot function as a watchdog of other organs of state if it is entirely dependent on the executive for its resources. Judicial independence cannot be guaranteed if the Minister is capable of withholding or restricting funds in a manner that hampers the functioning of the courts.”²¹⁴ The GCB“s submission is bolstered by the Constitutional court judgment in the case of *De Lange v Smuts*²¹⁵. In this case, court administration was identified as “one of the conditions of judicial independence”²¹⁶ as it “bears directly and immediately on the exercise on judicial functions.”²¹⁷

²¹² International Bar Association: Comments on the impact of South Africa’s Constitution Fourteenth Amendment Bill and the Superior Courts Bill 6 available at www.ibanet.org/Document/Default.aspx?DocumentUid accessed on 15 September 2012

²¹³ Submissions to the Portfolio Committee on Justice and Constitutional Development on behalf of the General Council of the Bar of South Africa: The Constitution Fourteenth Amendment Bill and The Superior Courts Bill

²¹⁴ Ibid 23

²¹⁵ (note 170 above)

²¹⁶ (note 170 above) 70

²¹⁷ Ibid

The establishment of the National Office of the Chief Justice has been greeted with caution. For example, Klaaren has been quoted as saying:

“it is not a problem for judicial independence that the office was set up under the Public Service Act. Such an office had to be established in the framework of the public service. Depending on how the office will be structured, it will probably enhance judicial independence and the separation of powers. The detailing of the lines of authority would be applicable not only between the chief justice and head of the office, but also at the middle and lower levels of the office.”²¹⁸

Indeed, while this development may look attractive at first sight, what remains to be seen is how it’s going to be structured. For example, any such structuring ought to detail the lines of authority between the Chief Justice and the heads of Superior and Lower Courts as pointed out by Klaaren. Moreover, as much as the establishment of such a department may bode well for the strengthening of institutional independence and place the responsibility of administration of courts with the judiciary, it is however cautioned that this model may not overcome the problem of judicial independence in its entirety as the separate national department may still be an arm of the executive branch of government.²¹⁹ Moreover, it is also doubtful whether any sense of independence in the administration of the courts will be achieved if the Bill comes into law, despite the noble attempts of establishing an Office of the Chief Justice. Therefore, it is important that any structuring of this national department takes into cognisance Constitutional court jurisprudence which seems to suggest that the court administration ought to be vested in the judiciary.

4.5 Conclusion

While the Superior Courts Bill is a welcomed development in that it purports to strengthen the independence of the judiciary, it leaves much to be desired as far as the administration of courts is concerned. The conclusion is based on the following. Firstly, it fails to place the administrative and budgetary authority with judiciary as it clearly states that such

²¹⁸ F Rabkin New office 'likely to strengthen judiciary' Business Day Live 14 September 2010 available at <http://www.bdlive.co.za/articles/2010/09/14/new-office-likely-to-strengthen-judiciary> accessed on 20 August 2012

²¹⁹ Justice Ngcobo (note 171 above) 14

responsibilities lie with the executive. Thus, because of these incursion into the separation of powers and independence of the judiciary, the Bill fails to distinguish itself from the current Supreme Court Act which a relic of the past dispensation and incompatible with the dictates of the current constitutional dispensation. Secondly, the Bill fails to recognise the judiciary as a co-equal arm of govern. In fact, the Bill does the contrary. It effectively relegates the judiciary to a subordinate position. This is because in terms of the Bill, the judiciary can neither appoint its own staff nor participates in the drafting of its own budget. This essentially leaves the judiciary vulnerable and at the mercy of the *bona fide* of the executive. This is untenable as it lends itself to abuse. Thirdly, the Bill seems to have taken regressive steps when compared with the Constitutional Court Complementary Act in that whereas in terms of this Act, the power to appoint administrative staff and draft the budget resides with the judiciary, the Bill removes of these powers from the judiciary and places them with executive. As far as the establishment of the national department of the Office of the Chief Justice is concerned, suffice it to say that on the face of it, such a development is encouraging and may potentially strengthen judicial independence. However, this strength entirely depends on how this department is structured and where court administrative and budgetary powers lie. Lastly, it is therefore submitted that in its current format, the Superior Courts Bill does not constitute a sustainable solution to the problem of executive exercise of administrative and budgetary authority over the courts.

CHAPTER 5: CHALLENGES OF JUDICIAL INDEPENDENCE: THE HLOPHE SAGA

This chapter seeks to discuss challenges that threaten judicial independence in South Africa. Although South Africa is a young constitutional democracy, there have been a number of incidents which have sought to compromise the independence of the judiciary. For example, the appointment of Advocate Mpshe as an acting judge in the North West Province by the Minister of Justice and Constitutional Development in terms of section 175 (2) of the Constitution. Advocate Mpshe is the former Acting National Director of Public Prosecution. At the time of his appointment, he was the Deputy Director of Public Prosecution employed by the National Prosecuting Authority (NPA). After the appointment, he immediately resigned from this position in this position in the NPA.

Advocate Mpshe's appointment to the bench was met with much consternation. In response of the objections against the appointment, the Minister of Justice and Constitutional Development responded by saying

"The fact that Advocate Mpshe requested the President to allow him to vacate his office with immediate effect, as a Deputy National Director of Public Prosecutions, based on personal considerations could not have affected my position with regards to his appointment as an Acting Judge. I would still have held the same view and position regardless of whether or not he left the NPA."²²⁰

Relying on the case of *Law Society of Lesotho v The Prime Minister of Lesotho and Another*²²¹, which invalidated the appointment of a member of the Attorney General's office as an acting judge in Lesotho, critics²²² alleged that this appointment of Advocate Mpshe constituted a breach of judicial independence as it had the potential of tarnishing the perception of independence and adversely impacting on public confidence in the judiciary.²²³

²²⁰ J Radebe, Department of Justice and Constitutional Development available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=8464&tid=8481> accessed on 3 December 2012

²²¹ [1985] LSCA 144

²²² P de Vos "Mpshe's appointment: scandalous attack on independence of the judiciary" (2010) available at <http://constitutionallyspeaking.co.za/mpshes-appointment-scandalous-attack-on-independence-of-the-judiciary/> accessed on 3 December 2012

²²³ (note 198 above) 45

This was predicated by the fact that Advocate Mpshe was still under the employment of the state as the Deputy Director of Public Prosecution in the NPA when to the bench. The crux of the objection against Advocate Mpshe's appointment was that he was still a state employee at the time of his appointment and this therefore constituted a breach of separation of powers.²²⁴ Unfortunately, Advocate Mpshe's appointment has never been challenged in a court of law. Be that as it may, on the face of it, the Minister's pronouncement that he would've appointed Advocate Mpshe as an acting judge regardless of whether or not he resigned from his position in the NPA seems to be concerning and contrary to the principle emanating from the *Law Society of Lesotho v The Prime Minister of Lesotho and Another* judgment.

Another example of an incident which threatened to compromise the independence of the judiciary in South Africa arose when Judge Heath was appointed as the head of the Special Investigative Unit²²⁵ (SIU). In dealing with this issue, the Constitutional Court held that

"Judge Heath's appointment to head of the SUI could result in a public perception that judges were functionally associated with the executive and therefore unable to control the power of that executive with the detachment and independence called for by the Constitution. This in turn would undermine the separation of powers and the independence of the judiciary. Therefore, the appointment of a judge to head the SIU could not be supported and thus invalid."²²⁶

Although nuanced, these two incidents are analogous as they represent insidious attempts to erode the separation of powers and the judiciary's independence. If the sanctity of these constitutional principles is to remain, it is imperative that any such attempts are resisted. Having said that, it is almost impossible to have a detailed discussion on all such incidents that have occurred. What follows is a discussion on the Hlophe saga. The reason that this incident has been highlighted is due to its flagrant and stark manner. Thus, the Hlophe saga is utilised as an example to illustrate how judicial independence can be compromised.

²²⁴ M Trapido "Mpshe's appointment cannot be justified" (2010) available at <http://www.thoughtleader.co.za/traps/2010/02/13/mpshe-appointment-cannot-be-justified/> accessed on 3 December

²²⁵ Established in terms of Special Investigating Units and Special Tribunals Act 74 of 1996.

²²⁶ *South African Personal Injury Lawyers v Heath* (note 198 above) 46

5.1 The Hlophe Saga

By way of introduction, the term “Hlophe saga” is a generic term used by the author to describe a series of events which began with judges of the Constitutional Court claiming that the Cape Judge President John Hlophe tried to improperly influence two of them, namely Justice Nkabinde and Justice Jafta to rule in favour of Jacob Zuma (now the President of South Africa) who was facing corruption charges at the time. Hlophe subsequently instituted a counter complaint against the judges of the Constitutional Court on the basis that they issued a statement to the media regarding their complaint without giving him an opportunity to defend himself. These issues shall be elaborated on in greater detail in subsequent paragraphs. The Hlophe saga is a vexed and controversial issue which continues to cast a dark shadow over the independence of the judiciary in South Africa.

This chapter seeks to determine whether the dismissal of the complaint against Judge Hlophe by the JSC amounted to an abdication of its constitutional responsibility and whether such abdication constitutes a threat to judicial independence. The counter-complaint lodged by Hlophe against the judges of the Constitutional Court is deliberately omitted from this discussion as the Supreme Court of Appeal (SCA) has on two occasions held that the JSC acted lawfully in dismissing the counter-complaint.²²⁷ It is also important to note that there shall be no view expressed on the merits of the case against Hlophe. Thus, in responding to these questions, the following will be discussed:

i) There will be an attempt to give an account of Judge Hlophe’s ascendancy within the judiciary. This section will also give a full explanation of the series of events which are cumulatively termed the “Hlophe Saga”. Included in this explanation shall be the counter complaint lodged by Hlophe against the Constitutional Court judges, the JSC’s response and their ultimate findings.

²²⁷ *Langa CJ and Others v Hlophe* 2009 (8) BCLR 823 (SCA) and *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* (2011 (3) SA 549 (SCA)

ii) This section will consider the court challenge instituted against the JSC by Freedom Under Law (FUL) and the findings made by the court.

iii) In conclusion, this section shall consider whether the decision of the JSC constitutes a threat to judicial independence.

5.2 Judge President Hlophe's Ascendency

After returning from the University of Cambridge, where he studied for a Masters degree and subsequently his PhD, Judge Hlophe became a senior lecturer at the erstwhile University of Natal (now University of KwaZulu Natal). He subsequently moved to the erstwhile University of Transkei (now Walter Sisulu University) where he became a professor. He was a very able and highly qualified legal scholar precisely when South Africa was undergoing political and social transformation. In 1995, at the tender age of 36, he was appointed a judge of the Cape High Court. He was the first full time academic appointed to the high court bench in South Africa. In the following years, many opportunities for advancement and promotion would be laid before him. Barely four years after his first appointment to the bench, the judge presidency fell vacant. He grasped the opportunity and was appointed Judge President of the Cape High Court in 2000. Thus, Judge Hlophe's rise to judicial prominence was meteoric. In years to follow, Judge Hlophe would become a very controversial figure within the judiciary.²²⁸

5.3 The Hlophe Saga: Facts

“On 11 and 12 March 2008 the Constitutional Court heard argument in four matters regarding the prosecution of Mr Jacob Zuma and Thint (Pty) Ltd on corruption charges (Zuma/Thint matters). The cases concerned, among other things, the lawfulness of search and seizure procedures and the question of legal professional privilege over documents held on behalf of clients. The Constitutional Court reserved judgment at the conclusion of the hearing of the

²²⁸ C Forsyth *The Failure of Institutions: The South African Judicial Service Commission and the Hlophe Saga* in S Sheetreet and C Forsyth (ed) *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (2011) 69-77

four matters. Nkabinde J and Jafta AJ were two of the eleven judges who heard the matters. Jafta was acting as a judge of the Constitutional Court at the time.”²²⁹

“Before judgment in the Zuma/Thint matters was handed down Hlophe JP visited Nkabinde J and Jafta AJ separately in their chambers at the Constitutional Court and had discussions with them. These discussions were subsequently reported to the other members of the Constitutional Court and led to a complaint being lodged by the judges of the Constitutional Court with the JSC that Judge John Hlophe had approached some of the judges of the Constitutional Court in an improper attempt to influence the Court’s pending judgment in one or more cases”. The judges of the Constitutional Court also published a press statement stating that they had done so. Hlophe JP then lodged a counter-complaint against the judges of the Constitutional Court. He accused them of having undermined the Constitution by making a public statement in which they sought to activate a procedure for his removal for alleged improper conduct before properly filing a complaint with the JSC and of having violated his rights to dignity, privacy, equality, procedural fairness and access to courts by filing the complaint even before they had heard his version of the events.”²³⁰

“The JSC requested statements from the judges who were directly involved in the incident whereupon Nkabinde J and Jafta AJ responded that they were not complainants, that they had not lodged a complaint, did not intend to lodge one and did not intend making statements about the matter. Shortly thereafter a statement by Langa CJ on behalf of all the judges of the Constitutional Court and confirmed by, amongst others, Nkabinde J and Jafta AJ, in so far as the contents of the statement referred to them, was filed with the JSC in support of, and in answer to, the complaint and the counter-complaint.”²³¹

“In the statement filed by the Constitutional Court judges in support of their claim Langa CJ (former) related the versions of Jafta AJ and Nkabinde J as to what was said during their discussions with Hlophe JP and how it came about that the complaint was lodged. According to the statement Nkabinde J and Jafta AJ had made it clear to Langa CJ and Moseneke DCJ that in their view the approach by Hlophe JP had been improper and that after they had dealt with the matter by rejecting the approach of Hlophe JP they did not consider it necessary to

²²⁹ *Freedom Under Law v JSC* (note 227 above) 2

²³⁰ *Freedom Under Law v JSC* (note 227 above) 3

²³¹ *Freedom Under Law v JSC* (note 227 above) 4

lodge a complaint or make a statement. A meeting of Constitutional Court judges was thereafter called at which Langa CJ and Moseneke DCJ reported that in their view the conduct of Hlophe JP, as reported to them by Jafta AJ and Nkabinde J, constituted a serious attempt to influence the decision of the Court in the Zuma/Thint cases. After discussion the judges decided to lodge a complaint with the JSC.”²³²

“Hlophe JP also filed a statement in answer to the complaint and in support of his counter-complaint. He contended that the Constitutional Court judges made themselves guilty of gross misconduct by laying the complaint and by issuing a media release stating that a complaint had been laid, before even having afforded him a hearing, thereby violating his constitutional rights and undermining the integrity of the judiciary. He stated that the history related by the judges of the Constitutional Court showed a motive by Langa CJ and Moseneke DCJ to get rid of him at all costs. He stated further that it would seem that inappropriate pressure had been brought to bear on Nkabinde J and Jafta AJ to associate themselves with the complaint and that Langa CJ and Moseneke DCJ failed to convey the correct position „in respect of the so called “complainant judges” to the JSC” and hoodwinked them into supporting a decision without knowledge of the position taken by Nkabinde J and Jafta AJ. Given the personalities involved in the cases which the Constitutional Court had to decide, Hlophe JP suggested, „it does appear that there may well have been a political motive on the part of the Chief Justice and his Deputy“.”²³³

“On 5 July 2008 the JSC, after having considered both the complaint and counter-complaint, released a media statement in which they said:”

“The Commission unanimously decided that, in view of the conflict of fact on the papers placed before it, it was necessary to refer both the complaint by Constitutional Court and the counter complaint by the Judge President to the hearing of oral evidence on a date to be arranged by the Commission.”²³⁴

“The JSC advised the parties that 1 to 8 April 2009 had been set aside for the hearing of oral evidence on disputes it considered to be material disputes of fact which could not be resolved

²³² *Freedom Under Law v JSC* (note 227 above) 5

²³³ *Freedom Under Law v JSC* (note 227 above)6

²³⁴ *Freedom Under Law v JSC* (note 227 above) 9

on the papers. It indicated that it believed that judges Nkabinde, Jafta, Langa, Moseneke, Mokgoro and Hlophe would have to give evidence. In a subsequent letter the JSC advised that all questions had to be aimed at resolving the disputes of fact that had been identified. An urgent application by Hlophe JP to the South Gauteng High Court, Johannesburg for an order declaring the entire proceedings of the JSC commencing on 5 July 2008 unlawful and therefore void ab initio was partly successful in that the court set aside the proceedings of 7 and 8 April 2009 and ordered that they were to commence de novo on a date suitable to the parties. The court could find no basis for a finding that the proceedings on 5 July 2008 were unlawful.²³⁵

“On 20 July 2009 the JSC reconvened to discuss the complaint and counter-complaint. In the meantime its composition had changed. A new President, Mr Jacob Zuma, had been elected and a new Minister of Justice had been appointed. The Minister of Justice became an *ex officio* member of the JSC and the newly elected President Zuma, as he was entitled to do, replaced four of its members, who had been appointed by his predecessor, with four new appointees. One of the new members had previously acted as counsel for one of the complainants and recused himself from the discussion leaving four new members who had not previously been involved in the matter. The reconstituted JSC decided that it was necessary to commence with the matter de novo. Having reconsidered the matter they concluded in terms of rule 3.1 „that the allegations made in the Complaint and Counter complaint, if established, would amount to gross misconduct“ and in terms of rule 4.1 appointed a sub-committee to investigate the complaints by conducting interviews behind closed doors with Langa CJ, Moseneke DCJ, Hlophe JP, Nkabinde J and Jafta AJ.²³⁶

“The JSC sub-committee held interviews and upon conclusion thereof in a report to the JSC recommended „fresh deliberations to the complaint and the counter-complaint“ in light of the proceedings before them and the transcript of the proceedings of April 2009. The JSC reconsidered the matter and dismissed both complaints on the following grounds:²³⁷”

“i) That the evidence in respect of the complaint did not justify a finding that the Judge President was guilty of gross misconduct and that the matter was accordingly finalised;

²³⁵ *Freedom Under Law v JSC* (note 227 above)12

²³⁶ *Freedom Under Law v JSC* (note 227 above)13

²³⁷ *Freedom Under Law v JSC* (note 227 above)15

ii) That the evidence in support of the counter-complaint did not support a finding that the Constitutional Court justices were guilty of gross misconduct and that the matter was accordingly finalised; and

iii) That none of the judges against whom complaints had been lodged was guilty of gross misconduct.”²³⁸

5.4 Court challenges to JSC decision

As discussed under section 3.4, the laws which relate to disciplinary proceedings against judges have dramatically changed since the Hlophe Saga. However, due to the non-retrospective application of the law, this discussion will be conducted as the law stood then. In terms of section 177(1) of the Constitution “a judge may be removed from office only if the JSC finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct and if the National Assembly calls for that judge to be removed by a resolution adopted with a supporting vote of at least two-thirds of its members. The JSC may determine its own procedure but its decisions must be supported by a majority of its members. Rule 3 of the rules adopted by the JSC provides:”

“3.1 On receipt of a complaint and the responses referred to above, the JSC shall consider the relevant documentation and decide whether, *prima facie*, the conduct complained of would, if established, amount to such incapacity, incompetence or misconduct as may justify removal of the Judge in terms of Section 177(1) of the Constitution.

3.2 In the event of the view of the JSC being that the conduct complained of would not constitute grounds for removal from office, the matter shall be treated as finalised and the complainant and the Judge notified accordingly.

3.3 In the event of the JSC resolving that the pertinent conduct, if established, may justify removal from office, the matter shall be dealt with further as provided below.”

“Rule 4 makes provision for a preliminary investigation by a subcommittee and rule 5 provides for a hearing at which the judge is charged in terms of a charge sheet. The judge must be asked to plead to the charge, is entitled to legal representation, may call evidence, cross-examine witnesses and present argument. After the enquiry the JSC must make a

²³⁸ *JSC v Premier of the Western Cape Premier* (note 97 above)

finding as to whether or not the judge suffers from incapacity, or is grossly incompetent, or is guilty of gross misconduct as envisaged by s 177(1).”

“The JSC”s decision to dismiss both complaints against Judge Hlophe attracted two legal challenges. The first challenge was from Helen Zille, the Premier of the Western Cape and the second one came from an organisation called “Freedom Under Law” (FUL) who describe themselves as “not-for-profit organisation in order to promote democracy under law and to advance the understanding and respect of the rule of law and the principle of legality.”²³⁹ Although the two challenges were instituted on different grounds, they both sought the same relief, that is, to set aside the decision of the JSC of dismissing both the complaint by judges of the Constitutional against Judge Hlophe and Judge Hlophe’s counter complaint. However, for purposes of this discussion, a lengthy discussion on the matter brought to court by the Premier of the Western Cape is not necessary as it was instituted on a technicality which essentially related to three issues, firstly, the fact that she was not present at the meeting where such a decision was taken “because the JSC had not notified her when and where the meetings were to take place, and she was accordingly unable to comply with her obligation to attend as required by s 178(1)(k) of the Constitution.” Secondly, “only ten members of the JSC participated when on the JSC’s own interpretation of s 178(1)(k), the JSC should have been composed of 13 members and thirdly, the decisions of the JSC were not supported by a majority of the members of the JSC, as required by s 178(6) of the Constitution.”

Of relevance is the SCA judgment in the legal action instituted by FUL. FUL “applied to the North Gauteng High Court, Pretoria, for an order setting aside the decision by the JSC to dismiss the complaints.” The high court dismissed the application. Subsequently, FUL appealed to the SCA.²⁴⁰ In making its decision, the court held:

“...In these circumstances the decision by the JSC to dismiss the complaint on the basis of a procedure inappropriate for the final determination of the complaint and on the basis that cross-examination would not take the matter any further constituted an abdication of its constitutional duty to investigate the complaint properly. The dismissal of the complaint was therefore unlawful. In addition, the JSC’s decision to dismiss the complaint constituted administrative

²³⁹ http://www.freedomunderlaw.org/?page_id=2 accessed on 13 October 2012

²⁴⁰ *Freedom Under Law v JSC* (note 227 above) 1

action and is reviewable in terms of s 6(h) of PAJA for being unreasonable in that there was no reasonable basis for it.”²⁴¹

In other words, what the court was saying is that “any attempt by an outsider to improperly influence a pending judgment of a court constitutes a threat to the independence of the judiciary, which places a duty on the JSC to investigate such allegations.” Thus, the JSC’s decision not to continue investigating Hlopho, after it had made a prima facie finding, “on the basis that cross examination would not take the matter any further, constituted a flagrant abdication of its constitutional duty to investigate the complaint properly.” This led to the court emphatically finding that the “dismissal of the complaint was unlawful.” The justification given by the JSC for their dismissal of the matter also raised the court’s ire. The court found it quite surprising that a body partly comprised of legal practitioners could reach such a conclusion as courts often “have to decide where the truth lies between two conflicting versions. They often do so where there is only the word of one witness against another and neither of the witnesses concedes the version of the other.” Even after having gone through cross examination, a court may “still be unable to decide where the truth lies. However, that possibility does not entitle a court to decide the matter without allowing cross-examination and it does not entitle the JSC to do so either.”²⁴²

The court’s utterance in this regard indicates that there were indeed other avenues that could have been explored with the view of resolving the matter; however the JSC chose to ignore these options. Clearly, the reasoning of the JSC did not make legal sense and was inconsistent with acceptable adjudicative standards. This constituted a gross abdication of the JSC’s constitutional obligation to expeditiously dispose of complaints against judges.

5.5 A threat to judicial independence

This section essentially seeks to consider whether the JSC’s conduct constitutes a threat to judicial independence. In the *De Lange v Smuts* it was held that “it’s important that the judiciary should be perceived as independent as well as impartial and that the test for independence should include that perception. Without that confidence the system cannot

²⁴¹ *Freedom Under Law v JSC* (note 227 above) 50

²⁴² *Freedom Under Law v JSC* (note 227 above) 48

command the respect and acceptance that are essential to its effective operation.”²⁴³ What emerges from this case is that the perception of impartiality and independence are an essential ingredient to the formulation of judicial independence and that without that confidence, the system cannot command the respect and acceptance that are essential to its effective operation. The failure of the JSC as an institution leaves a number of unresolved questions which may be damaging to the perception of judicial independence.

The failure of the JSC as an institution constitutes a threat to judicial independence. The amount of damage the Hlophe saga may have potentially caused is unknown. Anecdotal evidence seems to suggest that the JSC as an institution may have suffered some harm. For example, in 2009, Judge Nugent of the SCA withdrew his application with the JSC as a candidate for a vacancy in the Constitutional court. Nugent’s submitted reason for withdrawing his application was his lack of trust in the JSC as a result of the manner in which the body had handled the Hlophe saga. He further suggested that the low number of candidates applying for positions in the Constitutional court in recent times may be influenced by the lack of confidence in the body to dutifully dispose of its mandate.²⁴⁴ The JSC ought to act against these ominous signs and take every measure possible to rectify them, lest such views spread uncontrollably.

5.6 Conclusion

This chapter sought to determine whether the dismissal of the complaint against Hlophe by the JSC amounted to an abdication of its constitutional responsibility and whether such abdication constitutes a threat to judicial independence. In making this determination, there was an analysis of constitutional provisions which establish the functioning of the judiciary and case law. It is therefore concluded that the abdication of responsibility by the JSC constitutes a threat to judicial independence.

²⁴³ *De Lange v Smuts* (note 170 above) 6

²⁴⁴ <http://www.iol.co.za/news/crime-courts/concourt-candidate-riles-commissioners-1.1315509> accessed on 5 October 2012

In conclusion, while acknowledging the relatively weak position the judiciary finds itself in comparison to other arms of government, South Africa's Constitution puts measures in place to ameliorate against such weakness. These measures manifest themselves in the establishment of bodies such as the JSC. Amongst others, the objective of the JSC is to protect the independence of the judiciary. Thus, once the JSC abdicates this responsibility, the judiciary is left exposed and susceptible to interference. In other words, its independence is threatened. One of the reasons why judicial independence needs to be jealously protected is that it occupies the unique position of upholding the rule of law, which is pivotal to the functioning of any democratic society. Therefore, the lingering unresolved questions which arose out of the Hlophe saga cast a cloud of doubt over the impartiality and independent functioning of the judiciary. This cloud of doubt may slowly erode the confidence the public has in the judiciary and its perception of independence. As a constitutional democracy that is still in its infancy, it is important that any alleged improper attempts are duly investigated so as to maintain not only the public confidence in the functioning of such bodies, but also protect the integrity of the judiciary.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

This dissertation, essentially sought to address two broad issues. Firstly, it sought to explore the judiciary as an independent arm of government; secondly it sought to highlight serious threats to South Africa judicial independence. In addressing these two broad issues, this paper has discussed the history of judicial independence giving a historical context and highlighted the material conditions that gave rise to its development; discussed judicial independence from an international law perspective and identified certain conventions and basic principles which protect judicial independence; discussed the constitutional and legislative framework protecting judicial independence in South Africa. Central to this discussion was the court administration system inherited from the apartheid regime. The question of its consistency with the Constitution was addressed. This section also dealt with certain judicial reforms that have been proposed by the Minister of Justice and Constitutional Development. Moreover, there was also a discussion on the doctrine of separation of powers and how such a doctrine relates to the independence of the judiciary; discussed threats to judicial independence in South Africa. In this regard, the controversial Hlophe saga was discussed, amongst others.

Through its constitutional and legislative framework, South Africa has gone to great lengths in ensuring the protection of the independence of the judiciary. The impartiality and bias of judges has been dealt with on many occasions by South African courts, both before and after the establishment of the South Africa's constitutional democratic dispensation. To this effect, the Constitutional court has held that the test for determining bias is that of a reasonable apprehension of bias. In other words, the test is objective. The Constitutional court has also cautioned judges not to be overhasty in acceding to requests for recusal. The presumption is that a judge is impartial and the onus rests with the party seeking recusal to prove bias. The courts have therefore developed an exacting standard for those seeking recusal.

The Constitution, through the establishment of the JSC, establishes clear procedures to be followed in the appointment of judges. In its appointment procedure, the JSC is obliged by the Constitution to ensure that the judiciary is broadly reflective of the racial and gender composition of South Africa. JSC has diligently strived towards the achievement of this ideal.

However, the JSC is not without its problems. Of the 23 members in the JSC, 15 are political nominees. The desire for accountability and ensuring that the electorate is represented in the appointment process of judges through executive and parliamentary appointees is unquestionable, however, it is submitted that political nominees are over represented. In form, the JSC is broadly representative of members of the judiciary, legal profession, legislature and executive. However, due to the fact that candidates are recommended for appointment through a voting procedure, in substance, the JSC is essentially a body of politicians tasked with the responsibility of appointing judges.

Another troublesome issue is that although the rules and procedures of the JSC invite submissions from interested parties and institutions before candidates are interviewed, the interviews are generally conducted behind closed doors, save for a few exceptions. This clandestine manner of operation makes no sense and flies in the face of the Constitutional principles of accountability and transparency. The issue of the appointment acting judges also needs mention. As it stands, section 175 of the Constitution essentially gives the discretion of making such appointments either to the President or the Minister of Justice and Constitutional Development. In other words, this authority solely vests in the executive, save for the Constitutional court where the recommendation must be made by the Minister of Justice of Justice in concurrence with the Chief Justice. It is accepted that the appointment of acting judges may at times need to be made urgently and the JSC, which only meets twice a year may not be able to make such appointments, however, it is submitted that giving the executive discretion in the appointment of acting judges seems to be contrary to the constitutional scheme of ensuring that the JSC oversees the appointment of judges.

The tenure of judges in South Africa is secure. This has been done through constitutional and legislative measures. South Africa's legal mechanisms protecting the security of tenure of judges seems to make a distinction between judges of the Constitutional court and other judges, in that, judges of the Constitutional court serve for a 12 year period or until the age of 70, whichever comes first, and judges of other courts may essentially serve until retirement. It is not immediately clear why there is such a distinction. The distinction between these terms of office doesn't appear to have a rational base.

As far as complaints, disciplinary proceedings and the removal of judges are concerned, the South African legal framework develops unequivocal procedures. The law distinguishes

between serious but non impeachable complaints and impeachable complaints and sets separate procedures to be followed on either occasion. These distinctions have been prompted by the establishment of a Judicial Conduct Tribunal. This positive development seeks to ensure that disciplinary proceedings are conducted in terms of established adjudicative principles.

Judges in South Africa are well remunerated. What can be deduced from the legal framework is that while the President determines the salary of judges, the legislature retains the right to debate and reject the President's proposal. These checks and balances compel both the legislature and the executive to cooperate in determining judges salaries, ensuring that such power does not solely lie at the discretion of the President. Further, the President's authority to determine the salary of judges is also limited by the Constitution which stipulates that the salary, allowance and benefits of judges may not be reduced. This important principle ensures that judges perform their functions freely without the fear of their remunerations being threatened or compromised by unfavourable judgments.

On the other hand, the administration of courts in South Africa leaves much to be desired. The legislative framework governing the administration of courts seems to establish two dispensations, one for the Constitutional court, and one for other courts. The legal framework effectively gives the Minister of Justice and Constitutional Development administrative and budgetary authority over the judiciary, save for the Constitutional court. This essentially places judicial functions in the hands of the executive. On the face of it, this appears to constitute an unjustifiable breach of the principle of separation of powers. The Minister of Justice and Constitutional Development has however taken measures to rectify the situation through drafting of the Superior Courts Bill. Although the Bill has legitimate objectives, it has been found wanting by many within the legal fraternity for the incursions it makes into the independence of the judiciary. It is therefore submitted that the Bill is an unsustainable solution to the impasse.

The Hlophe saga and the unsatisfactory manner in which it was resolved by the JSC continue to haunt the judiciary and cast doubt on the independence of the judiciary in South Africa. Doubt in the independence of the judiciary may inevitably diminish the confidence the public has in the judiciary. Furthermore, the Hlophe saga also raises concern about the functioning and ability of the JSC to resolve controversial issues affecting the judiciary. As the weakest

arm of government, it is imperative that the JSC acts with deliberate speed in investigating and disposing of allegations of attempts to improperly influence the judiciary.

In conclusion, South Africa has taken extensive measures to ensure that the independence of the judiciary is protected in both its conceptions, that is, individual and institutional independence. As far as individual independence is concerned, these measures range from the appointment of judges, the security of tenure and remuneration of judges, and the complaints, disciplinary proceedings and the removal of judges. However, institutional independence leaves much to be desired, as previously stated. The South African system of court administration still suffers from the hangover of the previous regime whereby the administration of courts is vested in the executive, which is incompatible with South Africa's current system of constitutional governance. Although the Minister of Justice and Constitutional Development has proposed certain legislative measures to remedy the situation, it is submitted that these measures appear to have the potential to cause more harm than good as they threaten to expose the judiciary to greater interference. This assertion is occasioned by the fact that these purported proposals place administrative responsibilities within the executive. It also needs to be noted that these proposed reforms constitute a regression from current existing legislation governing such as the Constitutional Court Complementary Act. The judiciary in South Africa is yet to face a threat to judicial independence greater than the Hlophe saga. What is a greater threat to the independence of the judiciary is the failure of the JSC, a constitutionally mandated body, to adequately and expeditiously dispose of the matter. Any alleged attempts of improperly influencing a judge ought to be taken seriously. However, the JSC in this regard has had to be compelled by a judgment of the SCA to act in accordance with its mandate.

The protection of judicial independence in South Africa seems schizophrenic. While many positive legislative measures have been taken in order to protect the independence of the judiciary, perplexing measures which undermine the judiciary as an equal arm of government remain in place. Of greater concern is that the proposed judicial reforms, seem to fail to address this issues. Until this situation is remedied, South Africa's judiciary shall continue to be under the insidious control of the executive. While the establishment of the national department of the Office of the Chief Justice is welcome, it remains to be seen how this office is going to be structured and to what extent it's going to assist in strengthening the independence of the judiciary. Thus, while the impartiality of South African judges is

unquestionable, South Africa's judiciary suffers from contradictory structural elements which are inconsistent with the Constitution and established jurisprudence.

6.1 Recommendations

The constitutional and legislative framework which has been adopted has to a certain extent assisted in the protection independence of the judiciary. There remain areas of concern which need to be addressed in order to strengthen judicial independence. What follows are recommendations of measure which could be adopted in order in order to strengthen judicial independence in South Africa consistently with the Constitution.

6.1.1. JSC

Two issues have been identified to be problematic with the functioning of the JSC. The first issue relates to its composition, and the second issue relates to the clandestine manner in which the interviews of candidates are conducted in.

The JSC plays a critical role in the functioning of the judiciary; however its current composition is unjustifiable. This is occasioned by the unreasonable domination of political representatives in the composition of the body. It is recommended that the composition of the JSC is amended. This is in order to give judges/legal representatives majority representation and to decrease the number of political representatives in the JSC. This shall ensure that there is a proper balance between the judiciary being able to manage its own affairs, with the imperative of ensuring accountability, openness and responsiveness. Secondly, as it currently stands, candidates are interviewed by the JSC behind closed doors. It is recommended meetings and interviews of the JSC are open to the public either through television or radio broadcast. This recommendation seeks to create transparency and understanding in the processes of the JSC. The advantage that may stem from this amendment is greater public

confidence in the functioning of the JSC which appears to be particularly low with at the moment, if anecdotal evidence is anything to go by.

6.1.2 Section 175 of the Constitution

The problem which has been identified with this section is that it confers the authority to appoint acting judges on the executive. It is recommended that this section is amended in order to establish a 3 member committee of the JSC that shall be constituted in the event that acting judges are needed in a particular court. This committee shall comprise of the Chief Justice, the Judge President of a particular division and the Minister of Justice and Constitutional Development. This committee shall be tasked with the responsibility of going through the names of nominees and making a recommendation to the President for appointment. This committee shall also be guided by the same considerations of, for example, “the need for the judiciary to reflect broadly the racial and gender composition of South Africa when considering judicial appointments.” This shall balance the need for making urgent appointments and that of ensuring acting appointments are also overseen by the JSC.

6.1.3 Tenure of judges

The problem which has been identified in this regard is that South Africa’s Constitution and legislative framework establishes two dispensations for the term of service of judges, one for the Constitutional Court and another for other courts. It is recommended that the term of office of all judges, irrespective of the court of service, are rationalised to the effect that all judges serve until retirement. It is submitted that the 12 year tenure in Constitutional court is untenable as it may lead to relative instability within the Constitutional court due to the change of judges. Secondly, it may it may lead to a loss of knowledge as judges who may have been appointed to the bench at a relatively young age are lost to the judiciary, a prime example of this is the retirement of Justice Kate O’Regan from the Constitutional court.

6.1.4 Administration of courts

The problem that has been identified in this regard that the administration of courts vests in the executive, save for the Constitutional court. It is therefore recommended that the legislative framework which governs the administration of courts is amended, so as to vest the authority to appoint administrative staff, including court managers and the registrar in the judiciary. Moreover, it recommended that all issues incidental to the administration of courts also vests in the judiciary. This amendment shall give effect to the doctrine of separation of powers and allow the judiciary to manage its own administrative affairs. This amendment shall strengthen judicial independence and affirm the judiciary's position as an equal arm of government.

6.1.5 Hlophe saga

The Hlophe saga remains unresolved. As previously stated, through a series of court applications contesting the unsatisfactory manner in which the JSC dealt with the complaint against Hlophe, the SCA has held that the manner in which the JSC dealt with the complaint constitutes a threat to judicial independence. Thus, these judgments have compelled the JSC to reinstitute disciplinary proceedings against Hlophe. Thus, this recommendation shall be for future purposes as corrective measures are being taken to remedy the Hlophe saga. It is recommended that any future complaints ought to be dealt with expeditiously in terms of recognised adjudicative principles. Moreover, the JSC ought to be guided by the JSC Act in processing the complaint as it contains clear guidelines. This shall undoubtedly restore the public's confidence in the JSC.

6.1.6 Superior Courts Bill

Although the Superior Courts Bill has laudable objectives, two main problems have been identified. The first problem relates to finance and accountability and the second problem relates to the appointment of officers and staff. Both these sections appear to vest these responsibilities in the Minister of Justice and Constitutional Development. The reason for this isn't immediately clear. It is recommended that these two sections are amended in such a manner that the judiciary is able to draft its own budget, address requests for funds needed for court administration through the newly established Office of the Chief Justice and is able to appoint its own staff through the Judge President of a particular division, without the need for executive intervention. It is further recommended that the national Office of the Chief Justice ought to establish provincial offices which will be under the control and direction of the Judge President of the particular division. This office ought to have a management and administration model which resembles the current Constitutional court model. This seeks to ensure that each court is responsible for its own financial and administrative duties, which includes the ability to appoint administrative staff, while the national Officer of the Chief Justice is responsible for supervision and guidance. In order to cater for issues relating to accountability and transparency, the proposed offices shall account only to parliament which is the constitutionally mandated oversight body. Cumulatively these measures seek to rid the judiciary of executive supervision.

INTERNATIONAL CONVENTIONS, TREATIES AND OTHER RELEVANT INSTRUMENTS

African Charter on Human and Peoples Rights (1981)

American Convention on Human Rights (1969)

Bangalore Principles on Judicial Conduct (2007)

Beijing Statement of Principles of the Independence of the Judiciary (1995)

European Convention on Human Rights (1950)

International Bar Association Minimum Standards on Judicial Independence (1982)

International Convention on Civil and Political Rights (1966)

United Nations Basic Principles on the Independence of the Judiciary (1985)

Universal Declaration of Human Rights (1948)

LIST OF ACRONYMS

ACHR	American Convention on Human Rights
AJ	Acting Judge
CC	Constitutional Court
CJ	Chief Justice
DCJ	Deputy Chief Justice
ECHR	European Convention on Human Rights
FUL	Freedom Under Law
GCB	General Council of the Bar
IBA	International Bar Association
ICCPR	International Convention on Civil and Political Rights
JP	Judge President
JSC	Judicial Service Commission
NPA	National Prosecuting Authority
OAU	Organisation of African Unity
SACR	South African Criminal Law Reports
SALJ	South African Law Journal
SANRAL	South African National Roads Agency Limited
SCA	Supreme Court of Appeal
SIU	Special Investigative Unit
SLS	The Society for Legal Scholars
TBVC	Transkei, Bophuthatswana, Venda and the Ciskei
UDHR	Universal Declaration of Human Rights
UN	United Nations

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