

# **TRANSFORMATION AND THE INDEPENDENCE OF THE JUDICIARY IN SOUTH AFRICA**

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## ACRONYMS AND ABBREVIATIONS

ANC	African National Congress
ANCYL	ANC Youth League
CLAA	Criminal Law Amendment Act (105 of 1997)
Cosatu	Congress of South African Trade Unions
ICCPR	International Covenant on Civil and Political Rights (1976)
JSC	Judicial Services Commission
NP	National Party
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights (1948)
UN	United Nations

# 1. INTRODUCTION

During recent years there has been considerable debate about the judiciary in South Africa. One key issue which animated the debate was the controversy over five judicial reform bills, initially released by the Ministry of Justice in December 2004. Having been withdrawn in the face of criticism shortly after they were first issued, the bills, largely unaltered, were re-introduced to Parliament in mid-December 2005. In the months that followed, concerted opposition from the judiciary as well as from lawyers and others led to another defeat for the justice ministry's legislative programme. Now, as of late-2007, two of the bills have not been re-introduced to Parliament and the others have been substantially amended, largely in line with concerns raised about provisions that could have undermined judicial independence.<sup>1</sup>

The saga of the justice bills, ostensibly intended to improve court management and efficiency, rationalise court structures and promote transformation of the judiciary, has been one of the biggest tests for judicial independence in the post-apartheid period. At this point in time, it seems that the overall impact of this episode has not only been benign but that it may have contributed to a strengthening and deepening of understanding about the meaning of judicial independence among the various concerned role players in South Africa.

Focusing on the issue of judicial independence and transformation in South Africa, this paper discusses not only the justice bills but also other matters related to this topic, including the overall attitude of government and the ruling African National Congress (ANC) toward judicial independence. The paper also discusses the process of judicial appointments and the functioning of Judicial Services Commission (JSC), examining questions about whether the government uses the JSC process to create a judiciary that complies with and is aligned with governmental policies.<sup>2</sup>

This paper is intended to provide a perspective on questions related to the independence of the judiciary in present-day South Africa. While South Africa is no longer in the heart of its political transition, the legacy of apartheid rule is still strongly felt and post-apartheid "transformation" continues to be a central concern of government and society more broadly. But how does judicial independence relate to transformation? Rather than conceiving of it as a separate issue, this paper departs from the point of view that the consolidation of judicial independence is a key dimension of the process of judicial transformation in South Africa. If this is so, the question arises as to whether there may be tensions between independence and other key elements of transformation, including the creation of a judiciary that is representative of the people and that is dedicated to protecting and promoting South Africa's constitutional values, fostering an atmosphere of judicial accountability, and improving the efficiency and appropriateness of the justice system to ensure access to justice for all people.

While strengthening independence appears to be largely compatible with other aspects of transformation, there are potential tensions, and the report tries to clarify where these tensions lie. South Africa's constitutional democracy is barely over a decade old and faces complex challenges due to the lasting effects of over fifty years of apartheid rule. Repairing the problems left behind

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<sup>1</sup> It should be noted that the ANC policy conference in June adopted a draft resolution with the somewhat ambiguous resolution in favour of "Adoption and Implementation of Transformative bills that are currently being debated" (ANC, 2007: 17). It is not at all clear if this resolution is referring to the revised bills that are currently before Parliament or is also supposed to refer to the two bills that are currently completely withdrawn. The policy conference is a preparatory conference for the ANC national conference due to start on 16 December, and draft resolutions are developed for consideration by the national conference. Once adopted by the national conference they are intended to direct ANC, and thus government, policy.

<sup>2</sup> Another saga which is not discussed in detail in this report (though see the section on Race and Gender Transformation in the discussion of judicial appointments, footnotes 19, 20 and 21, and the Conclusion), involves two prominent court cases, one culminating in June 2005 (the trial of Schabir Shaik) and one in May 2006 (the rape trial of Jacob Zuma), which have had implications for the political career of Jacob Zuma and the succession battle within the ANC. In both of these cases, the judiciary was placed under pressure and selectively undermined and belittled by elements in the ruling party and the ruling tripartite alliance (composed of the ANC, Cosatu and the South African Communist Party). However, the eventual acquittal of Jacob Zuma in May 2006 may have increased respect for the judiciary and improved understanding of its role, so that the overall impact of this episode on the judiciary might also, in some ways, have been quite positive. Due to the fact that this paper does not focus on this episode, the paper should perhaps be considered a discussion of the way in which the ruling bloc within the political alliance that governs South Africa has dealt with the issue of judicial independence.

by apartheid, a legal order that institutionalised discrimination and impacted on every aspect of society, is a complicated, slow and often frustrating process. The judiciary is immune neither from the negative effects of apartheid nor from the challenges associated with transformation. However, to effectively protect the Constitution and ensure that discrimination and other abuses do not reoccur, the judiciary must consolidate and resist intrusions into its independence.

This report therefore provides an analysis of the question of judicial independence in current day South Africa. Part II gives a brief explanation of judicial independence and the principle of separation of powers. Part III provides an historical backdrop, examining the role of the judiciary during apartheid. Part IV discusses how judicial independence has been entrenched in the post-apartheid political dispensation and how the concern with independence relates to other dimensions of transformation. Part V explores some current challenges to protecting and promoting judicial independence, focusing on the government's attitude toward the judiciary, attempts at judicial reform in the form of the five justice bills, and the appointment of judges.

Finally, the conclusion of the report argues that while none of the recent events poses an insurmountable challenge to the independence of the judiciary, South Africans must continue to be aware of threats to judicial independence and prevent independence from being undermined. Although some of the concerns that motivated the judicial bills and other actions that potentially threaten judicial independence are valid, independence is crucial to an effectively functioning democracy and should not be sacrificed to achieve other, albeit valid and important, goals.

## 1.1 Methodology

The methodology employed for this report included a literature review of books, journal articles and reports from non-governmental organisations and other sources, as well as a survey of relevant newspaper and magazine articles from 2004 to the present. In addition, a number of individuals in government, the judiciary, academia and civil society were solicited for interviews; in total, nine people responded and open-ended interviews were conducted with each. The names of the nine interviewees are listed in Appendix A. For purposes of anonymity, no names are used when interviewees are cited in the document; only dates are provided. On one day, three interviews were conducted, and on all other days only one interview was conducted. Although a broad group of judges, lawyers, activists and legal scholars were contacted for interviews, many did not reply. The research for this report was conducted largely between June and August 2006, and the paper was finalised in mid-2007.

## 2. OVERVIEW OF JUDICIAL INDEPENDENCE

And independent judiciary is a fundamental element of democracy. Various international treaties including the Universal Declaration of Human Rights (1948) (UDHR), the International Covenant on Civil and Political Rights (1976) (ICCPR) and the African Charter on Human and People's Rights (1981) contain provisions affirming the importance of this principle. For instance, Article 14 of the ICCPR states that:

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.

Similarly, Article 26 of the African Charter 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 is intertwined with the doctrines of separation of powers and of checks and balances, both of which are generally considered to be defining characteristics of a democracy. Originating in the writings of the “French philosopher Montesquieu and the American statesmen Madison”, the notion of separation of powers stems from the belief that “the best way to control government power is to divide it among the various branches of government – the legislative, executive and judicial branches” (Motala, 1995: 506). The three branches of government must be functionally separate and refrain from interfering with the functions of one another. The doctrine of checks and balances “seeks to make the separation of powers effective by balancing the power of one agency against that of the other” (ibid). By separating official power among three different organs and by providing mechanisms by which each organ can check the power of the other, the tripartite system of government aims to prevent any one person or institution from gaining too much power and control over the government and thus the people.

The judiciary plays a crucial role in the system of checks and balances, a role which demands independence from the executive and legislature. By applying national constitutions, legislation and the common law to official actions, courts are supposed to ensure that the other branches of government respect the rights of the people and do not act illegally. Courts are often asked to review the validity of legislation, and members of the executive branch often come before the courts as litigants. To allow courts to carry out their functions and fairly determine the legality of governmental action, courts must be free from any actual or perceived interference by other branches of government. Clarifying the importance of independence in assuring the effective functioning of courts, David Dyzenhaus, a law and philosophy professor, stated:

At the moment that a court accepts jurisdiction over a controversy between government and an individual, government is demoted – it loses its claim to be the exclusive representative of the state. At the same time, the individual is promoted to a public role, to one with an equal claim to represent the state. The court, then, in deciding between these claims, articulates a vision of what the state is and publicly draws the line between law and politics... In order to articulate this vision, the court needs to be independent (1998: 172).

### 2.1 Institutional independence

On a more structural level, judicial independence has two components: individual independence and institutional independence. Institutional independence refers to the existence of “structures and guarantees to protect courts and judicial officers from interference by other branches of government”, while individual independence refers to judicial officers’ acting independently and impartially (International Bar Association, April 2006: 4). Underscoring the nearly universal support for these notions, numerous documents shed light on the structural safeguards that protect institutional and individual independence. Recognising that “an independent, impartial, honest and competent judiciary is integral to upholding the rule

of law and engendering public confidence and dispensing justice”, the *Commonwealth (Latimer House) Principles on the Three Branches of Government* (2003), a document approved by the heads of government of the Commonwealth countries, provides a framework for implementing the principles of separation of powers and judicial independence. Similarly, the *Basic Principles on the Independence of the Judiciary* (1985) (*UN Principles*), a United Nations (UN) document endorsed by the General Assembly in 1985, lists several principles aimed at securing independence.

In terms of ensuring institutional independence, constitutional guarantees of the separation of powers and of non-interference in the judiciary by other branches of government are crucial. As the *UN Principles* states:

The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (section 1).

Moreover, institutional independence requires that the judiciary has sole “jurisdiction over all issues of a judicial nature” (sections 3 and 4).

## 2.2. Individual independence

Individual independence involves a variety of factors that help ensure that judges can act free from the influence of any outside sources. For instance, judges must have security of tenure either in the form of life-long appointments, set terms of office or a mandatory retirement age (*Latimer House Principles*, section IV[b]; *UN Principles*, sections 11, 12). A well-defined process for removing judges from office also prevents the executive or legislature from dismissing judges in retaliation for an unfavourable decision and from using threats of impeachment to pressure judges. Likewise, judges should be removed only “for reasons of incapacity or behaviour that renders them unfit to discharge their duties” (*UN Principles*, section 17; *Latimer House Principles*, section IV[d]). Disciplinary procedures should also be “fairly and objectively administered” (*Latimer House Principles*, section VI[b]). Similarly, to protect them from fear of reprisals for their decisions, judges should be immune from civil suits arising from acts or omissions in the course of exercising their judicial functions (*UN Principles*, section 16).

Another important safeguard, financial security, is crucial to maintaining individual independence preventing other branches of government from using threats of salary reduction to influence judges (*UN Principles*, section 11; *Latimer House Principles*, section IV[b]). Financial security includes adequate remuneration and protections against the arbitrary reduction or suspension of judges’ salaries. Similarly, the adequate provision of resources allows the “judicial system to operate effectively without any undue constraints which may hamper” independence (*Latimer House Principles*, section IV[c]).

The judicial appointments process also impacts on individual independence. Judicial appointments “should be made on the basis of clearly defined criteria and by a publicly declared process” (*Latimer House Principles*, section IV[a]). The appointments process must also “safeguard against judicial appointments for improper motives”, and people selected should “be individuals of integrity and ability with appropriate training or qualifications in law” (*UN Principles*, section 10). If the appointment of judges were not based on well-defined criteria or not open to public scrutiny, the executive could try to appoint judges who shared its beliefs and would be unlikely to challenge government acts. Similarly, if appointments are based on merit as opposed to party allegiance or other inappropriate factors, judges will be less likely to feel that they need to favour the people who appointed them. Merit-based appointments also help ensure that judges have the necessary legal education and experience, both of which help foster and reinforce the importance of judicial independence. Furthermore, to protect independence, any system of promoting judges “should be based on objective factors, in particular ability, integrity and experience” (*UN Principles*, section 13). If judges believe that the content rather than the quality of their decisions will impact on their likelihood of being promoted, they might be reluctant to make decisions upon which the government will look unfavourably.

## 2.3 Impartiality

Structural safeguards help protect judges from outside influences, but the ability of each judge to put aside his or her own biases and decide cases objectively is as important. While independence is objective and protected by constitutional and other legal guarantees, impartiality is more subjective and refers to a judge's state of mind. According to Justice Harms, "without an independent mind, approach and attitude [on the part of a judge], judicial independence is worthless. Structures and constitutions cannot create this state of mind, they can only provide its framework and support it" (Harms, 1998). As Justice Harms points out, many of the formal protections of independence help support an independent judiciary, but judges themselves carry much of the burden of remaining impartial. While distinct, the concepts of independence and impartiality are closely linked and both crucial to maintaining an effective and well-respected judiciary.

Codes of judicial conduct provide useful guidelines for judges and are an important source of information for the general public. Many countries, international organizations and judges' organizations have developed their own codes and guidelines, but the *Bangalore Principles of Judicial Conduct* (2002) (*Bangalore Principles*) arguably represent the views of the majority of democracies. According to its preamble, the *Bangalore Principles* "establish standards for ethical conduct of judges" and are "designed to provide guidance to judges" and to aid members of the government, lawyers and the general public "to better understand and support the judiciary". The principles were written by the Judicial Group on Strengthening Judicial Integrity after extensive consultation with judges from civil- and common-law countries<sup>3</sup> and after considering several existing national and international codes. They include provisions aimed at six key areas related to individual judges: independence; impartiality; integrity; propriety; equality; and competence and diligence. Each of these six categories impacts on a judge's ability to decide a case without bias or prejudice and thus impacts on the independence of the judiciary as whole.

The section on impartiality, for instance, demands that a judge "disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially" (section 2.5). Judges also must not make comments that could affect the outcome of a trial or impact on the fairness of the process (section 2.4). Many of the provisions addressing propriety deal with a judge's refraining from acting in a way that would compromise his or her impartiality or the appearance of impartiality. For example, a judge or family member of a judge cannot accept gifts or favours in relation to anything done as part of the judge's official functions (section 4.14). Similarly, if a judge has relationship with members of the legal profession who practice in his or her court, he or she must "avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality" (section 4.3). On a slightly different note but similarly encouraging impartiality, the *Bangalore Principles* demand that judges are cognisant of diversity and "carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground..." (section 5.3). Various other provisions also address issues pertaining to a judge's impartiality in the performance of his or her judicial functions. Essentially, when accepting a seat on the bench, a judge must put aside his or her personal biases and should refrain from any activity that directly affects or gives the appearance of affecting his or her ability to decide cases impartially.

## 2.4 Independence and public confidence

While judicial conduct is important in ensuring that judge's act impartially, public perception of the judiciary is also fundamental to creating an effective system of justice and a legitimate government. The preamble to the *Bangalore Principles* asserts that "public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic state". According to Justice John Evans of the Canadian Federal Court of Appeal, independence "is a necessary condition for obtaining and maintaining this confidence, without which the courts' legitimacy ... will rapidly erode,

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<sup>3</sup> In common law countries, such as the US and the UK, judges interpret and apply legal rules by relying heavily on precedent from earlier judicial decisions. In civil law countries, such as Japan, judges apply comprehensive legal rules that are usually, though not always, codified. Legislation is the primary source of law in civil-law countries, whereas case precedent is the primary source of law in common law countries. Some countries, such as South Africa, have mixed civil and common-law systems. South Africa's legal system relies on both English common law and Roman-Dutch civil law.

and with it human rights and the rule of law” (Budlender, 25 July 2005). Courts are supposed to protect the people against illegal action by the executive or legislature; if people do not believe that the courts are independent, they will not trust courts’ pronouncements about the validity of government action and may thus lose faith in the system as a whole. If the public does not have confidence in the courts, the legitimacy of the entire government will be called into question. Moreover, if people doubt the impartiality of judges or view the judiciary as representative or supportive of a certain segment of society, individuals may stop turning to the courts for dispute resolution or may fail to respect court decisions, with a negative impact on efforts to establish the rule of law and the ability of courts to fulfil their functions.

Many of the provisions in the *Bangalore Principles* aim to foster public confidence. For instance, a judge must “ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary” (section 2.2). Similarly, the *UN Principles* provides that members of the judiciary are entitled to freedom of expression, belief, association and assembly but includes the caveat that “judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary” (section 8). Independence and impartiality, as expressed in court decisions, in the processes by which judges arrive at decisions, and in judges’ individual behaviour, underpin public confidence in the legitimacy of the judiciary and thus strengthen democracy as a whole.

### 3. JUDICIAL INDEPENDENCE DURING APARTHEID

South African history demonstrates the vulnerability of the judiciary to manipulation even while the pretence of independence is maintained. Throughout apartheid, in an attempt to legitimate the political order, the National Party (NP) government claimed consistently that the judiciary was independent. While formal structural guarantees of independence existed and while the judiciary had a history of independence and at times rendered decisions contrary to the wishes of the ruling party, a closer examination of the judiciary's position, powers and composition reveals that the judicial branch was not truly independent and did not effectively curb abuses of power by the other branches of government. Instead, by upholding blatantly discriminatory and unjust legislation, the judiciary functioned as part of the apartheid legal order and contributed to legitimising and sustaining it. The role and attitude of the judiciary during apartheid sheds light on why both institutional and individual independence are critical to an effectively functioning judiciary that is able to protect the people and fairly adjudicate disputes between individuals and the government.

#### 3.1 Formal independence

During apartheid, the judicial branch did not enjoy true independence from the executive and legislature, and the government often tried to stymie what little independent decision-making power judges were able to invoke. However, to lend legitimacy to the apartheid legal order, the government insisted that the judiciary was independent. The Truth and Reconciliation Commission's (TRC) report on the legal hearings (1998) explains the basis for the government's claims:

[T]he appearance of judicial independence and adherence to legalism under the guise of "rule by law" serves as powerful legitimating mechanisms for the exercise of governmental authority. It is all the more useful to a government which is pursuing legislative and executive injustice to be able to point to superficial regulation by the judiciary, while being able to rely on the courts not to delve too deeply in their interpretation and enforcement of the law (chapter 4, volume 4).

Because of the virtual universal acceptance that judicial independence is a hallmark of democratic and legitimate government, the NP benefited from assertions that the South African judiciary was independent. As Professor Wacks observed, a "government that can point to an apparently independent judiciary which ... acquiesces in the promulgation of blatantly unjust laws and Draconian assaults upon some of the most sacred principles of justice, is readily able to legitimise itself" (1984: 280). Thus, claims that an independent judiciary was protecting the people and overseeing the exercise of government power helped strengthen the government's contention that the apartheid legal order was legitimate, legal and just.

Throughout apartheid, the judiciary enjoyed many of the formal structural protections of independence. For instance, courtrooms were generally open to the public, and although career advancement may have "depended on not incurring the political displeasure of politicians" (Dyzenhaus, 1998: 89), all judges had security of tenure and of salary. Judges served until the age of seventy and could be removed before that time only by the state president "at the request of both Houses of Parliament in the same session, on the grounds of misbehaviour or incapacity" (Dugard, 1978: 10). No judge was removed during apartheid. Moreover, the remuneration of judges was guaranteed legally and could not be reduced during a judge's term of office (Forsyth, 1985: 37).

Perhaps more important than structural guarantees is South Africa's history of judicial independence. Writing in 1978, John Dugard pointed out that the "South African judiciary has, until recent times, enjoyed an almost unsurpassed reputation for independence from the other branches of government" (279). Until the late 1950s the Appellate Division, the highest court at the time, "vigorously asserted its independence from the executive" and its "judgments frequently emphasised the importance of individual liberty above the interests of the state" (McQuoid-Mason, 1987: 232). However, the judgments invalidating legislation and frustrating NP initiatives prompted reaction from the government and the enactment of various measures aimed at frustrating the ability of the courts to act independently.

Two cases in the early 1950s illustrate the Appellate Division's impartiality and willingness to act in opposition to the NP. First, in 1951 the Appellate Division found that the Separate Representation of Voters Act – an act attempting to remove the Cape coloured voters from the common electoral role – was invalid because the legislature had not passed the Act according to the correct procedures. The government responded by passing the High Court of Parliament Act, which provided that when the Appellate Division invalidated an Act of Parliament, Parliament would then sit as a so-called “High Court of Parliament” and review the court's decision. In the case challenging this act, the five Appellate Division judges, each writing a separate but concurring opinion, found that the High Court of Parliament was “simply Parliament in disguise” and invalidated the Act (Dugard, 1978: 31). Noting the court's independence and willingness to assert its independence during this 1950s, John Dugard explained that the court “was in many ways perpetuating a tradition that had been fostered by the Appellate Division since the time of Union” (1978: 288).

In spite of formal guarantees, the judiciary's history and the government's contentions, a closer examination of the apartheid legal order reveals that the judiciary was not independent and impartial in practice and tended to sanction – either tacitly or at time more overtly – violations of individual rights by the government.

### 3.2 Parliamentary supremacy

Beginning at the time of the union of South Africa in 1910, the country had a Westminster system of government in which the legislature was supreme over the other branches of government. South Africa's various constitutions – the Constitution of the Union, the 1961 Constitution of the Republic, and the 1983 amended Constitution – codified the Westminster model and the accompanying doctrine of parliamentary supremacy. For example, section 34 of the 1983 Constitution stated that “no court of law shall be competent to inquire into or to pronounce upon the validity of an Act of Parliament” (Republic of South Africa Constitution Act No. 110 of 1983). In practical terms, this provision meant that the legislature, a body which theoretically represented the will of the people at large, could enact whatever legislation it desired (Cowling, 1987: 178). Thus, unlike in the present-day constitutional democracy, courts during apartheid did not have the power of judicial review by which they could determine the legality of acts of Parliament. Instead, courts were confined to interpreting legislation.

Moreover, the judiciary adopted a “narrow approach to its interpretive function” (Dugard, 1971: 182), choosing to interpret legislation according to what it believed Parliament would have desired. Dyzenhaus described the judiciary's approach to interpreting legislation as a “plain-fact” approach, meaning that:

... judges hold that the judicial duty when interpreting a statute is always to look to those parts of the public record that make clear what the legislators as a matter of fact intended. In this way, the judges merely determine the law as it is, without permitting their substantive convictions about justice to interfere (16).

In addition to courts' lacking the power to invalidate acts of Parliament, the South African constitution did not include a bill of rights nor did other legal provisions codify individual rights. Thus, the judiciary lacked “textual standards and equally important, a body of jurisprudence interpreting those textual standards, by which to evaluate alleged violations of civil liberties” (Higginbotham, 1990: 563). Rather than trying to apply notions of justice, equality, and fairness to their interpretation of acts of Parliament, judges tried only to discern the intent of Parliament and confined themselves to interpretation based on this intent.

Notwithstanding its relatively independent role, the Appellate Division, the highest court during apartheid, also explained its views of the judiciary's function and legislative interpretation. In the case of *Sachs v. Minister of Justice*, for instance, the court stated that “Parliament may make any encroachment it chooses upon the life, liberty or property or any individual subject to its sway, and ... it is the function of the courts of law to enforce its will” (1934 A.D. 11 at 37). In a 1986 decision, then Chief Justice Rabie explained the court's approach to dealing with acts of Parliament as follows:

It has been said that, if the language thereof [of a statute] is uncertain or ambiguous, it should be interpreted in a way which least interferes with the rights of the individual. It is to be noted, however, that

such an approach to the task of interpretation is permissible only if the language used by the legislature is indeed ambiguous or open to doubt. If it is not, and the meaning thereof is clear, the Court must give effect thereto, no matter how unfortunate the result may be for those who may be affected by it” (1986 [4] SA 1150, 1176[A] as cited in Davis, 1987: 102–3).

While judges ostensibly had room to interpret unclear legislation and while a small number of judges took advantage of this opportunity, courts more often found that the language in legislation was unambiguous and that Parliament’s intent, if not stated explicitly, could be easily inferred.

Two cases illustrate the judiciary’s approach to alleged violations of civil liberties. First, in *Minister of the Interior v. Lockhat* (1961), the Appellate Division dealt with a case challenging the validity of a proclamation dividing Durban into group areas. The challenge was based on the fact that whites were given the best areas and Indians were given poorer areas. Speaking for a unanimous court, Justice Holmes explained that for the discriminatory division of land to be valid, “the power to discriminate unreasonably had to be given expressly or by necessary implication” (cited in Dyzenhaus, 1998: 17). Thus, the court had to answer the “purely legal” question of whether the legislation “impliedly authorise[d], towards the attainment of its goal, the more immediate and foreseeable discriminatory results” that occurred (ibid). Justice Holmes concluded that while not provided explicitly by the legislation, authorisation for the inequitable results was “clearly implied” (ibid: 17–18). Similarly, in the case of *Rossouw v. Sachs* (1964), a case concerning the detention of Albie Sachs under the 90-day law, Justice Ogilvie Thompson of the Appellate Division found that the law authorised “psychological compulsion” of detainees, and he thus attributed to Parliament the intention of authorising this compulsion (ibid: 69). Though the legislation in neither case expressly provided for or permitted the result being challenged, in both cases the court found that Parliament’s intention to authorise the unfair outcome could be implied from the existence of the Act.

Under the Westminster model of government the legislature is supreme and courts are confined to interpreting acts when the language is ambiguous and to discerning the Parliament’s intent. The Westminster system, however, was designed to work in a country where the legislature was representative of and considered legitimate by the majority of the people. In South Africa, the legislature was certainly not representative of or concerned with protecting the rights of the black majority; rather, the country was a “pigmentocracy” in which a “white oligarchy” controlled by an “Afrikaner elite” had all the political power (Dugard, 1978: 7). Thus, the political conditions during apartheid were not conducive to the Westminster-style of government and called instead for a judiciary that was able to protect the disenfranchised majority. Whereas a legislature that is subject to the will of all the people is restrained by the knowledge that it can be voted out of office, the South African legislature did not face this constraint.

In its report on the institutional hearings about the legal community, the TRC explained the problem with the Westminster model in apartheid-era South Africa:

[P]arliamentary sovereignty and the rule of law work hand in hand and are premised on a political system that is fundamentally representative of all the people subject to that Parliament. This situation never applied in South Africa; not only was representative (and responsible) government conferred effectively only on the white inhabitants of the Union in 1910 (at maximum less than 20 per cent of the population), but South African political and legal life was never characterised by that unwritten sense of “fair play” which is so much a part of the native Westminster tradition (paragraph 41).

Thus, notwithstanding the judiciary’s formal independence, the Westminster system combined with the “plain-fact” approach created a judiciary that was complicit in sustaining the apartheid legal order. The judiciary’s reluctance to interpret legislation in favour of individual rights and preference for supporting the will of Parliament belied any claims of meaningful independence.

Despite the doctrine of legislative supremacy, some lawyers and academics argued at the time as well as in hindsight that judges often had leeway to interpret legislation in a manner that protected or at least mitigated the breach of individual liberties. The TRC report found that despite claims to the contrary by many apartheid-era judges, given the “inherent ambiguity of language

and the diversity of factual circumstances with which judges were confronted”, they had some degree of latitude in interpreting and applying legislation in almost all cases (volume 4, chapter 4, paragraph 23). During apartheid, some members of the legal profession recognised the ability of judges to interpret legislation rather than merely discern the intention of Parliament. In his inaugural address as a law professor at the University of the Witwatersrand, John Dugard (1971) acknowledged the doctrine of legislative supremacy but called on judges to apply common law principles, many of which were rooted in Roman-Dutch law and had been recognised by the courts, to the interpretation of statutes (181–200).<sup>4</sup> He argued that because courts were frequently “called upon to discover the intention of the legislature on a subject in respect of which the legislature clearly had no intention at all”, judges could play a “creative role in filling in the gaps of the statute” (183).

Furthermore, some people reject the notion that there exists only one valid interpretation of any given piece of legislation. In a 1987 article, DM Davis argued that “there is no such thing as an absolute unitary common use of language and hence any presumption that all parties who are subject to a legal document ... must necessarily share the same meaning thereof or employ the same conceptual tools of interpretation, cannot be sustained” (230). Therefore, owing to the inherent ambiguity in language, judges always had some degree of room to interpret statutes and could have acted, more often than they did, to prevent the application of patently unjust legislation. Similarly, as CF Forsyth (1985) observed in his book about the Appellate Division, although the court repeatedly upheld discriminatory and repressive legislation such as the group areas act and various security measures, the legislation never compelled the court’s decision and “frequently persuasive legal grounds exist[ed] which would justify if not compel, a less harsh result or one which kept the executive under judicial control” (226). However, in practice most judges failed to use the opportunities they had to interpret legislation in favour of the protection of individual liberties. The judiciary thus became more of a rubberstamp than an independent check on the actions of the executive and Parliament.

### 3.3 Executive-mindedness of the judiciary

In addition to the Westminster model of government influencing the judiciary’s ability to act independently, judges were often accused of being “executive-minded”. For example, in 1968 the International Commission of Jurists said of the South African judiciary: “In spite of a number of courageous decisions at first instance, the overall impression is of a judiciary as ‘establishment-minded’ as the executive, prepared to adopt an interpretation that will facilitate the executive’s task rather than defend the liberty of the subject and uphold the Rule of Law” (Dugard, 1978: 280). More precisely, the allegation of executive-mindedness attributes to a judge:

... an excess of ardour in countenancing government power when its exercise is challenged before him. It suggests an attenuated commitment to protecting the rights and entitlements of individual citizens when these are infringed by government action. It may also, more broadly, imply that the judge concerned tends to lean toward the side of a government or public body when its interests are in dispute before him (Cameron, 1982: 52).

Importantly, executive-mindedness does not necessarily imply that a judge is consciously biased and intentionally partial to the government.

The judiciary’s tendency to agree with the executive stemmed in part from the similar composition of the two branches and the fact that judges’ past experiences and “perceptions of contemporary social circumstances and needs” impact on the way in which they interpret laws (Cowling, 1987: 190). Members of all branches of government were “drawn from the same privileged white elite” (Dugard, 1971: 191) and thus tended to have similar backgrounds and world views. Likewise, because judges came from the segment of society that benefited most from the prevailing political and social order, they were likely to support and want to preserve the status quo. Given that a judge is “inevitably influenced by his own perceptions of the needs of social policy, of the

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<sup>4</sup> The common-law principles to which he referred included: “freedom from arbitrary arrest and detention without trial; freedom from cruel and unusual punishment; the right to legal representation when the individual’s liberty is at stake; the right to be heard in one’s own defence before one’s liberty is curtailed; equality before the law; freedom of speech and literary expression; freedom of the Press; freedom of assembly; and freedom of movement” (197).

expectations of society and, perhaps, by inarticulate, subconscious factors which constitute part of the make-up of each judge” (Dugard, 1978: 303), it is not surprising that judges during apartheid tended to support the NP. While many may not have been consciously biased in favour of the executive, by virtue of the fact that they came from the same small sector of society, judges shared with other members of government similar interests and were thus less likely than judges in representative and diverse legal orders to disagree with legislative enactments.

The case of *Bloem v. State President* (1986 [4] SA 1064 [O]), concerning the validity of the state of emergency declared on 12 June 1986, is often cited as an illustration of the executive-mindedness of judges, specifically Chief Justice Steyn. Although Justice Steyn spoke about the duty of a court to balance fairly the power of executive against the rights of the individual, he prefaced his decision “with a politically partisan, one-sided and emotive exposition of the government’s view on the causes and necessity for the declaration of the state of emergency” (Cameron, 1987: 224). Attempting to contextualise the enactment of the emergency regulations, Justice Steyn declared that South Africa was undergoing a period of constitutional, socio-economic, political and cultural reform which was “accompanied by social turbulence and unrest generated mainly by resistance to that change and reform not only as to its tempo but also to its ambit, nature and direction” (1986[4] SA 1064[O], 1067F). The resistance was violent and directed not only at government authorities but also at the private sector, members of the security forces and “indiscriminately at the general public” (ibid). Justice Steyn explained that it was in the context of this violent unrest and of the fear that the tenth anniversary of the Soweto uprising would “be the occasion for a grave escalation and intensification of the aforesaid unrest and violence”, that the court would have to consider the validity of the emergency regulations (1986[4] SA 1064[O], 1068D).

Steyn’s contextualisation of the environment in which the state of emergency was declared undeniably accorded with the executive’s official view and justifications for the policy. Although he discussed the role of a court in balancing the needs of the executive and the individual and “undoubtedly considered that he was adopting an even-handed approach ... the ideological context in which he operate[d] made it almost impossible for him to interpret the enabling legislation in any other manner than in a pro-executive fashion” (Davis, 1987: 99). Given that he had accepted the government’s reasons for declaring the state of emergency, Steyn would have had a difficult time finding that the regulations were invalid. The *Bloem* case is one illustration of the way in which a judge’s view of society and ideological framework can affect his or her decision-making process. Because most judges shared not only with one another but also with members of the other branches of government similar backgrounds and positions in society, it was likely that judges would also share with the executive similar notions of what policies were desirable. Thus, along with the Westminster system’s institutional impediments to independence, many members of the judiciary did not have the subjective impartiality necessary to act independently of the executive.

### 3.4 Attempts to undermine the judiciary

Some actions by the NP government also more directly and deliberately sought to undermine the judiciary and to create a bench where judges would be more likely to approve, or at least tacitly accept, apartheid laws.

#### 3.4.1 Appellate Division Quorum Act

As discussed previously, in the early 1950s several Appellate Division decisions frustrated the government’s legislative scheme. In 1995, the government responded to the court’s invalidating the Separate Representation of Voters Act by expanding the number of judges in the Appellate Division from six to eleven and requiring that all eleven had to sit in cases concerning the validity of an Act of Parliament (Appellate Division Quorum Act, 1955). Thus, the NP created a situation in which it had to appoint five additional judges to the highest court, the likely effect of which “would be to dilute the opposition in the Appellate Division to the removal of the coloured voters from the roll” (Forsyth, 1985: 15). As Nadel member Zanade Hussein (1997) explained during the legal hearing at the TRC, although the Appellate Division invalidated segregatory regulations in several key cases in the 1950s, “a court expanded by the appointment of five new judges displayed no inclination to compromise the apartheid project” and upheld discriminatory legislation that the six member court likely would have overturned.

### 3.4.2 Appointment and promotion of judges

The appointment of judges to the bench and the elevation of judges to courts of appeal also affected perceived and actual judicial independence. The State-President-in-Council, that is, the cabinet, appointed all judges, and the appointment process was in private. This practice facilitated the creation of a situation where the bench “was largely a mirror of the political establishment: virtually all-male, all-white, all middle-class and largely Afrikaans speaking” (Rickard, 2003). Especially during the 1950s but throughout the apartheid-era, “the National Party government packed the Bench either with political appointments or with lawyers who had no history of opposition to apartheid” (Dyzenhaus: 38). Additionally, in its quest to appoint judges who were sympathetic to apartheid, the government often placed political factors above merit which “led in many cases to better qualified men being passed over in favour of other less worthy of appointments or promotion” (Ellmann, 1992: 228–29). A brief look at the composition of the bench and at some specific examples of appointments and promotions will illustrate the government’s attempts to create a compliant judiciary.

First, in support of the contention that the government appointed conservative and politically like-minded judges, many critics point to the increase in the number of Afrikaans-speaking judges and to the disproportionate appointment, particularly to the appellate bench, of members of the Pretoria Bar. Denying membership to non-white people until the 1980s, the Pretoria Bar had a reputation throughout the apartheid era as one of the most conservative bars in South Africa. Moreover, because Pretoria was the administrative capital of the country, members of its bar were “well-positioned to come to government attention and, in particular, to the attention of officials involved in the process of selecting advocates for appointment to the bench” (Ellmann, 1995: 59). Beginning in the 1950s, the proportion of judges of appeal who had been members of the Pretoria Bar or who had served as civil servants there increased quite steadily. In 1950, only one judge in the Appellate Division had come from the Pretoria Bar (Forsyth, 1985: 42), but by 1980, although only 17% of advocates in the country were members of the Pretoria Bar, almost 50% of Appellate Division judges had practised there (Ellmann, 1985: 59). Similarly, the proportion of judges of the Appellate Division who had practised at the Johannesburg Bar, one of the more liberal bars in the country, fell during the NP’s reign (Forsyth, 1985: 42).

Moreover, starting in the 1950s the number of Appellate Division judges whose first language was Afrikaans also grew steadily. Although a judge’s language is not a definitive indication of his or her political beliefs, because Afrikaans speakers tended to support the NP or other conservative parties, the increase in the number of Afrikaans speakers indicated that the bench in general had become more conservative (Forsyth, 1985: 45). The increase in the proportion of Afrikaans-speaking judges coupled with the increase in the proportion of judges from the Pretoria Bar support claims that the government attempted to create a more conservative and thus sympathetic bench.

The government’s desire to have a more compliant judiciary also extended to its appointment of chief justices to the Appellate Division. Since 1914 when the first chief justice died, whenever a vacancy occurred the senior judge of appeal was elevated to the seat of chief justice (Dugard, 1978: 286). However, the “seniority norm was violated” in 1957 when the NP appointed HA Fagan, an Afrikaner, instead of OD Schreiner, the senior judge of appeal (Hausegger & Haynie, 2003: 641). Although Justice Schreiner was the senior judge and “probably the most distinguished member of the court ... the Government was clearly unable to forgive him for his persistent opposition to their legislative scheme to remove the coloured voters from the common roll in the Cape and his steadfast dedication to the notion of equality before the law” (Dugard, 1978: 286). From Fagan’s appointment onwards, political considerations took their place alongside questions of seniority when decisions were to be made on whom to elevate to chief justice.

As with Fagan, the appointment of LC Steyn both to the Transvaal Provincial Division and later to the Appellate Division reveals the government’s attempt to pack the bench with judges who would support the apartheid programme. Having represented the South African government at the UN from 1946 to 1949, and having been a senior government lawyer, LC Steyn was named to the Transvaal Provincial Division in 1951, directly from his position as a government lawyer. Not only was his appointment to the Transvaal Provincial Division “a break with the wholesome practice of appointing to the Bench only senior members of the Bar”, but after only four years in that position, he was also promoted to the Appellate Division “over the heads of more senior and undoubtedly more able judges” (Forsyth, 1985: 14). In 1959, having served only four years in the Appellate Division, Steyn – “the person who had clearly been groomed for the post” – was then elevated chief justice, again above more senior appellate

judges (Dugard, 1978: 286). Two examples of the NP's emphasis on political considerations, the appointments of Steyn and Fagan indicate that government did not want to foster an independent judiciary and instead tried to create a bench that would support the official programmes.

The government also used some creative methods to retain judges sympathetic to its views. In 1987 when Chief Justice Pierre Rabie reached the mandatory retirement age of 70, he did not retire but became "acting chief justice", a position the government ostensibly created at the time, for another two years. While the government never explained its rationale for or otherwise justified this "constitutionally unprecedented appointment" (Cameron, 1987: 344), it is reasonable to guess that the NP wanted to keep as chief justice an individual who was likely to uphold apartheid legislation. As the following section will explain, in numerous cases concerning challenges to controversial emergency regulations, the Appellate Division under Justice Rabie decided in favour of the government. In June 1986, soon before Rabie was supposed to retire, the government had declared a state of emergency and one could reasonably infer that the government created the position of "acting chief justice" to essentially guarantee that the Appellate Division would not invalidate any of the emergency regulations.

### 3.4.3 Assignment of judges to cases

Within the judiciary itself, the assignment of judges to cases, particularly those concerning apartheid regulations, also undermined the independence of the courts and reduced the ability of courts to effectively check government action. By the mid-1980s there were "substantiated suggestions" that in the provincial divisions, especially the Transvaal, more liberal judges were intentionally *not* assigned to security trials (Forsyth, 1985: 50). Likewise, in 1978 John Dugard noted that "misgiving have been expressed in professional quarters about the regularity with which a few judges who are popularly regarded as being sympathetic to Government policies have happened to preside over political trials to the exclusion of other judges" (233). English-speaking judges were rarely appointed to political trials in the Transvaal, the province in which most important political trials occurred (*ibid*). There appears to be little doubt that political considerations were taken into account in assigning judges to cases.

Perhaps the most blatant illustration of the politically motivated assignment of judges occurred during Justice Rabie's tenure, from June 1982 to January 1989, as chief justice of the Appellate Division. Consisting of an average of 17 judges during the period in question, the Appellate Division sat in five-judge panels to hear emergency law cases, and the chief justice had the power to draw up the roll for each court term. While Rabie was chief justice, at least three of the five judges assigned to every emergency case were members of what Stephen Ellmann (1992) has called the "emergency team" (4). Agreeing on the result in every emergency case, the team consisted of five judges – Rabie and four others – who without fail found in favour of the government. Moreover, despite having at least three emergency team judges on each panel and thus a majority in every emergency law case, when other judges dissented from emergency team decisions, Rabie never again assigned them to sit on an emergency case (Ellmann, 1992: 65).

Although the domination of the five judges in emergency decisions did not technically violate the law, it did "fly in the face of the norms of judicial objectivity that South African law holds dear" (Ellmann, 1992: 57). Given that the Appellate Division was already unrepresentative – demographically and politically – of the people of South Africa, the domination of five judges over all emergency-related decisions for six-and-a-half years "made the court's jurisprudence the expression of an even smaller range of South African understanding..." (Ellmann, 1992: 113). By preventing all except the emergency team judges from having any meaningful role in assessing emergency regulations, Rabie's method of assigning judges to cases undermined court's independence and the legitimacy of its decisions and arguably turned the Appellate Division into a political rubberstamp.

### 3.4.4 Other attempts to weaken the courts

Aside from actions that undermined the ability of the judiciary to operate independently, the government's reaction to unfavourable decisions also underscores the judiciary's inability to significantly impact on government policies. One way in which the government reacted to the potential activism of independent courts was with so-called "ouster clauses". These clauses sought to prevent courts from reviewing the validity of a regulation passed under, or an official action taken under, the enabling legislation. One example of many ouster clauses, a 1986 addition to the Public Safety Act (3 of 1953) stated:

No interdict or other process shall issue forth staying or setting aside any proclamation issued by the State President [under the Act] ... and no court shall be competent to inquire into or give judgment on the validity of any such proclamation, notice or regulation (section 5B).

Because the President's power to declare a state of emergency stemmed from the Public Safety Act, any actions taken by state officials under the emergency regulations were, according to the law, not subject to judicial review. The attempt to "exclude the supervision of executive powers by legal institutions" (Haysom & Plasket, 1988: 306) is another example of the government's attempts to weaken the power of the judiciary.

It is important to note that courts often refused to allow their jurisdiction to be thrown out completely and "always held that for the ouster clause to be operative, the action must be taken "under" or "in terms of" the relevant statute, which includes the implied limitations imposed by the statute" (Haysom & Plasket, 1988: 327). By looking at whether an act was *ultra vires* or void for vagueness and thus outside the ambit of the enabling statute, courts circumvented the ouster clauses and empowered themselves to decide cases (ibid). However, in the United Democratic Front case, the Appellate Division for the first time "gave effect to one of these clauses, when it found that the Public Safety Act's ouster clause precluded it from reviewing or invalidating emergency regulations which were challenged as being incomprehensibly vague and therefore invalid" (Ellmann, 1995: 98). Notwithstanding judges' reluctance to act upon ouster clauses in most cases, the ouster clauses underscore the government's lack of respect for the judiciary.

The second way in which the government reacted to "liberal" decisions was with the passage of new legislation. By passing explicitly worded legislation that was ostensibly not open to interpretation, the legislature often overruled decisions of the courts. In an article in the *South African Journal of Human Rights* in 1987, Dion Basson, then a professor of public law at the University of Pretoria, discussed four areas – legislation authorising arrest and detention that relies on the subjective opinion of arresting officers; legislation that expressly excludes the *audi alteram partem* rule; subordinate legislation authorising certain infringements of individual rights; and ouster clauses – in which the courts, by taking advantage of imprecise or questionable wording, had issued judgments to "control the exercise of (executive) government power in order to protect individual rights and freedoms" (41–43). Basson noted, however, that in reaction to many of these judgments, the legislature passed unambiguously worded legislation that "destroy[ed] the benefits of many of" the decisions (42).

It is important to note that throughout the apartheid-era, liberal judges – judges who prioritised protecting individual liberties against intrusion by the government – continued to exist within the judiciary and at times managed to interpret laws so as to minimise their otherwise harsh and unjust effects. While liberal judges presided over courts in many parts of the country, the Natal provincial division of the Supreme Court was particularly well known for liberal decisions and for having a "propensity for overcoming the apparent legislative will" (Hoexter, 1986: 446). One of the most outspoken opponents of apartheid legislation, Justice Didcott of the Natal provincial division tried whenever possible to interpret legislation in a manner that provided maximum protection for human rights. For instance, in *Re Dube* (1979 [3] SA 820 [N]), Justice Didcott had to determine "the validity of a decision that a black man was 'idle and undesirable' and should for that reason be ordered to leave the city" (Chaskalson, 1999: 131). In assessing whether the earlier proceedings were in "accordance with justice", Justice Didcott said:

It may have been in accordance with the legislation and, perhaps because what appears in the legislation is the law, in accordance with that too. But it can hardly be said to have been in 'accordance with justice'. Parliament has the power to pass statutes that it likes, and there is nothing that the courts can do about that. The result is the law. But that is not always the same as justice. The only way that Parliament can ever make legislation just is by making just legislation (quoted in Chaskalson, 1999: 132).

Justice Didcott thus set aside the order on grounds that the proceedings were contrary to justice and thus that the decision had not been made correctly.

*Re Dube* is one of several cases in which liberal judges used creative interpretation to overcome the will of Parliament and interpret legislation in a way that protected individual liberties and prevented the application of unjust laws.<sup>5</sup> While these judges undeniably lessened the oppressive effects of apartheid legislation and while their existence helped provide a foundation for the building of an independent and legitimate judiciary post-apartheid, most members of the judiciary, ostensibly interpreting legislation according to parliamentary will, upheld unjust and oppressive laws and contributed to allegations that the judiciary was complicit in maintaining the apartheid legal order.

### 3.5 Perception and role of the judiciary in the apartheid legal order

Despite the government's claims that the judiciary was independent and despite the continued functioning of the courts throughout apartheid, by the 1980s after judges had repeatedly upheld discriminatory and repressive legislation, public perception of the judiciary was increasingly unfavourable. For many of the reasons discussed above, judges were more and more "seen as willing and obedient servants of a repressive legislature rather than impartial and objective arbiters of and dispensers of justice, stepping in to protect the individual citizen from legislative and executive excesses" (Cowling, 1987: 181). For instance, in his submission to the TRC, Pius Langa, the chief justice at the time of writing, affirmed that the "role of the courts in implementation of the pass laws contributed to a diminishing of the esteem which ordinary people might have had for institutions set up to administer justice" (Dyzenhaus: 61). Similarly, in a speech in 1983 in which he argued that resignation was the only moral option open to judges, Raymond Wacks (1984) insisted that "[t]alk of independence of the judiciary rings decidedly hollow" in an environment in which an "exclusively white judiciary applies the essentially unjust laws of an exclusively white legislature to an unconsenting majority" (281). Given the composition of the judiciary, the illegitimacy of the government that appointed the judges and the fact that the laws the judiciary was asked to enforce were enacted by an unrepresentative legislature, the majority of South Africans by the 1980s doubted the legitimacy of the judiciary and viewed the courts as more aligned with the interests of the ruling party than the people it was supposed to protect.

The very people for whom independent review of government action was most necessary – the black majority whose interests were not represented by either the executive or legislature – increasingly lost confidence in the judiciary as an independent institution. Moreover, by upholding apartheid laws the judiciary helped legitimise the apartheid legal order. Failing to declare invalid racist, oppressive and unjust legislation, the judiciary "put the stamp of legality on a legal framework structured to perpetuate disadvantage and inequality" (Dyzenhaus: 61, quoting Pius Langa). Had the apartheid laws never been subject to judicial review or had the courts declared the laws invalid and the executive enforced them regardless of the judicial pronouncements, the government might have had a harder time claiming that the apartheid system was a valid political and legal order. Similarly, as the TRC concluded, "those both inside the country and abroad who might have been embarrassed by the gross racism and exploitation of apartheid could seek some comfort in the semblance of an independent legal system" (paragraph 38). Thus, the judiciary's failure to invalidate unjust laws or interpret them so as to minimise their harsh effects coupled with official claims of judicial independence helped the government legitimise and perpetuate the apartheid legal order.

At the same time, it is important to note that the judiciary's traditions of independence and pride in its history may have in some ways tempered what otherwise might have been an even more conservative and executive-minded response to apartheid. Stephen Ellmann (1995) contended that although the government and certain judges exploited "gaps in the legal structure" that allowed them to partially undermine whatever formal independence existed, "traditions of independence of lawyers and judges in South Africa may well have helped insulate the courts from the full distorting force of white political sentiment" (245). While the judiciary's history of independence was undermined it was not completely corrupted or destroyed and provided at least part of a foundation upon which a substantially independent judiciary could be built in post-apartheid South Africa.

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<sup>5</sup> For examples of other cases in which liberal judges prevailed and prevented the application of unjust laws, see: *S v. Ramgobin & Others*, 1985 (3) SA 587 (N); *S v. Meer & Another*, 1981 (1) SA 739 (N), reversed on appeal 1981 (4) SA 604 (A); *Magubane v. Minister of Police*, 1982 (3) SA 542 (N).

## 4. INDEPENDENCE AND JUDICIAL TRANSFORMATION IN DEMOCRATIC SOUTH AFRICA

The opening chapter of the Constitution (1996) states that South Africa is a sovereign, democratic state founded on the values of human dignity; equality; advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the Constitution and the rule of law; and a multi-party system of democratic government, to ensure accountability, responsiveness and openness (section 1). Tasked with the role of interpreting and applying the Constitution, the judiciary has a particularly important role to play in protecting and promoting these values which are intended to provide a framework for the transformation of the entire country and of institutions such as the judiciary. Taking into account the role of the judiciary during apartheid and its resulting lack of legitimacy among many South Africans, transformation is fundamental to the creation of a legitimate and effective judicial branch.

Judicial transformation involves the creation of a judiciary that is appropriate to a democratic South Africa. This embraces a variety of factors including building a bench that is demographically representative of the population, appointing judges who identify with and are dedicated to the new constitutional order, increasing access to justice for all sectors of society, promoting a culture of judicial accountability, reorganising the court system to better reflect changes in the country's provincial and demographic make-up, and creating the structures necessary to foster judicial independence. In addition to the specific facets of transformation, MK Moerane, an advocate and member of the Judicial Service Commission, explained in a 2003 speech at the National Judges Symposium that judicial transformation is also "part and parcel of the 'reconstruction of society' mentioned in the Postscript to the Interim Constitution" and "carried forward in the Preamble to the Constitution" (711). In part the Preamble states:

We, the people of South Africa ... through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- Improve the quality of life of all citizens and free the potential of each person; and
- Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

The need to address the racial inequalities resulting from apartheid and diversify the judiciary are fundamental elements of transformation due to the overwhelming predominance of white males in the apartheid-era judiciary. In 1994 at the start of the transition, out of 166 high court judges there were three black males, two white females and 161 white males (Symposium Statement, 2003: 650). The need to create a judiciary that was more representative of the people of South Africa along both race and gender lines was thus indisputable. As examples from apartheid courts reveal, the composition of the bench impacts on various aspects of judicial activity and influences public opinion about the independence and legitimacy of the courts. For instance, the tendency toward executive-mindedness stemmed in part from the fact that almost all judges were white males from the same strata of society and with the same backgrounds as the members of the minority government. The judiciary thus tended to agree with and support the executive's political and social views and could not relate to the experiences and struggles of the majority of South Africans. The attempt to increase race and gender representivity aims to rectify this situation and ensure that the judiciary as a whole is better able to understand and relate to the people of South Africa. As Geoff Budlender (2005) observed, it is an "inescapable fact that in general, black judges are more likely than white judges to understand and have some connectedness with the life experiences and concerns of the people who constitute the majority" of South Africa. Along with creating a judiciary better able to respond to the needs of the people, increased diversity helps foster public confidence in the judiciary and thus in the government as a whole.

In addition to demographic representivity, judicial transformation involves creating a bench that is dedicated to protecting and promoting the new democratic dispensation. During apartheid, the doctrine of parliamentary supremacy meant that judges

had only limited power to protect individual rights against violations by the government, and judges had no bill of rights against which the legality of official acts could be measured. Thus, transformation demands that all judges accept “the values and precepts of the Constitution as the founding principles of [the] legal order” (Symposium Statement, 2003: 650) and integrate these values into their decision-making. Similarly, all judges must try to “understand the social context that exists in South Africa” (Kollapen, 2006: 12), a context which impacts on all facets of life and politics in the country. As Morné Olivier, a law lecturer at the University of Port Elizabeth, explained, “[j]udicial officers may perhaps not fully appreciate the importance of their role in delivering on the promises and ideals recorded in the Constitution unless they are made aware of the deplorable socio-economic conditions under which many South Africans are living” (2001: 462). While increased diversity on the bench will help ensure that more judges are able to relate directly to the experiences of litigants before them, a litigant is in no way assured that a judge of the same race, gender or background will hear his or her case, so all judges must be cognisant of the history and current social environment in South Africa.

Another important aspect of judicial transformation is increasing access to justice for all South Africans, particularly the poor, marginalised and otherwise disempowered sectors of society whose situations in part reflect the legacy of apartheid policies. Access to justice includes various factors such as physical access to courts, the existence of multi-lingual courts and interpreters so all litigants can understand court proceedings, and the provision of lawyers or legal aid so that lack of resources does not become a barrier to accessing the justice system. However, ensuring justice for all people requires not only providing the poor and marginalised with access to courts but also ensuring that judges are sensitive to social and economic matters and are dedicated to protecting the constitutional rights of all people. Thus, increased access to justice is intertwined with the above requirements of representivity and a commitment to democratic values. Emphasising the importance of a commitment to constitutional values, Geoff Budlender (2005) declared that the “transformative approach has to permeate everything judges do – not just the great constitutional cases, but also the ‘routine’ cases”. By focusing in each case on promoting equality, dignity, human rights and the rule of law, judges will be more likely to ensure that all litigants receive fair and equal treatment and thus that justice is increasingly available and provided to all South Africans.

In addition to improving access to courts and to promoting awareness of and commitment to remedying the problems of all South Africans, transformation should aim to increase the sense among all people that the justice systems belongs to them and is not merely a tool in the hands of the elite. Feelings of belonging and of ownership are arguably as important as structural guarantees in promoting the use of courts as a means of solving disputes and of improving quality of life for all people. While not as concretely defined as some of the other elements of transformation, changing the culture of the courts so as to foster a greater sense of belonging among all groups in South Africa seems critical to creating a judiciary that can effectively protect the rights of all people and promote the democratic transformation of the country as a whole. Perhaps improving the demographic representivity of the judiciary will help promote a view of the courts as champions of the people rather than of a particular powerful segment of society. However, given the history of the judiciary, improving racial representivity may not be enough on its own to transform the culture of the courts in a way that creates a belief among all people that they have a stake in and can benefit from the justice system.

Related to improving access to justice and promoting the values enshrined in the Constitution, developing a culture of accountability among judges is another aspect of transformation. Whereas the actions and decisions of judges during apartheid often evidenced greater allegiance to the ruling party than to the people the courts were supposed to serve, judges should now realise that they are “equal to all other citizens and are accountable to society in general for the manner in which they discharge their judicial functions” (Moerane, 2003: 714). While they must base their decisions on the law and not on public opinion, judges should be aware that their actions affect individual people and influence public perceptions of the judiciary.

Structural and institutional reforms are also necessary for a successful transformation of the judiciary. On a practical level, the configuration of court divisions should reflect the country’s new provincial make-up and any changes in the names of provinces or cities and should “take account of the practical realities and demands on the courts” (Van de Vijver, 2006: 149). Institutional transformation, on the other hand, involves the enactment of legal provisions and the creation of structures that enable the judiciary to operate independently within a tripartite system of government. Particularly given the judiciary’s position and powers during apartheid, legal provisions protecting the judiciary’s independence and granting to the courts the power of review over governmental actions are essential components of the creation of an effective judicial system. Moreover, because

political and social conditions change and because judicial reform is an ongoing process, the need to cultivate and defend the independence of the judiciary will never disappear, regardless of the existence of constitutional and other formal guarantees.

## 4.1 Judicial independence

The strengthening of judicial independence is a crucial element of the transformation of the judiciary and is fundamental to the creation of a democratic state. From the beginning of the process in the early 1990s to end apartheid and transfer power to an elected government, the negotiators viewed an independent judiciary as an essential component of the new constitutional democracy. Expressing those values and changes that were most critical to the creation of a new state, the 1993 Interim Constitution included 34 principles with which the final Constitution had to comply in order to be certified by the Constitutional Court Act (200 of 1993). Two of these principles ensured that the final Constitution would create an independent judiciary that could prevent abuse of power by the other branches of government. Specifically, Principle VI provided that there would be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness. Principle VII stated that the judiciary must “be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights”.

### 4.1.1 Separation of powers and the power of the judiciary

In accordance with the Constitutional Principles, the 1996 Constitution created a legal order in which an independent judiciary is empowered to review the legality of all official acts. Whereas the legislature was supreme under the Westminster system and the courts thus had only limited power to decide on the validity of legislation, the Constitution is now “the supreme law of the Republic” and “law or conduct inconsistent with it is invalid” (section 2). As the courts have the power to determine whether legislation is consistent with the Constitution, the judiciary no longer must defer to but actually has power over the legislature and executive. The Constitution in fact requires that a court “declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency” (section 172[1][a]). During apartheid, the lack of a bill of rights or other legal norms against which to measure official acts was often seen as an obstacle to a court’s effective protection of individual rights; the 1996 Constitution removes this hurdle by insisting that courts invalidate legislation that is inconsistent with the constitutional standards.

The Constitution (1996) also codifies the separation of power among the three branches by requiring:

... all spheres of government and all organs of state within each sphere must ... respect the constitutional status, institutions, power, and functions of government in the other spheres; not assume any power or function except those conferred on them in terms of the Constitution; [and] exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere (section 41).

Specifically addressing the role of the judiciary, section 165 of the Constitution vests the “judicial authority of the Republic” in the courts and provides that courts are independent and must apply the Constitution and the law “without fear, favour, or prejudice” (section 165[2]). This section, while prohibiting other organs of state from interfering with the “functioning of the courts”, also requires that other organs “assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts” (section 165[3] and section 165[4]). The Constitution thus empowers courts to exercise their judicial authority, including the power to review official acts, independently and impartially.

### 4.1.2 Justiciable bill of rights

During apartheid, the lack of codified rights and standards by which to measure official action was a barrier to the judiciary’s effective protection of civil liberties. While some judges argued in favour of applying Roman-Dutch common law principles – such as the right to be free from cruel and inhuman treatment – when interpreting statutes, the fact that these norms existed only in common law and not in statutory form made their application difficult and subject to the will of the judge in any given

trial. The existence of a bill of rights in the 1996 Constitution (chapter 2) not only illuminates to the general public the values to which South Africa now strives but also provides judges with a legal framework to guide their decisions and clarify the limits of government power and the extent of government obligations.

Similarly, a justiciable bill of rights plays a fundamental role in the broader transformation agenda, particularly in trying to achieve the goals of increased access to justice and an integration of human rights priorities into judicial decision making. As Dyzenhaus observed, “the new legal order differs from the old mainly in that it entrenches the rights of those subject to the law in a written constitution, thus making it very explicit that fidelity to law is also fidelity to such values” (77). Whereas discriminatory regulations were not illegal under South African law and judges thus decided that courts were justified in upholding them, the bill of rights renders any such claims meaningless by providing concrete standards. Instead of having little power to significantly affect actions of the executive or legislature, the judiciary now has not only the power but the duty to ensure that all government acts conform to the requirements and obligations set forth in the Bill of Rights.

A “cornerstone” of South Africa’s democracy, the Bill of Rights “enshrines the rights of all people ... without any distinction and affirms the democratic values of human dignity, equality and freedom...” (Maduna, 2003: 664). Requiring that the state “respect, protect, promote and fulfil” the enumerated rights (section 7[2]), the Bill of Rights includes certain provisions that address directly the role of the judiciary. For example, everyone has the rights to “equal protection and benefit of the law” (section 9[1]) and to “have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum” (section 36[2]). Moreover, section 33 of the Bill of Rights provides that “[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair”, thus empowering the courts to review administrative action.

In addition to provisions addressing access to justice, a limitations clause helps guide judges by requiring that rights be limited only by laws of “general application” and only “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” (section 36[1]).<sup>6</sup> The government often used claims about the existence of a “state of emergency” to justify the violation of people’s rights during apartheid, and largely as a result of executive-mindedness, the judiciary often agreed with the alleged rationale. However, a constitutional clause outlining the circumstances in which limitations are valid now enables courts to better assess purported justifications for government restriction of rights. Given that individual rights are entrenched in the Constitution – the supreme law of South Africa – and given that the courts are entrusted with the role of applying and interpreting the Constitution, the judiciary now occupies a completely different and much more powerful position than it did in the apartheid legal order.

### 4.1.3 Constitutional and legislative guarantees

To successfully fulfil its new role as protector of the Bill of Rights, the judiciary must have both institutional and individual independence.<sup>7</sup> Consequently, in addition to codifying the doctrine of separation of powers and empowering courts to invalidate illegal acts, the Constitution created the institutional framework necessary to enable the judiciary to function independently (chapter 8).

#### 4.1.3.1 Appointment of judges

The Constitution includes various provisions that facilitate the appointment of diverse, well-qualified individuals in an open and fair process. Anyone who is “appropriately qualified” and is a “fit and proper person” may be appointed as a judge (section 174[1]), and the “need for the judiciary to reflect broadly the racial and gender composition of South Africa” should be considered in appointing judicial officers (section 174[2]). The aspiration for increased diversity is a reflection of the apartheid past and the need to create a more representative bench that enjoys the confidence of all South Africans. The pool of candidates

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<sup>6</sup> The clause also enumerates factors that the court should consider in determining the validity of a limitation.

<sup>7</sup> For an explanation of institutional and individual independence, see the overview of judicial independence at the beginning of this report.

from which judges are appointed has increased since 1994 to include not only senior members of the bar but also practising attorneys and academics, thus facilitating that appointment of more women and blacks judges, two groups which traditionally have not been as active in the bar.

Other constitutional provisions also help ensure that competent judges are appointed according to transparent and fair procedures. The JSC, a constitutionally mandated body made up of judges, practising advocates and attorneys, academics, members of the legislative and executive branches and presidential appointees (section 178),<sup>8</sup> plays a large role in the appointment of judges to all courts in South Africa. Depending on the vacancy, the JSC researches and interviews candidates, writes lists of nominees and gives advice about appointments. A diverse body made up of legal and non-legal governmental and non-governmental members and required to include representatives from opposition parties, the JSC is supposed to provide protection against appointments of the sort seen during apartheid – politically motivated appointments made behind closed doors without any participation by the public or legal profession. According to the Constitutional Court, “as an institution it [the JSC] provides a broadly based selection panel for appointments to the judiciary and provides a check and balance to the power of the executive to make such appointments” (*Re Certification of the Constitution*, paragraph 124).

Regarding specific procedures for appointing judges, section 174 of the Constitution provides that the President, after consulting the JSC, appoints the chief justice and deputy chief justice of the Constitutional Court and the president and deputy president of the Supreme Court of Appeal (section 174[3]). Other Constitutional Court judges are appointed by the President from a list of recommendations compiled by the JSC (section 174[3]). The President appoints judges to all other courts “on the advice of” the JSC (section 174[6]). Not addressed by any constitutional provisions, the appointment of judges president and deputy judges president to the high courts is governed by the Supreme Court Act 59 of 1959 (section 3). Although this Act does not have constitutional status, according to the General Council of the Bar of South Africa (2006), “it has been accepted ever since the establishment of the JSC that” appointments as judge president or deputy judge president are made “under section 174(6) of the Constitution by the President on the advice of the JSC”, advice upon which the President is “bound to act” (24). Also providing some guarantees that the executive branch does not have undue control over the naming of judges, the Constitution provides that when appointing acting judges to the Constitutional Court, the President must have the concurrence of the chief justice. However, the Minister of Justice appoints acting judges to all other courts after consulting the senior judge of that court on which the acting judge will sit (section 175).

As a result of the tension between the need for racial transformation and the need for a well-qualified and experienced judiciary, the JSC has come under attack for allegedly focusing more on race than on merit when making appointments. Additionally, some people believe that the JSC includes too many politicians and political appointees and thus permits excessive political influence in the appointment of judges. The minister’s power in appointing acting judges has also led to some concern about executive infringement in the judiciary. The final section of this report will address these issues in greater detail.

#### **4.1.3.2 Terms of office and salary**

Once judges are appointed to the bench, additional safeguards must ensure that they can operate in an environment conducive to maintaining impartiality and independence. Regulations concerning terms of office, the removal of judges from the bench and remuneration play a large role in allowing judges to act without fear of repercussions for decisions that are contrary to what the governing party or other powerful interests desire. According to the Constitution, a Constitutional Court judge holds office for one 12-year term or until he or she reaches the age of 70, whichever occurs first (section 176[1]).<sup>9</sup> The Judges’ Remuneration and Conditions of Employment Act (2001) sets out the terms of office for judges in other courts: a judge serves until age 70, assuming he or she has served at least 10 years active service by that time; if the judge has not yet served 10 years, he or she continues to serve until doing so (Act 47 of 2001, section 3[2][a]).<sup>10</sup>

<sup>8</sup> Section 178 lists the membership of the JSC and details procedures for appointing the members.

<sup>9</sup> This provision also allows for an act of Parliament to extend the term of office of a Constitutional Court judge.

<sup>10</sup> Also, if a judge reaches the age of 65 and has performed active service for at least 15 years, he or she has the right to retire then (section 3[2][b]).

The question of why and how a judge can be removed from the bench before the expiration of his or her term of service is also critical to promoting independence. If the executive or legislature could remove a judge without cause or if the process for impeachment were ill-designed or opaque, the risk of removal would loom over judges and potentially influence, at least subconsciously, their decisions. Consequently, the Constitution sets out guidelines for removal and requires that a variety of actors, rather than only the executive, play a role in the ultimate decision. According to section 177, if the JSC finds that a “judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct” and if at least two-thirds of the National Assembly votes for that judge’s removal, the President must remove the judge from office. Thus, judges have the security of knowing that their removal requires agreement by both the JSC and a supra-majority of the National Assembly; judges do not have to fear that decisions unfavourable to the government or to other influential parties will lead to impeachment.

Currently no system or procedures exist to deal with complaints against judges of non-impeachable conduct. The Constitution states that national legislation should provide for “procedures for dealing with complaints about judicial officers” (section 180[b]), but thus far such complaints have been dealt with informally by the senior judge of the court involved (interview). Judges, however, recognise the need for a more formal mechanism and in 2000 a committee of senior judges gave to the Department of Justice a draft “Bill to Amend the Judges’ Remuneration and Conditions of Employment 88 of 1989 to Create a Judicial Council” (Anonymous, 2000). Approved by the JSC and the heads of courts, the bill proposes setting up a body and formal procedure to deal with complaints of misconduct. In 2005, the Department of Justice introduced its own set of draft bills that dealt with the same issue but included several provisions that differed markedly from the judges’ proposal. The following section will address the controversy that ensued surrounding the minister’s draft bills and will discuss more comprehensively the question of judicial accountability.

Along with defining the terms of service and the process for impeaching a judge, the Constitution states that the “salaries, allowances, and benefits of judges cannot be reduced” (section 176[3]), so other state organs are not able to use threats of salary reduction as a means of influence or punishment. Moreover, the Judges’ Remuneration and Conditions of Employment Act (2001) established other mechanisms that help ensure judges will not be influenced by financial concerns. For instance, after they retire from active service judges receive a reduced salary (section 5), and surviving spouses of judges’ are also paid a salary (sections 9 and 10). Also in the interests of fostering impartiality, by law no judge may, “without the consent of the Minister, accept, hold or perform any other office of profit or receive in respect of any service and fees, emoluments or other remuneration apart from his salary and any allowances which may be payable to him in his capacity” as a judge (Supreme Court Act [59 of 1959], section 11; Judges Remuneration and Conditions of Employment Act 2001, as amended in 2003, section 2[6]).<sup>11</sup> Given that judges have financial security, the prohibition on their receiving outside remuneration is a reasonable measure that helps prevent conflicts of interests from arising.

#### **4.1.3.3 Court rules and administration**

The administration and funding of courts and the rules governing court procedure are intimately connected to the ability of courts to administer justice in an efficient, timely and fair manner. Likewise, these issues influence judicial independence insofar as a judge must have some control over the functioning of his or her own courtroom and over the way in which he or she manages cases. Under the Constitution, the Constitutional Court, the Supreme Court of Appeal and the high courts “have the inherent power to protect and regulate their own process ... taking into account the interests of justice” (section 173), and national legislation must provide for court rules and procedures (section 171). Court rules govern issues such as the schedule of court terms, powers and duties of the registrar, guidelines for compiling the case record, and court fees. At present, rules for the Supreme Court of Appeal, the high courts and the lower courts are made by the Rules Board, which was established in 1985 by the Rules Board of Courts of Law Act (107 of 1985). The Board consists mainly of members of the legal profession,<sup>12</sup> and while

<sup>11</sup> Supreme Court Act (59 of 1959), section 11 (applying only to judges on the Supreme Court of Appeal and high courts); Judges’ Remuneration and Conditions of Employment Act (2001) section 2(6) as amended in 2003 (extending application of the law to Constitutional Court and all other judges).

<sup>12</sup> The Rules Board Consists of a judge of the Constitutional Court, the Supreme Court of Appeal or a high court as chairperson and vice-chairperson; a magistrate, two advocates; two attorneys; a law lecturer; an officer of the Department of Justice; and three people who in the opinion of the minister have experience to serve as members.

the Minister of Justice must approve the rules, he or she does not have the power to make any rules (Chaskalson, 17 February 2006), thus preserving the separation of powers. Likewise, according to the 1997 Amendment to the Constitutional Court Complementary Act, the Constitutional Court has the power to make its own rules (Act 13 of 1995, section 16).

#### **4.1.3.4 Code of conduct**

South Africa currently does not have a legally binding code of conduct for judges, although for several years the judiciary and Department of Justice have discussed the writing and adoption of such a code. In 2000, the same committee of judges that wrote the draft bill on mechanisms to deal with judicial misconduct formulated a “Code of Judicial Ethics” which the JSC and heads of court approved. The Code recognises that “[i]ndividual judges must be free from personal influence or private interest and that the judiciary must be beyond the undue influence of the legislative or executive branches of government and removed from the direct influence of popular majorities” (Anonymous, 2000: 405). Moreover, given that public confidence is crucial to upholding the rule of law and the independence of the judiciary and that “lapses or questionable conduct by judges tend to erode that confidence”, the Code provides standards for judges concerning both their judicial duties and their non-judicial activities (ibid). The Code has not yet been enacted as law, and the Department of Justice in 2005 released a draft bill that included provisions for the adoption of a code of ethics but did not acknowledge the judges’ proposed code. This paper addresses the various proposals and provides a more detailed discussion of the Code of Judicial Ethics below.

#### **4.1.4 Relevant Constitutional Court cases**

While not directly related to judicial independence, the creation of the Constitutional Court impacted on the ability of the judiciary to effectively execute its power of review and to promote the values and freedoms to which the country had agreed during the transition. As the “highest court in all constitutional matters” (Constitution, 1996, section 167[3][a]), the Constitutional Court makes the final decision on any issue “involving the interpretation, protection or enforcement of the Constitution” (section 167[7]). Because the Court is empowered to decide, among others, the constitutionality of any amendment to the Constitution; disputes between organs of state concerning their powers or functions; and the constitutionality of acts of Parliament, provincial acts or the conduct of the President, its decisions impact on all South Africans.

Various factors informed the decision to create a new court to deal with constitutional matters. For instance, many people believed that a court that “had to adjudicate human rights and constitutional issues had to be representative of SA’s demography” (Lewis, 2006), and none of the existing courts was remotely representative in 1994. Additionally, according to Justice Lewis, rather than rely on the existing Appellate Division to act as the guarantors of the Constitution, the negotiators of the interim constitution established a new court because of the unspoken belief that old-order judges could not “be relied upon to give effect to the fundamental rights enshrined in the new Constitution” (Lewis, 23 January 2006). The creation of the Constitutional Court thus represents an effort to promote the development of constitutional values, many of which were not recognised during apartheid, by a legitimate body that is demographically representative and composed of judges who are dedicated to and knowledgeable about the new democratic dispensation.

In various cases the Constitutional Court has recognised the importance of and clarified the meaning of an independent judiciary and the separation of powers in the South African context. The *First Certification* judgment (1996), in which the Constitutional Court refused to certify the new Constitution, sheds some light on the court’s interpretation of judicial independence and separation of powers. The court explained that the principle of separation of powers “recognises the functional independence of branches of government”, while 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” (paragraph 109). Importantly, however, the court insisted that no constitutional system of government can have an absolute separation of powers and that one branch of government will inevitably intrude to some degree on the “terrain of another” (paragraph 109). Furthermore, recognising the need for both individual and institutional independence, the court stated that “[w]hat 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” (paragraph 123). The court cited section 165 of the Constitution as providing the protections necessary for the judiciary to operate in this manner (ibid).

In the 1998 case of *De Lange v. Smuts* (1998 [3] SA 785 [CC]), the court expanded on its view of judicial independence. Explaining that independence is “foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law”, the court endorsed the Supreme Court of Canada’s view that the minimum criteria of judicial independence are: judges’ security of tenure, financial security and institutional independence (paragraphs 59 and 70). In the 2002 case of *Van Rooyen v. The State* (2002 [5] SA 246 [CC]), the court again addressed the issue of institutional independence and, citing section 165 of the Constitution, explained that the Constitution “not only recognises that courts are independent and impartial, but also provides important institutional protection for courts” (paragraph 18). Importantly, the court stated that judicial independence “is a constitutional principle and norm that goes beyond and lies outside the Bill of Rights” and thus is not subject to the limitation (paragraph 35).

In the *Van Rooyen* case, the court also set forth a test for assessing whether the courts were sufficiently independent in their relationships with other branches of government. Writing on behalf of a unanimous court, Justice Chaskalson adopted an objective test that asks whether from the viewpoint of a “reasonable and informed person”, the court or tribunal will “be perceived as enjoying the essential conditions of independence” (paragraph 32). This test acknowledges that the “appearance of perception of independence plays an important role in evaluating whether courts are sufficiently independent”. Clarifying the meaning of an “objective test”, Justice Chaskalson stated that the test must be “properly contextualised”, meaning that the objective observer should not be cynical and overly critical but “must be sensitive to the country’s complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution...” (paragraph 34). Thus, the court’s test for independence takes into account a variety of factors including formal guarantees, public perceptions, social context and constitutional norms.

The Constitutional Court has also addressed the question of whether a judge’s performance of non-judicial functions impacts on judicial independence. In the case of *South African Association of Personal Injury Lawyers v. Heath and Others* (2001 [1] SA 883 [CC]), the court considered whether appointing a judge to head the Special Investigation Unit (SIU), a unit designed to investigate serious malpractice in the administration of state institutions, state assets and public money (paragraph 1), would undermine the separation of powers. The court recognised that judges could sometimes perform non-judicial functions, such as presiding over commissions of inquiry or sanctioning search warrants, without infringing on the separation of powers, but explained that “[c]ertain functions are so far removed from the judicial function, that to permit judges to perform them would blur the separation that must be maintained between the judiciary and other branches of government” (paragraphs 34–35). Rather than create a strict test to determine whether a particular function was “incompatible with the judicial office”, the court said that it would assess facts on a case-by-case basis and look at:

... whether or not the functions that the judge is expected to perform are incompatible with the judicial office, and if they are, whether there are countervailing factors that suggest that the performance of such functions by a judge will not be harmful to the institution of the judiciary, or materially breach the line that has to be kept between the judiciary and the other branches of government in order to maintain the independence of the judiciary” (paragraph 31).<sup>13</sup>

The court acknowledged that while judges have skills and experiences that are useful in a variety of contexts, the need to protect the separation of powers and judicial independence is of overriding concern and must inform any functions that a judge performs.

Applying its ad hoc test, the court decided that appointing a judge as the head of the SIU would blur the line separating the branches of government. The responsibilities of the head of the SUI included functions that “are ordinarily performed by the police, members of the staff of the National Prosecuting Authority or the state attorney” and are “inconsistent with judicial

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<sup>8</sup> The court said that in determining whether the non-judicial function threatened the separation of powers, it would consider various factors including whether the performance of the function: (a) is more usual or appropriate to another branch of government; (b) is subject to executive control or direction; (c) requires the judge to exercise a discretion and make decisions on the grounds of policy rather than law; (d) creates the risk of judicial entanglement in matters of political controversy; (e) involves the judge in the process of law enforcement; (f) will occupy the judge to such an extent that he or she is no longer able to perform his or her normal judicial functions” (paragraph 29).

functions as ordinarily understood in South Africa” (paragraph 39). Additionally, the SIU tries to recover money for the state, a function which is necessarily partisan and thus inappropriate for a judge to perform (paragraph 40). The court also considered the importance of public perception of judicial independence, and contended that if judges were able to perform executive functions, the public could “come to see the judiciary as being functionally associated with the executive and consequently unable to control the executive’s power with the detachment and independence required by the Constitution” (paragraph 46). This lack of confidence would then weaken the separation of powers and the ability of the judiciary to effectively perform its constitutional functions. Overall, this case underscores the importance of preserving the separation of powers and the need to foster public confidence in judicial independence.

Along with preventing the blurring of the separation of powers, recusal of judges is fundamental to the impartial adjudication of cases and to public perception of a fair trial. Neither the Constitution nor other legislation provides guidelines for recusal, but the Constitutional Court has addressed this issue in various cases. In *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* (Sarfu) (1999 [4] SA 147 [CC]), the court dealt with a motion for recusal against five of its own judges. The court first reiterated the importance of “impartial adjudication of disputes” in “any fair and just legal system” and explained that “[n]othing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes” (paragraph 35). According to the court, the proper test for recusal is an objective one based on a “reasonable apprehension of bias” (paragraphs 36–38).

While acknowledging the importance of recusal when appropriate, the decision stressed that various factors influence what constitutes a “reasonable” apprehension of bias. First, there is a presumption that judicial officers are impartial due to their legal training and experience (paragraph 40). Second, given that all people have emotions, experiences and beliefs, it is virtually impossible for judges to be absolutely neutral, and it is appropriate for judges to draw on their own life experiences, thereby adding diversity of perspectives, when adjudicating cases (paragraph 42). Moreover, given that South Africa is multiracial, multilingual and multicultural, litigants cannot expect judges to share their views and cannot demand recusal based on a judge’s race or other personal characteristics (paragraph 42). Similarly, the court acknowledged that many judges were active politically before taking seats on the bench and that judges have “political preferences” and views on “law and society” (paragraph 70). At the same time, when they accept judicial appointments and take the oath of office, judges put “any party political loyalties behind them” (paragraph 75); thus a “reasonable apprehension of bias cannot be based upon political associations or activities of judges prior to their appointment to the bench unless the subject matter of the litigation in question arises from such associations or activities” (paragraph 76).

Summing up the test for recusal, the court stated that 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 persuasion by the evidence and the submissions of counsel” (paragraph 48). The applicant has the burden of proving a reasonable apprehension of bias, and the question of reasonableness must take into account the judge’s oath of office and their training and experience that enable them to carry out the oath and decide cases free from the influence of their own beliefs or predispositions (ibid). In spite of the various considerations influencing a “reasonable apprehension”, the court stressed that when reasonable apprehension of bias in fact exists, in the interests of guaranteeing the right to a fair trial and preserving public confidence, a judge should not hesitate to recuse himself or herself (paragraph 48).

Dismissing the application for recusal in the *Sarfu* case, the court also discussed the relationship between transformation and public perception of impartiality. Under the new Constitution and in accordance with the aims of transformation, the judiciary is now much more diverse in terms of the race, gender and social and economic background and in terms of the sectors of the legal profession from which judges are drawn. Thus, litigants may find themselves before a judge of a different race or from a different background than themselves. However, the court explained, litigants do not have the “right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society” (paragraph 104). Along with the transformation of the judiciary will come more interaction among litigants and judicial officers of different races, backgrounds, genders, and political leanings; however, according to the oath of office and to the constitutional, judges must put aside their

personal prejudices and decide cases based on the facts presented to them. While judges must recuse themselves when conflicts of interest occur, litigants must have faith in the ability of judges to act impartially.

In addition to above-mentioned judgments, the Constitutional Court in other cases has given its views on matters relating to judicial independence. While the issues differed, underlying all of the decisions is the notion that if separation of powers is not upheld, “the role of the courts as 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” (2002 [1] SA 883 [CC], paragraph 25).

#### 4.1.5 The impact of history and traditions

While the Constitution and various legislative acts help protect the independence of the judiciary, other non-legal factors have also played and will continue to play an important role in the successful creation and maintenance of a truly independent South African judiciary. Notwithstanding the role that the judiciary played in upholding and legitimising the apartheid legal order and the fact that the independence of the judiciary was corrupted, South Africa has had a history of judicial independence. Unlike in other countries that have tried to rebuild their governments after periods of conflict or authoritarian rule, the fact that there is tradition of judicial independence in South Africa, though tarnished, has helped lay the groundwork for the independence of the judiciary in its new democracy.

In his submission to the TRC, Justice Chaskalson explained that during apartheid the “principles and values central to the rule of law and a just legal system were not entirely lost” and that the “maintenance of such values ... facilitated the transition to a constitutional democracy and provided an important foundation for the legal system in that democracy” (Dyzenhaus: 109). While questions existed during the negotiations in the early 1990s as to specific characteristics and structures of the new South African judiciary, the negotiators and framers of the constitution presumed that there would be a separation of powers and that the judiciary would operate as an independent check to ensure that abuses of power did not occur.

Despite allegations of executive-mindedness and despite ouster clauses and various other roadblocks to an independently functioning judiciary, lawyers during the apartheid-era continued to bring cases challenging discriminatory, oppressive and otherwise unjust official acts. For example, even though Chief Justice Rabie’s “emergency team” upheld every emergency regulation challenged before the court, lawyers continued to bring cases. Although the continuing litigation may have in some ways helped legitimise the legal system, Ellmann (1995) hypothesises that “the possibility that anti-apartheid lawyering might have encouraged South Africans to see virtue in the ideals of fearless advocacy, independent judging and the rule of law offered promise that these same ideals would be honoured in a post-Apartheid South Africa” (409). Writing in 1995 when the country’s transition was just beginning, Ellmann observed that despite the often criticised role of the judiciary during apartheid, the continued existence of ideals – albeit unattained in many respects – of independence and rule of law could help contribute to the building of an independent judiciary.

Perhaps owing in part to the traditions of judicial independence, the negotiators of the new democracy agreed that judges who had been appointed by the old regime could retain their positions after the 1994 transition, subject to their taking the new oath of office, and all of the judges did so (Harms, May 2003: 20–21). Underscoring the importance of impartiality and of adherence to the constitutional values, the oath provides that all judges must:

... be faithful to the Republic of South Africa ... uphold and protect the Constitution and the human rights entrenched in it, and ... administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law” (Constitution, schedule 2).

Given that the pledge itself cannot guarantee that judges will abide by its commands, the argument that the judiciary already had an appreciation for and understanding of independence must have played a role in the decision to trust apartheid-era judges with applying the new Constitution. At the same time, during apartheid, judges functioned in a system in which the legislature was supreme and the judiciary had little power to affect government actions; consequently, talk of judicial transformation virtually always includes the need for judges commit to the new constitutional order and focus on human rights and put aside

prejudices that contradict this. Overall, the history of the South African judiciary and the pride that many judges have in the judiciary's traditions of independence aided in the creation of and transition to a new democratic state.

## 4.2 Independence as an element of judicial transformation

Important in every constitutional democracy, judicial independence is perhaps even more critical in South Africa because of the apartheid past and the critical role that the judiciary must play in the overall transformation of the country. A fundamental component of democratic transformation, independence both complements and in some ways exists in tension with the other elements of transformation. Not only is independence essential to creating a transformed judiciary but accomplishing overall transformation will also help strengthen and protect judicial independence. However, in attempting to achieve important goals, such as racial representivity or improved court administration, one must be conscious of protecting the independence of the judiciary and not permit measures that, while furthering other goals of transformation, will weaken or otherwise threaten judicial independence.

One example of the relationship between independence and other elements of transformation, the racial composition of the judiciary influences public perception of the judicial independence. As former Chief Justice Chaskalson pointed out when opening the 2003 National Judges' Symposium, "[t]he impartiality of the judiciary is more likely to be respected by the public if it is seen to be drawn from all sectors of our community than will be the case if it is drawn from one race and one gender..." (662). According to a July 2005 survey of 2000 South Africans, 52% of respondents, with no difference between race groups, agreed with the statement that a judge's race influences how he or she judges a case (Research Surveys, July 2005). Given that, as these results indicate, the racial composition of the judiciary impacts on public perception of judicial independence, any discussion of independence must include an examination of racial representivity.

Although diversity affects public perception of the judiciary, it is not a precondition of actual independence. More than the race of the judges, what nurtures independence and impartiality are factors such as selection procedures, security of tenure, structural protections, education and other more intangible qualities including such as judicial traditions, concern for legitimacy, and integrity. Diversity may give greater depth and a greater range of perspectives to judicial decisions, but diversity does not necessarily ensure independence. However, because of the importance of public perception in the judiciary, one cannot ignore the impact of racial representivity on transformation in general and independence in particular.

As with racial transformation, independence goes hand-in-hand with the goal of transforming the underlying attitudes and values of the judiciary. Budlender (2005) argued that focusing on underlying attitudes is crucial because South Africa needs a "transformative jurisprudence which is firmly anchored in the fundamental constitutional values – human dignity, the achievement of equality, and the advancement of human rights and freedoms". To produce this type of jurisprudence, the judiciary must be free to interpret the Constitution without outside interference and to invalidate government action that infringes on the constitutional values. At the same time, to create a bench willing to objectively and impartially evaluate each case, when appointing judges it is reasonable to consider a candidate's attitude toward and dedication to the new human rights culture and to the Constitution.

Furthermore, independent courts are vital to ensuring access to justice for all members of society. One of the goals of transformation and one of the purposes of a judiciary is to ensure that "all citizens, particularly the vulnerable and impoverished, have a means to ensure that we are run by a government that can be called to account and be compelled to justify its action" (Serjeant at the Bar, 2005). To call the government to account and to defend the rights of all people against unjust government action, the judiciary must be independent. The rule of law demands that those who hold public power are subject to the law and are accountable for use of their power; one of the goals of judicial transformation is the creation of a body that is willing and able to provide this accountability. Moreover, an independent judiciary is necessary to fairly adjudicate disputes between any two litigants. Because individuals often face powerful, wealthy and sometimes politically influential corporations in court, it is crucial that the judge is not only impartial in fact but also perceived by both parties to be impartial. In pursuing the goal of providing justice for all South Africans – a fundamental aim of democratic transformation – judicial independence is critical.

Overall, judicial independence, itself an element of democratic transformation, facilitates the achievement of many of the other transformation goals. At the same time, it is important to note that independence is sometimes in tension with these other elements. Efforts to address other aspects of transformation, particularly where they do not take full cognisance of the need to maintain independence, can at times encroach on judicial independence. The following part of this report will illustrate this.

## 5. CURRENT ISSUES RELATING TO JUDICIAL INDEPENDENCE

A vital part of the creation of a constitutional democracy in South Africa was the transformation of the judiciary into a fully independent branch of government. Although the tradition of independence had been undermined during apartheid, some remnants of this tradition served as a foundation for rebuilding the judiciary. The Constitution and various legislative acts now provide the formal support necessary for maintaining independence. Various statements and events over recent years have raised questions, however, about the attitude of government to the independence of the judiciary. The most prominent of these statements and events are discussed below.

### 5.1 The government's attitude towards the judiciary

South Africa's constitutional democracy is little more than a decade old. As in countries such as the US with centuries-old democracies, tensions exist among the branches of government over their powers and functions. Political life in South Africa is dominated by the ANC. The ANC dominates political life insofar as it controls the executive branch, the national legislature, all of the provincial legislatures and executives, and the bulk of local governments. Thus, any analysis of the relationship among the judiciary and other branches of government is largely an analysis of the ANC's attitude toward the judiciary and its belief about the role that the judiciary should play. At the same time, discerning a single attitude on the part of the ANC is near impossible given that the party is comprised of a diverse group of people with different interests and beliefs about the way in which the state should be organised. The ANC was a key author of the 1996 Constitution that clearly establishes and tries to protect judicial independence, and since 1994, the judiciary has functioned independently and the courts have been free to render judgments that conflict with the preferences of the executive. However, several recent incidents have raised questions about the dedication of the current government to protecting judicial independence.

One of the more widely publicised incidents that raised questions about the ANC's attitude toward judicial independence was on 8 January 2005 at its 93rd anniversary celebration where the ANC's National Executive Committee made the following statement:

We face the continuing and important challenge to work for the transformation of the judiciary... We are also confronted by the similarly important challenge to transform the collective mindset of the judiciary to bring it into consonance with the vision and aspirations of the millions who engaged in struggle to liberate our country from white minority domination. The reality can no longer be avoided that many within our judiciary do not see themselves as being part of these masses, accountable to them, and inspired by their hopes, dreams and value systems. If this persists for too long, it will inevitably result in popular antagonism towards the judiciary and our courts, with serious negative consequences for our democratic system as a whole (ANC statement, 8 January 2005).

Various legal practitioners and academics, members of the opposition Democratic Alliance (DA) and other critics reacted strongly to this statement, claiming that it indicated a desire on the part of the ANC to have a compliant judiciary that would not interfere with government policies. In a *Business Day* article, Nicole Fritz, a human rights lawyer, and David Unterhalter, a law professor, (2005) contended that "the ANC's position confuse[d] adherence to government policy for constitutional fidelity and so threaten[ed] the independence of the judiciary". The Constitution, they argue, does not require that the judiciary adhere to government policies but demands that the judiciary ensure that government policies conform to the bill of rights and other requirements of legality. Similarly, Mark Ellis, the director of the International Bar Association, (2005) acknowledged that "inherent tension" will occur whenever the judiciary makes decisions that conflict with government policy, but that the ANC's apparent desire for compliant courts "threatens the judiciary in that it creates the expectation of executive-mindedness from judges, holding out adherence to government policy as a worthy attribute of judicial office" (7).

Taking a less critical view of the ANC's comments and motives, then Chief Justice Chaskalson issued a public statement in which he interpreted the statement as referring to the need for judges to uphold and give effect to the values in the Constitution (Chaskalson, 2005). Reaffirming the need for judicial transformation and the importance of judicial independence, Chaskalson

said that the ANC's comments were aimed not just at white judges or judges who had given decisions unfavourable to the government but at the judiciary as a whole. According to Chaskalson, the ANC's statement reflected the widely agreed upon need for further judicial transformation, especially with regard to creating a more rights-oriented and socially conscious judiciary.

Assuming the statement referred to the need for a judiciary that is aligned with and dedicated to the overall transformation goals of equality, democracy and human rights protection, the ANC's comments were in line with constitutional demands and compatible with judicial independence. However, if the party were implying that judges should promote the government's policies regardless of whether the policies complied with the Bill of Rights and other legal standards, then the ANC could rightly be seen as endangering at least respect for if not actual judicial independence. The need to address the collective attitudes and values of the judiciary should not be confused with creating a judiciary that blindly accepts all government policies. At a minimum, the ambiguity of the statement and the absence within it of emphasis on judicial independence provided room for concern about the direction of thinking within the ANC.

The tension between governing parties and the judiciary is not unique to South Africa and must be assessed in the broader context of the structure and nature of democratic government. In any democracy in which the judiciary has the power to review and declare invalid government actions, tension will exist between the judicial and other branches. As one judge explained, it is "extraordinarily hard" to have a system based on constitutional supremacy; by virtue of this design, judges who interpret and apply the constitution are in a sense supreme over the other organs of government, and this fact does "not fit well with any government" (Interview, 4 July 2006). Given that South Africa's democracy is young and that all of those involved in government are still learning how the system works in practice, the ruling party's somewhat ambiguous statements about the judiciary are not necessarily indicative of sinister intentions or of a desire to control the courts. While such statements merit reaction from the community and while protecting judicial independence is imperative, it is important to keep in mind that, particularly in a healthy democracy where the courts are performing their functions, the tension between the executive and judiciary will never disappear.

The ANC's statement notwithstanding, the government has responded relatively well to judicial decisions, even those that conflicted with the government's policies. The executive has not attempted to actually interfere in and influence the outcomes of cases, and "there is not significant evidence of deliberate non-compliance with orders made by" the courts, even orders made in controversial Constitutional Court cases that invalidated or altered government programmes (Budlender, 2005). There have been some cases of less-than-perfect compliance, however. For instance, the Treatment Action Campaign "has repeatedly complained that the government only partially complied with the Constitutional Court's 2002 order to make the anti-retroviral drug Nevirapine, available in public hospitals" to reduce the risk of HIV transmission from mother to child (Afrimap, 2005: 29). Additionally, "contempt proceedings had to be brought to compel the Mpumalanga government to comply with the judgment in the *Treatment Action Campaign* case" (Budlender, 2005).

In many cases where compliance was not exemplary, administrative inefficiency rather than intentional refusal to abide by the judgments is usually blamed. For instance, the government has not complied fully with the *Grootboom* decision in which the Constitutional Court determined that the right of access to adequate housing imposed on the government the obligation to provide housing for people in crisis situations (Afrimap, 2005: 31). However, Budlender contends that the government's slow and less than adequate response was due more to "lack of attentiveness and a lack of competence in some areas" than to deliberate non-compliance. Similarly, while many people point out that the Eastern Cape provincial government repeatedly fails of to comply with court judgments, most people blame bureaucratic and administrative inefficiency rather than deliberate defiance (Budlender, 2005). Overall, despite examples of non-compliance, the government has generally respected and fulfilled or at least tried to fulfil court orders.

In any democracy in which courts have the power of review, and particularly in a country where the Constitution is supreme over all governmental organs, tension will exist between the government, that is, the governing party, and the judiciary. As a young country still struggling to define the roles of the various branches of government, South Africa is in some ways particularly prone to such tensions. Moreover, one cannot ignore the history of the ANC and the tremendously difficult challenge the ANC

undertook in 1994 when it began the transformation of all aspects of South African government and society. Given that the ANC struggled for decades to come to power and create a democratic, human rights-based state, one can understand why the government would be frustrated when judicial decisions seemingly derail its policies. Understanding, however, should not excuse government attempts to weaken the power or independence of the judiciary.

Opinions differ as the underlying attitudes and motivations of the ANC with respect to the judiciary. One judge explained that there is “both documentary and personal support for” many different views within the ANC (18 July 2006). The ANC is a diverse party composed of people from different social, political, and economic backgrounds, and while some members believe in the need to instrumentalise the judiciary, others believe in the separation of powers and some take a more bureaucratic view of the judiciary. Despite the existence of a variety of views within the ANC, the judge believes that the “preponderant view within the ANC – the business section and the popular section – remains a commitment to an independent judiciary”. While the business sector “understands that an independent judiciary is a prerequisite for an efficient and modern state, the populist arm is committed to securing an independent judiciary” because of the belief that courts are a safeguard for the values that the ANC treasures.

Moreover, the ANC was instrumental in writing the 1996 Constitution that provides the important structural guarantees for an independent judiciary. Perhaps the ANC feels in some ways constrained by the powerful judiciary that it created, but evidence does not support a contention that the majority of the ANC’s now wants to undermine the Constitution that it wrote only a decade ago. Despite some indications that the party desires a more compliant judiciary, the ANC has not actively interfered in the judicial process and has respected court decisions that conflict with the desires of the ruling party.

It is also important to recognise that even in countries with much older and much more established democracies, debates continuously flare up about the role of the judiciary. For instance, Budlender (2005) cited a recent example from the UK in which the House of Lords reaction to anti-terrorism legislation led to tension between the executive and the judiciary. The House of Lords had held that a statute authorising internment or detention without trial was irrational and discriminatory because it applied only to foreigners, and the prime minister reacted by warning the judges who had been “blocking” parts of his anti-terrorism legislation that they would face many battles if they prevented the deportation of terrorists. The prime minister’s warning could be viewed as an attempt to influence judicial review of the government’s legislation. Although some statements by the ANC and government officials might indicate a desire for a more “executive-minded” judiciary, there is no evidence that government officials have tried to influence the outcome of trials by interfering directly in proceedings or by threatening judges.

Aside from the general attitude of the government toward the judiciary, recent attempts at judicial reform have sparked controversy and led to allegations that the Department of Justice and Constitutional Development and the executive branch in general were trying to gain control over and undermine the independence of the judiciary.

## 5.2 Judicial reform

Although the Constitution went far in creating an independent judiciary that is responsive to the needs of a new South Africa, structural and administrative changes are still necessary. As it was impossible for the framers of the Constitution to predict and address every issue that might arise concerning the judiciary, the Constitution itself requires that “as soon as is practical ... all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution” (section 16(6)). For example, although South Africa currently has nine provinces, the jurisdiction of the high courts is still based on pre-1994 provincial and homeland boundaries and jurisdictions and is not aligned with the demarcation of provinces (AfriMAP, 2005: 17–18). As a result, as Hugh Corder noted (2006), “we still speak of officials of the High Court of the Transvaal” and “there are still traces of the bantustans in the court structures”. Many judges also agree that judicial education, mechanisms for dealing with complaints against judges and a code of conduct are important reforms needed to create a transformed judiciary. While the need for reform is widely accepted by all branches of government, government’s efforts to address some of these challenges have proved controversial.

### 5.2.1 The “justice bills”

For the past several years, judges and representatives of the Department of Justice have discussed judicial reform and tried to come up with mutually satisfactory proposals. After a series of consultations starting in the late 1990s, the judiciary and the Ministry of Justice, under the leadership of Dullah Omar, agreed by 2003 “on a series of draft bills dealing with superior court structures and processes, judicial educations, disciplinary and ethical issues”, and other issues (Corder, 2006). Although the bills reached Parliament’s portfolio committee on justice by late 2003, with the June 2004 election and the change in leadership of the Ministry of Justice, progress on the bills stopped. In December 2004, the ministry, led by Brigitte Mabandla and Deputy Minister Johnny De Lange, released a new set of bills that reflected “changes which struck at the heart of some of the key elements on which agreement had been reached” (Corder, 2006). Composed of the Superior Courts Bill, the National Justice College Bill, the Judicial Services Commission Amendment Bill and the Judicial Conduct Tribunal Bill, the so-called “justice bills” incited a strong reaction from the leadership of the judiciary. In response to the outcry, the minister agreed to reconsider the bills.

Despite some changes to the package of bills, in mid-December 2005 after having received Cabinet approval, the minister gazetted for public comment the Constitutional Fourteenth Amendment Bill, which proposed altering various aspects of court administration and functioning and reintroduced the “justice bills” with little change. Although many judges and legal practitioners agree that various features of the bills are appropriate and necessary, certain proposals proved very controversial and gave rise to allegations that the executive was trying to gain more control over the courts. Additionally, many judges criticised the ministry’s failure to consult the judiciary while the bills were being prepared, the way in which the bills were proposed, and the continued lack of communication between the ministry and members of the judiciary.

After months of opposition by and discontent within the judiciary, in late July 2006 President Mbeki announced that the Superior Courts Bill and the Fourteenth Amendment Bill would be processed only after the buy-in of judges into a new policy on transformation of the judiciary (*Cape Times*, 31 July 2006).<sup>14</sup> The National Justice College Training Bill had similarly been withdrawn earlier in 2006 in response to opposition from the judiciary and has now been replaced by the South African Judicial Education Institute Bill (B4 – 2007). The Judicial Conduct Tribunals Bill and the JSC Act Amendment Bill have been combined into a new Judicial Service Commission Amendment Bill (not numbered).

A discussion of the conflict surrounding the bills provides useful insight into current debates about the role of the judiciary and about judicial independence. Given that efforts at reform continue, it is important to understand the controversial aspects of the previous bills and ensure that any future bills do not include similar threats to independence. However, because numerous organisations and individuals have already written detailed analyses of the legal aspects of the bills and of their potential impact on judicial powers and independence, this report will give only a broad outline of the major issues involved with each of the proposals, focusing on those aspects that most implicate questions of judicial independence and the question of the relationship between independence and other aspects of transformation.<sup>15</sup>

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<sup>14</sup> At the time the President said government would release a white paper, outlining a “broad policy framework”, on the transformation of the judiciary to generate public debate on the topic. The President said the white paper would hopefully be completed by the end of 2006 (*Cape Times*, 31 July 2006). As of July 2007 no white paper has been published. It is not clear if the idea has now been abandoned or whether a white paper is still to be expected. A press report published in May 2007 indicated that Chief Justice Pius Langa had motivated for the contested clauses to be removed from the Superior Courts Bill and the Constitutional Fourteenth Amendment Bill so that the other aspects of the bills could go ahead, but that Minister of Justice Mabandla had indicated her opposition to this idea (*Business Day*, 30 May 2007).

<sup>15</sup> For more comprehensive analysis of the “justice bills”, see: the “General Council of the Bar of South Africa’s Submission to the Portfolio Committee on Justice and Constitutional Development”, 2006, available at <[http://www.legalbrief.co.za/filemgmt\\_data/files/GCB%20justice%20bills%20submissions.pdf](http://www.legalbrief.co.za/filemgmt_data/files/GCB%20justice%20bills%20submissions.pdf)>; the transcript of the “General Council of the Bar’s Conference on the Justice Bills, Judicial Independence and the Restructuring of the Courts”, 17 February 2006, available at <[http://www.sabar.co.za/conference\\_transcript.pdf](http://www.sabar.co.za/conference_transcript.pdf)>; Idasa’s submissions to the portfolio committee on the Constitutional Fourteenth Amendment Bill, 25 May 2006, available at <<http://www.idasa.org.za/>>; Legal Resources Centre “Comments on Clause 1 of the Constitutional Fourteenth Amendment Bill”, 1 February 2006, and “Comments on the Constitution Fourteenth Amendment Bill”, 14 January 2006, available at <[http://www.lrc.co.za/Focus\\_Areas/Submissions\\_to\\_Justice.asp](http://www.lrc.co.za/Focus_Areas/Submissions_to_Justice.asp)>; and the “CALS Discussion Paper on the Constitutional Amendment Bill”, February 2006, available at <<http://www.law.wits.ac.za/cals/>>.

While all of the bills sparked controversy, the most contentious were the Constitutional Amendment Bill and the Superior Courts Bill. The Constitutional Amendment (Constitutional Fourteenth Amendment Bill, Notice 2023 of 2005, DoJCD, 14 December 2005) sought to:

- Give the Ministry of Justice responsibility over the administration and budget of all courts;
- Make the chief justice the head of the “judicial authority”;
- Give the President more power over appointing acting judges to the Constitutional Court, and judges president and deputy judges president to the high courts;
- Take away the power of the Constitutional Court to suspend the commencement of an act of Parliament; and
- Redefine the Constitutional Court as the single apex court in the country.

In line with the Constitutional Amendment Bill, the Superior Courts Bill proposed giving the minister increased rule-making power over the courts and increased control over certain day-to-day aspects of court operations and procedures. The bill also integrated into the high court system some of the specialised courts, including the Competition Tribunal, the Land Claims Court, Electoral Court, Income Tax Court and the Labour Court. According to Deputy Minister of Justice De Lange (11 May 2005), “[t]he two bills ... are aimed at improving the functioning and administration of courts; the establishment of governance provisions within the judiciary for and by the judiciary; the improvement of service delivery in our courts; and ensuring more access to justice”. Although these aims are ostensibly aligned with goals of judicial transformation, many judges and other critics disputed De Lange’s characterisation of the bills and argued that the proposals represented an attempt by the executive to gain more control over the courts.

### **5.2.1.1 Constitutional Fourteenth Amendment Bill**

Proposed after absolutely no consultation with the judiciary, the Constitutional Fourteenth Amendment Bill included various provisions that judges and other members of the legal professional feared would weaken judicial independence and hamper efforts at transformation. For instance, the bill sought to remove the power of the Constitutional Court to suspend the commencement of an act of Parliament or of a provincial act (section 172[3]). Arguably reminiscent of apartheid-era ouster clauses, the bill’s attempt to reduce the constitutionally mandated powers of the court potentially conflicts with the separation of powers and the requirement that all branches of government aid the judiciary in protecting its independence. Moreover, the ouster clause in some ways hampers judicial transformation, particularly efforts to provide increased access to justice and protect the rights of all people. The power to suspend the commencement of an act of Parliament is “an important weapon” because it enables courts “to protect the public, especially minority groups, in the interim against harm that can be caused by potentially unconstitutional legislation” (Steyn, 2006). Particularly in a government dominated by a single party and in a country trying to impress on its judiciary and the people in general a new rights-oriented, equality-based outlook, it is important that courts have the power to protect the rights of all groups.

Furthermore, in the case of *President of the Republic of South Africa v. United Democratic Movement* (“*Floor Crossing*” case) (2002), the Constitutional Court recognised that because suspending the commencement of an act of Parliament is a drastic measure, it should use the power only in very limited circumstances. Balancing the deference with which the court must treat the legislature against the judiciary’s need to ensure that the government acts within the law, the court determined that it would suspend the commencement of an act only when there was prima facie evidence that the act was unconstitutional and when suspension was “absolutely necessary to avoid likely irreparable harm” (paragraphs 31–33). Additionally, the court would act “in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation” (paragraph 31). The court’s understanding of its role in relation to that of the legislature and its reluctance to act except when absolutely necessary further support the argument that the Constitutional Fourteenth Amendment Bill’s ouster clause is not only unnecessary but potentially detrimental to the court’s ability to protect people from unjust legislation, an ability that is crucial to achieving the goal of increased access to justice for all South Africans.

Another controversial provision of the Constitutional Fourteenth Amendment Bill attempted to give more power to the President in appointing acting judges to the Constitutional Court (section 175[1]). Currently, the President must have the “*concurrence of the Chief Justice*” before naming an acting judge (Constitution, section 175[1]). The requirement of concurrence acts a safeguard against the executive’s exerting excessive influence on the judiciary by appointing like-minded judges. The draft amendment, however, eliminates the need for concurrence and empowers the President to appoint a judge “*after consultation with the Chief Justice*” (section 175[1]). Because the executive is often a litigant before the Constitutional Court and because the Court sits *en banc* when hearing all cases, giving the “*executive de facto sole power in appointing acting judges ... could lead to a suspicion of undue influence in decisions of the Court*” (Idasa, 25 May 2006).

In addition to changing the appointment procedure regarding acting judges, the amendment proposed giving the President more power with respect to the appointment of judges president and deputy judges president of the high court divisions. Although the Constitution does not provide a procedure for selecting these judges, “*since 1994 the JSC has recommended appointments to the President and he has acted on them*” (Corder, 2005). The amendment proposes altering this accepted procedure by empowering the President to select judges president and deputy judges president *after consulting* the chief justice and Minister of Justice (section 174[5]). As consultation does not bind the President, in reality the provision gives complete authority to the President to name the heads of the high courts. One judge argued that this part of the amendment was “*incontestably damaging to the independence of the judiciary*” (Interview, 18 July 2006), and Professor Corder (5 June 2005) thought that the phrase “*after consultation with*” is “*redolent of language of late-apartheid Parliament*”. As the decisions of the Rabie “*emergency team*” during apartheid revealed, the selection of judges, particularly senior judges, can impact on the outcome of cases and the perceived impartiality of the judiciary. Giving the President’s sole power over judicial appointments increases the executive branch’s influence in the judiciary, blurs the separation of powers and impacts on public perception of independence.

Also inciting widespread objections, the amendment proposed giving the Minister of Justice authority over the administration and budget of all courts (section 165[7]). Although the provision purported to distinguish between administrative and judicial functions, judges and lawyers have argued that making such a distinction is impossible. George Bizos (February 2006) explained that because many “*functions that may be described as administrative bear directly on the exercise of judicial functions, a clean severance of the two is not possible*”. Justice Ngcobo (2003) similarly argued that the “*regulation of practice and procedure in courts is so fundamental and necessary to a court ... that to divest courts of control in this sphere is to undermine the very phrase ‘judicial authority’ contained in section 165(1)’ of the Constitution*” (704). Given that day-to-day courtroom procedures and higher level administration of courts impact significantly on a court’s ability to carry out its judicial functions, separating administrative and judicial spheres is impossible on a practical level.

In addition to the impossibility of distinguishing administrative and judicial functions, giving the minister increased control over court practice and procedure could weaken the institutional independence of the judiciary by allowing improper executive influence. Administration by the judiciary, as opposed to an outside body, “*protects the courts against outside efforts to make the judicial function unduly dependant on improper forces*” (Justice Ngcobo, 2003: 697–8). Largely because separating judicial and administrative functions is difficult on a practical level, giving the minister control over the court administration creates the risk that the minister, either intentionally or unintentionally, will use this power to exert influence over the judiciary and thus affect the outcome of cases. Control by the minister of court budgets similarly creates the potential for executive infringement on the judiciary’s institutional independence. Threats by the executive to withhold or reduce resources and even the mere knowledge that the judiciary is dependent on the executive for its resources could put pressure on judges and impair the ability of courts to effectively and impartially watch over the other branches of government.

In terms of transformation, most critics argue that putting administrative power in the hands of the minister will not improve the functioning and efficiency of the courts or enhance access to justice, two goals that Deputy Minister De Lange has repeatedly cited as justifications for the amendment (Corder, 5 June 2005). Despite the ministry’s claims, Justice Ngcobo believes that “*self-administration by courts is one of the most important, if not the most important means of achieving the highest level of operational efficiency of courts and ultimately the delivery of justice*”. Judges have intimate knowledge of courtroom practices and procedures and of the measures necessary to run an efficient trial; consequently, as former Minister of Justice Maduna stated at a conference in 2003, “[a]t the end of the day, each judicial officer should be in control of his or her own court and see to it that the court functions effectively and efficiently” (668). Judges must be able to request interpreters, give instructions

to the court staff, repair broken equipment and perform all of the other functions associated with running a courtroom. Efficient court administration improves public perception of the judiciary and helps increase access to justice; pursuit of these transformation goals, however, should “strengthen both the judiciary and the system, and not [...] detract from the principles of the separation of functions and independence of the judiciary” (Maduna, 2003: 670). At the very least it may therefore be said that transferring authority over court administration to the minister was not clearly motivated for and runs contrary to a range of opinion which appears to favour judicial control of court administration both on technical grounds and on the basis that ministerial control may undermine judicial independence. Thus, not only are judges arguably in the best position to run courts efficiently and effectively but transformation should also fortify rather than undercut judicial independence.

Along with vesting administrative and budgetary authority in the Minister of Justice, the amendment established the chief justice as head of the “judicial authority” and gave him responsibility “over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law” (section 165[6]). The provision sought to centralise control of the courts in the chief justice, although under the existing system courts operate in a horizontal not a hierarchical fashion: each high court division operates independently and the head of court in each division has the ultimate responsibility for running the courts (General Council of the Bar of South Africa [GCB], 2006: 17). The proposal to create a hierarchical structure with the chief justice at the top is thus inconsistent with the existing system. Moreover, one individual should not have excessive control or influence over the creation of norms and standards, and vesting so much power in the chief justice arguably conflicts with that idea that the judiciary as an institution must be independent and free from undue influence by any source.

### **5.2.1.2 Superior Courts Bill**

In many ways complementing the Constitutional Fourteenth Amendment Bill, the Superior Courts Bill has proven similarly controversial in regard to judicial independence. At the same time, it is important to note that the judiciary supports and views as necessary many of the proposed reforms, and in 2003 after extensive consultations with and with the support of the judiciary, former justice minister Maduna proposed a Superior Courts Bills (Superior Courts Bill, B52 of 2003, Gazette No. 25282, 30 July 2003) that aimed to rationalise the structure of the court system to bring it more in line with post-1994 South Africa. However, in 2005 Minister Mabandla put before Parliament a new version of the Superior Courts Bill (Superior Courts Bill, Working Draft, 19 October 2005) that included several material changes and sparked debate inside and outside the judiciary. Many of the controversial provisions dealt with the same issues – giving the minister control over the administration and budget of all courts – as the Constitutional Fourteenth Amendment Bill, and some people allege that the proposed amendment was in part aimed at ensuring that the Superior Courts Bill would not violate existing constitutional norms concerning the judiciary.

In accordance with the proposal in the Constitutional Fourteenth Amendment Bill, the Superior Courts Bill proposed that the chief justice be recognised as the head of the judicial authority and gave him responsibility over the exercise of judicial functions (clause 11). To enable the chief justice to perform his new functions, the bill proposed an office of the chief justice that was comprised of an executive secretary named by the minister in consultation with the chief justice and other personnel appointed by the director-general of the Department of Justice in consultation with the chief justice (clause 12). Given that the office of the chief justice was supposed to deal with judicial functions, the executive branch’s role in appointing personnel could constitute infringement on the judiciary’s institutional independence. The General Council of the Bar (2006) explained that because judicial functions, such as the listing of cases for hearing and the assignment of judges to cases, are fundamental to the proper operation of courts, the “centralisation of these matters in a single office administered by public servants responsible to the Minister inevitably means that there is very considerable scope for the limitation of and interference with” the functioning of the courts (13–14).

Another provision of the Superior Courts Bill vested rule-making power in the Minister of Justice instead of the Rules Board (chapter 7). Established in 1985 by a legislative act and empowered to formulate the rules for courts, the Rules Board is composed of judges, lawyers, a law lecturer and representatives of the Department of Justice. While the Superior Courts Bill provided for the establishment of a similarly composed Board, the Board would have been a purely consultative body whose advice the minister was required only to consider before making, amending or repealing rules (clause 41). According to the bill, the minister would have had power to make all rules, including those regulating “the practice and procedure in connection

with litigation” and other important judicial processes. However, because rules impact on the course of a trial and affect the way in which the judiciary operates, it is important that neither the executive nor legislative branch have excessive influence in rule-making processes.

Along with control over rule-making, the Superior Courts Bill gave the minister extensive power to enact broader regulations regarding, for example, “any matter that may be necessary or expedient to prescribe regarding the administrative functions of courts and the efficient and effective functioning and administration of the courts, including the furnishing of periodical returns of statistics relating to any aspect of the functioning and administration of courts and the performance of judicial functions” (clause 66[a]). The requirement that judges provide reports to the minister regarding *judicial* functions erodes their independence by making them accountable to the executive. Furthermore, the bill allowed the minister to regulate the “periods of absence of judicial officers from courts” (clause 66[e]). Pointing out that even during apartheid “the Minister of Justice did not try to interfere to this extent with the daily operations of the courts”, the General Council of the Bar (2006) contended that this provision would have enabled the minister to decide when specific judges were on duty and to “punish judges who make unpopular decisions” (59). Overall, the ability of the minister to make rules or regulations that directly impact on judicial functions and daily operations of the courts would severely weaken judicial independence and facilitate executive influence, both intentional and unintentional, in the judiciary.

### 5.2.1.3 *Judicial education*

Virtually all judges agree that “one of the most effective ways of achieving transformation of the judiciary is through training” (Corder, 5 June 2005). Judges and legal scholars generally point to two main reasons why judicial education is key to transformation: first, already sitting judges should continually be exposed to new ways of thinking about law and to recent developments in the domestic and international legal fields; second, training helps increase the pool of potential judges beyond the ranks of senior advocates, the traditional source of most judges (Interview, 23 June 2006). Education is crucial to building a judiciary that understands and is dedicated to constitutional values and that appreciates the complex social and historical context within which it must function. Explaining the need for “sensitivity training”, former Chief Justice Mahomed (1998) stated:

[P]roper judicial insights in many areas would involve training sensitive to the perspectives and the complaints of special groups, unfairly marginalised in the past, such as women, blacks, homosexuals and even illiterate and disabled persons, all disadvantaged by assumptions which might need review and discussion” (109).

Demonstrating on a practical level the importance of ongoing judicial education, in a child custody case in the Pretoria High Court earlier this year the court granted custody to the father rather than the mother who was well-suited to be a parent but HIV positive. The trial transcript indicated that the mother’s HIV-status was influential in the decision and “effectively disqualified her from being a custodial parent and effectively disqualified her from her right to be considered a worthy custodial parent” (Kollapen, 2006). This case underscores the need for continuing education about the rights of HIV-positive South Africans, especially their right to non-discrimination, and the overall role of education in creating a human-rights oriented judiciary.

In terms of the practicalities of judicial education, judges agree that, as is the accepted practice in democracies, “judicial training should be organised and controlled by an adequately funded judicial body independent of the executive” (McQuoid-Mason & Wylie, 15 May 2005: 7). To maintain independence and cultivate an impartial bench, the judiciary must be able to control every aspect of its own education, from curriculum to appointing personnel to determining how the budget will be spent. Allowing other organs of government to control judicial training would potentially enable them to exercise an inappropriate influence on the perspectives and attitudes of judges, thus weakening the impartiality of individual judges and the independence of the judiciary as a whole.

Despite their belief in the importance of education, judges objected strongly to the National Justice Training College Draft Bill proposed by Minister Mabandla. The bill suggested that the Justice College, a state-run institution, would train judges along with the prosecutors and other judicial officials whom it already trains. Although the bill provided for a separate training facility for

judges and permitted judges to determine the curriculum, the Minister of Justice retained control over the resources, personnel and budgets (McQuoid-Mason & Wylie, 2005: 7) thus enabling the minister to dictate policy and control the operation of the institution. In response to the widespread objections by the judiciary, the minister withdrew the bill in late 2005 and agreed not only that the “judiciary would be responsible for its own training and education” but also that “magistrates who were currently being trained along with prosecutors and other officials at the Justice College would be removed and receive training along with judges under the proposed new regime” (*Sunday Independent*, 30 October 2005).

In contrast with the initial bill, the new South African Judicial Education Institute Bill (4 of 2007) provides explicitly for the envisaged institute to be under the direction of a council, chaired by the chief justice. The 21 members of the council will include nine judges (including one retired judge) and three magistrates. The other nine representatives will include teachers of law and representatives of attorneys and advocates, as well as the Minister of Justice (or her/his appointee) and a representative of the Judicial Service Commission (who may or may not be a judge). Funding for the institute will be allocated by Parliament in the annual budget. The authority of the minister over the institute will be fairly limited. For instance, the chief justice, with the concurrence of the minister, will issue guidelines regarding the functioning of the institute. The minister will have some authority in relation to the remuneration of the director of the institute, and the council will have to submit its annual report to the minister.

The issue of judicial education illustrates potential tensions between independence and the normative aspects of transformation. It also underscores the notion that attaining the goals of creating a well-qualified bench that understands the new legal framework within which it must work should not lead to a diminution in independence.

#### **5.2.1.4 Judicial ethics and accountability**

Many members of the judiciary agree with the need for a formal mechanism to deal with complaints against judges and for a code of conduct to guide judges. Fostering an atmosphere of judicial accountability is an integral part of the attempt to create a more people-focused judiciary and of overall judicial transformation. In recognition that they are supposed to serve the people of South Africa, judges should be held accountable for conduct that impedes the effective fulfilment of the judiciary’s function. While the Constitution includes procedures for dealing with allegations of impeachable conduct, it requires that national legislation create “procedures for dealing with complaints [of non-impeachable conduct] about judicial officers” (section 180). As Justice Howie explained, one must distinguish between judicial decisions and judicial behaviour when discussing accountability. In terms of decisions they make in court, judges “are answerable only to the decisions of higher courts, to the law and their consciences”. In terms of personal conduct, however, judges “are not above the law in any respect” and should be held accountable (2003: 682). While the appeals process is the only appropriate accountability mechanism for judges with regard to their judicial decisions, other methods should exist to ensure that judges are accountable to the public for conduct that seemingly influences their impartiality or reflects on their integrity.

Judges acknowledge that they must conduct themselves ethically and should be held responsible for failures to do so, but “striking a balance between independence and accountability is a tempestuous challenge” (Ellis, 2005). At the same time, fair and effective mechanisms for dealing with complaints can help promote and protect judicial independence. The objective of the constitutional provision establishing procedures for impeachment of judges is to “safeguard judicial tenure, thus shoring up the authority and independence of the judiciary” (Anonymous, 2000: 381). The provision ensures that judges will not be dismissed arbitrarily and that the executive cannot use impeachment or threats of impeachment to influence judges. The creation of a body that follows fair procedures to deal with allegations of non-impeachable misconduct could also help to ensure that judges are not punished unjustly and that threats of punishment are not used to pressure judges.

A complaints mechanism and formal code of conduct could also improve public perception of the impartiality of judges and the legitimacy of the judiciary as whole. Stressing the importance of public confidence, Justice Harms declared:

We [the judiciary] need public acceptance of our moral authority and integrity. Our moral authority and integrity provide the real source of our power, not the Constitution. The Constitution may well command

all organs of state to protect our independence but that is not enough. It is for us to maintain, protect and enhance the status of the judiciary (Harms, 2003b).

If an individual lodges a complaint against a judge and never hears any follow-up from the judiciary as to the status of or action taken in response to the complaint, he or she may question the judiciary's dedication not only to impartiality but also to the people whom it is supposed to serve. Thus, a process for dealing with complaints would illustrate the judiciary's commitment to the public and its appreciation for the importance of judicial conduct and would foster a climate of accountability among judges. Similarly, a code of conduct would promote and underscore the importance of impartiality, provide clear standards for judges, and educate the general public about appropriate judicial behaviour. Additionally, by clearly indicating what conduct is and is not proper, a code could potentially prevent spurious allegations of misconduct.

In terms of striking a balance between independence and accountability, a committee of senior judges chaired by Justice Harms began investigating accountability and ethics in the late 1990s. After consulting numerous judges and a myriad of outside sources, the committee developed a code of ethics and a draft bill establishing a disciplinary body. In 2000, all of the heads of superior courts and the JSC approved the documents, and the committee submitted the code and draft bill to the Department of Justice. To protect the independence of the judiciary and prevent the appearance that other organs of government were using the complaints procedure as a way to pressure judges, the committee determined that judges should control any complaints procedure with as little outside influence as possible. For instance, in terms of the composition of a body that would deal with complaints, the committee found that "the overwhelming view of the judiciary is that *all* the members are to be judges" (Anonymous, 2000: 395). Additionally, given that "judges are entrusted with the duty to interpret the Constitution and to consider the constitutionality of Acts of Parliament or actions of the executive or the legislature", it is reasonable to also trust judges with considering complaints against their colleagues (ibid).

One may question why the judges' opinion regarding the establishment of a complaints procedure should trump that of other branches of government. Because some types of professional conduct bodies, such as those that deal with complaints against doctors, encourage the participation of outsiders, it is reasonable to ask what distinguishes judges from other professionals and what justifies an internally controlled complaints procedure. One of the most distinctive features of judges as individuals and of the judiciary as a general professional body is the need for complete independence. This need influences many aspects of a judge's job, including salary, tenure and dismissal procedures, and a complaints procedure must similarly be sensitive to the need for independence and must not open the door to undue influence by other branches of government. If members of the legislature or executive controlled the complaints process or were permitted to sit on a committee that reviewed complaints and disciplined judges, the potential for either intentional abuse of this power or for unintentional influence over judicial activity would be unjustifiably high. Because other types of professionals do not face the same threat from involvement by outsiders, one cannot analogise the practices of these professional bodies to those of the judiciary. Moreover, although one may question whether judges will have the objectivity necessary to fairly address complaints against colleagues, given that judges are trusted to interpret the Constitution, review legislative and executive actions, and decide cases that impact on the litigants' lives, it seems reasonable to argue that judges also have the competence and personal integrity necessary to control a complaints process.

The practice of other countries lends support to the contention that such a model would be appropriate and justified partly because it is the model which best protects judicial independence.

Furthermore, it is worth noting that most common-law countries that have formal disciplinary processes for dealing with complaints – Canada and New Zealand – have adopted a model of judicial self-discipline (Anonymous, 2000: 395).<sup>16</sup> For instance, in Canada, the Canadian Judicial Council, which consists only of senior judges, has the power to investigate complaints against judges. The Council cannot discipline judges, but it can recommend that Parliament remove the judge from office and it can express publicly "its concluded opinion on the conduct of the judge who is subject of the enquiry" (SALJ,

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<sup>16</sup> In most common-law countries, no formal procedure exists for dealing with complaints against judges. Instead, the judiciary relies on "self-discipline enforced through seniority and collegiality. The reasons for this are the reluctance to appear to interfere with the judiciary and the difficulty of devising a machinery which would satisfy all concerns" (Anonymous, 2000: 384).

2000: 386). However, in the US, judicial disciplinary organisations operating at the state level comprise not only judges but also lawyers and private citizens (Seedat, 2007: 9).

Despite the widespread approval by the judiciary of the code of judicial ethics and draft bill on disciplinary procedures, in December 2004 the Department of Justice proposed two new bills – the Judicial Services Commission Act Amendment Bill and the Judicial Conduct Tribunals Bill – that dealt with the same issues but differed significantly from what the judges had recommended. After widespread opposition by the judiciary and a promise by the ministry to rewrite the bills, in February 2006 the department re-issued the bills “essentially unaltered” (Interview, 13 July 2006). The JSC Amendment Act created a judicial conduct and ethics committee within the JSC and a subcommittee on judicial conduct, and proposed the establishment of a judicial code of conduct and a register of financial interests for judges. The Judicial Conduct Tribunals Bill provided for the formation of a tribunal to investigate and report on allegations of “incapacity, gross incompetence or gross misconduct” – impeachable conduct according to the Constitution. Both bills were controversial with the main objection stemming from the proposal that the executive and legislature play a role in the discipline of judges.

In his submission to Parliament concerning the bills, Justice Harms (2006) stated that “[i]t is wrong in principle and constitutionally offensive to subject the judiciary to the functional or ethical control of a non-judicial body, especially one in which executive appointees predominate”. Additionally, the bills required that Parliament approve any code of ethics or amendment to the code. However, because judges are not subject to political control, it is “not constitutionally acceptable for the legislature to seek to prescribe ethical standards or dictate rules of conduct to the judiciary” (ibid). Moreover, the draft code to which the judiciary agreed in 2000 was based on internationally accepted norms and cited by the UN as a source for the *Bangalore Principles*. Thus, judges argue, the requirement that Parliament approve a code of conduct is unnecessary and could only serve to increase the possibility of legislative interference in the judiciary. Essentially, “judges are willing to be subject to the discipline of other judges in an open and transparent way but it must be within the judiciary” (Interview, 27 June 2006).

Concerning judicial discipline, the new 2007 draft Judicial Service Commission Amendment Bill provides in section 12 that the chief justice, “acting in consultation with the Minister” must compile a judicial code of conduct; there is no requirement for parliamentary approval. Section 8 of the bill provides for the Judicial Service Commission to include a judicial conduct committee comprised of the chief justice and deputy chief justice and three judges who are to be “designated by the Chief Justice in consultation with the Minister”. These provisions therefore allow for substantial ministerial influence over the terms of a code of conduct and over appointments to the judicial conduct committee, though the provisions seem to require that the chief justice and minister work in a cooperative manner to negotiate the code and the appointments.

The question of whether judges should have to disclose their financial interests has received media attention recently, largely as a result of allegations earlier this year that Justice Hlophe of the Cape High Court, while receiving a retainer from the Oasis Group granted the group leave to sue Justice Desai for defamation (*Business Day*, 4 April 2006).<sup>17</sup> Both the old and new draft bills include a provision requiring judges to declare their assets, and in spite of the attention that the issue has received from the media, judges in general do not see this requirement as particularly threatening to judicial independence. Although judges do not agree unanimously as to the desirability of an asset register, most of their concerns have more to do with questions of degree and practicality. For example, given that a judge who takes a bribe is unlikely to disclose it regardless of the existence of a mandatory asset register, the requirement will likely accomplish little on a practical level to prevent corruption or dishonesty (Interview, 13 July 2006).

While some judges object to an asset register, none has cited threats to judicial independence as a basis for his or her objection. Conversely, many people who support mandatory disclosure believe that the obligation would strengthen judicial independence and public perceptions of impartiality. For example, Judith February of Idasa (26 April 2006) explained that the “basis for

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<sup>17</sup> The JSC was due to meet early in October 2007 to discuss a request by a Cape Town advocate for Hlophe’s impeachment (*Mail & Guardian*, 28 September 2007). The JSC had previously cleared Hlophe of conflict of interest charges saying that it could not contest his assertion that he had received oral permission from the late Minister of Justice Dullah Omar (*Mail & Guardian*, 15 December 2006).

disclosure is to prevent a conflict of interest between the public interest and a private interest which they may hold in a company or some such commercial entity". An asset register would increase the public's faith in the impartiality of judges and assure litigants that their judge is not being inappropriately influenced by outside interests. Additionally, mandatory disclosure would prevent selectiveness in "outing" of judges with business interests (*Business Day*, 16 May 2006).

In section 11 the new bill also prohibits judges from holding or performing any other "office of profit" or receiving any other remuneration apart from his or her salary and any other amount which may be payable to him or her in his or her capacity as a judge, though it makes provision for a specifically defined set of circumstances in which additional income would be allowed. A provision in terms of which retired judges are also only allowed to take on work for remuneration if they receive written permission from the minister, has been one provision of the new bill which has given rise to specific objections (*Weekender*, 24 March 2007).

Judicial accountability is crucial to public perception of independence and impartiality, and the topic often receives media attention when a judge is accused of misconduct. Accusations of and actual incidences of judicial misconduct occur in every democracy, and South Africa is not immune to this problem. The existence of a complaints procedure would both ensure that judges are held accountable for any misbehaviour and, by investigating and dismissing unfounded allegations, protect judges from unwarranted criticism. A complaints mechanism and a code of conduct would also help reassure the public that the judiciary is dedicated to impartiality and fair adjudication and willing to hold itself accountable for any lapses in its commitment.

## 5.2.2 Relationship between the ministry and the judiciary

Aside from the actual content of the bills, the process by which the bills were proposed and the attitude of the ministry toward the judiciary provoked strong reaction from many judges and has implications for strength of judicial independence. The ministry proposed the first set of draft bills (excluding the Fourteenth Amendment Bill) in December, 2004, and although the bills all included material changes to what the judiciary and previous Minister of Justice had agreed, Minister Mabandla consulted no one in the judiciary beforehand. In response to criticism from numerous judges, the minister agreed to rewrite the bills and did in fact change the National Justice Training College Bill to reflect judicial concerns. However, on 14 December 2005, the minister published for comment the Fourteenth Amendment Bill and the Superior Courts Bill, having made few substantive changes in response to the judiciary's concerns. Although later extended to May 15 on orders from President Mbeki, the original deadline for comments was only one month later, on 15 January 2005. Given that the bills involved complex and controversial issues and given that many judges, non-governmental organisations and other interested stakeholders were on Christmas recess when the bills were published, the timelines indicated dismissiveness on the part of the ministry to the need for meaningful involvement from the judiciary or civil society.

Several judges have expressed disappointment and frustration at the process by which the minister proposed the bills. Justice Lewis (23 January 2006) believes that the "proposal of such a radical change without a proper process of consultation is contrary to the democratic principles" that the country has embraced. The Constitution demands that each organ of government respect the powers and functions of one another and explicitly states that organs of state "must assist and protect the courts to ensure independence, impartiality, dignity, accessibility and effectiveness of the courts" (Constitution, 1996: section 165[4]). Thus, in furtherance of constitutional values and in the interests of strengthening the judiciary, the executive should respect the right of judges to, at the very least, have meaningful input into changes to judicial structures, functioning and powers. In addition to implying a lack of respect for the views of judges, the ministry's failure to consult the judiciary, and the short window for comment on the draft bills, does not respect constitutional commands and norms. Underscoring the importance of involving judges in the judicial reform process, Professor Corder (24 January 2006) said that "[i]t would seem to be a matter of common sense and good government to ensure broad agreement by the leadership of the judiciary with changes to the law pertaining to the courts, for the judges are in a unique position to advice on the constitutionality, practicability and desirability of such reforms".

Not only did the minister introduce the bills in an arguably inappropriate manner, but when members of the judiciary attempted to give input into and voice objections to various aspects of the bills, the minister and deputy minister refused to engage in any meaningful discussions or debates. When asked about the relationship between the judiciary and the ministry, one judge

said that he felt like he was on a desert island throwing bottles filled with message into the ocean and having no idea whether anyone would ever find the messages and respond (Interview, 23 June 2006). Although no one has provided an explanation for the continual lack of communication between the two bodies, various judges have pointed out that the problem is complex and “multifaceted” and involves issues including the history of the Department of Justice and its leadership, the ANC’s attitude toward the judiciary, and the individual personalities involved in the current judicial reform debate (Interview, 13 July 2006).

### 5.2.3 The motivations of the ruling party

Considering that the judicial bills seem to be consistent with the 8 January 2005 statement of the ANC, it would appear that the bills in some way reflect the political objectives that the ANC is trying to pursue. But opinions differ regarding the exact intentions behind the bills and the degree to which the ANC consciously tried to give the executive more power over the judiciary. Some people believe that the drafters of the bills must have tapped into “a body of opinion within the ANC that either doesn’t care about the courts or is hostile to them” (Interview, 31 July 2006). Human rights activist Rhoda Kadalie (12 May 2005) asserted that the bills reflected “government’s frustration with the many court rulings that went against it over the past years”. On the other hand, one judge believes that motivations behind the bills were not necessarily sinister and explained that due to the nature of power and of a bureaucracy, the “executive at the administrative level will always seek to expand its influence and control” (Interview, 23 June 2006).

While some critics attribute to ruling party, malicious intentions to increase its control over the judiciary, it is important to note that President Mbeki intervened early in the process to extend the deadline for comment and intervened again to axe two of the bills entirely. Explaining that he was confused about the judiciary’s opposition to the draft legislation, in February 2006, President Mbeki said that he wanted to slow down the process and “engage the judiciary to understand properly what it is that leads them to this conclusion” (*Business Day*, 23 February 2006). The President’s statement that he was “quite certain that the cabinet never approved any legislation which had the intention of compromising the independence of the judiciary as provided for in our constitution” (*ibid*) also implies that he wished to align the government and the ruling party with the concern to uphold the independence of the judiciary. Whether motivated by a genuine concern about protecting judicial independence or by a desire to avoid bad publicity, President Mbeki’s reaction to the situation indicates that the government and the ANC are willing to listen to and act on outside concerns and advice and that the ANC might not have had the sinister intentions that some critics attribute to it.

As various judges and commentators have pointed out, the introduction of and debate about the bills took place in a complex context. A myriad of factors – including history, individual personalities, politics and possibly misunderstandings – influenced the situation, and people disagree as to which factor was most significant. Moreover, the government’s stated intentions behind the bills – rationalising the court system and improving court management and general service delivery – are valid and important goals.

Whether the government did not realise that the bills would have unintended consequences for judicial independence or whether the government used legitimate objectives as an excuse for gaining more control over the judiciary, the eventual withdrawal of the proposals indicates that the most influential segments of the ANC and the government were at least willing to listen and respond to concerns about judicial independence. If the bills’ impacts on independence were inadvertent, then perhaps the judiciary’s reaction helped educate the government about the importance of and need to protect independence. If the bills represented an underhanded attempt to create a more compliant judiciary, then perhaps the strong opposition by judges and parts of civil society will force the government to reconsider its approach and recognise that an independent judiciary is not an impediment to, but actually a crucial component of, building the type of democratic and values-based society to which the government has dedicated itself.

### 5.2.4 The importance of protecting judicial independence

While each of the five “justice bills” contains provisions that allegedly infringe on judicial independence and while some aspects of the bills could hinder rather than advance transformation, opinions differ as to the level of threat that the bills and related conflicts actually posed to the integrity of the South African legal system. At the same time, most judges would probably agree

that regardless of the intensity of the threat, protecting the judiciary's independence is extremely important. Some judges believe that although the bills posed some danger to the judicial branch, the judiciary's resistance to the bills prevented their becoming an actual threat and forestalled a crisis between the various branches of government (Interview, 23 June 2006; interview, 27 June 2006; interview, 4 July 2006). In essence, most people agree that while the bills threatened judicial independence and could have frustrated some of the progress that has already been made in transforming the judiciary, the widespread opposition – by members of the judiciary, legal scholars and by civil society – to the bills prevented the threats from becoming a reality.

Aside from the immediate and specific impact of the bills, many judges discussed the long-term ramifications of seemingly small encroachments on judicial independence. Summing up this argument, Justice Chaskalson (2006) explained:

It's the early incursions into checks and balances which historically have been shown to open the way for later incursions to be made. Nobody knows what the future holds for us, but once you accept you can eat into protections which are there, and that you can erode fundamental principles of the Constitution, sometime, somebody else can take it further. So any attempt to do so, no matter how small, is open to objection.

Justice Ngoepe (12 October 2005), the Judge President of the High Court of the Transvaal, similarly contended that “judicial independence can be whittled away through a subtle process”. Thus, even a slight weakening of the structural protections of independence should be avoided so as to not open the door to more drastic measures in the future. Additionally, even if the current government does not have sinister motives and would not take advantage of diluted judicial independence to push through unconstitutional or otherwise illegal programmes, it is important to recognise that any institutional and structural changes to the judiciary would last beyond this administration. No one knows who will govern the country in the future, so reducing the opportunity for governmental abuse of power and ensuring that the judiciary is strong enough to defend the Constitution are imperative to the long-term maintenance of democracy and the rule of law.

The need to protect the judiciary also arises from the notion that threats to independence “always come in little steps, each taken on ostensibly good grounds” (Interview, 27 June 2006). Although the minister's stated motivations for the bills – improving service delivery and management of the courts and rationalising the judicial system – are valid and important goals, achieving these goals should not excuse intrusions into independence. As South Africa's history has revealed, a judiciary that is not independent is not able to function properly as a check on the other branches of government or as an impartial arbiter in disputes between individuals and that state. Consequently, allowing the demands of transformation or the achievement of other important objectives to justify even the smallest weakening of judicial independence would defeat the overarching aims of promoting and protecting the new constitutional democracy and ensuring the rights of all people.

## 5.3 Appointment of judges

An important factor in promoting judicial independence and in fostering transformation, the appointment of judges to all of the courts has given rise to controversy on several levels. Although the Constitution established a much more transparent and fair appointment process than existed during apartheid, various issues have surfaced in the past decade that potentially challenge the independence of the judiciary and suggest that certain reforms might be necessary. The main concerns involve: the tension between the need for demographic transformation and the need for an experienced and well-qualified judiciary; the influence of politicians on the Judicial Service Commission, the body that nominates judges; and the appointment of acting judges.

### 5.3.1 Race and gender transformation

Along with questions of how to accomplish necessary judicial reform without compromising the independence of the judiciary are difficult questions of how best to achieve racial and gender transformation of the bench. As stated in the Constitution, one of the goals of transformation is the creation of a judiciary that “reflect[s] broadly the racial and gender composition of South Africa” (Constitution, section 174.2). Although the percentage of white judges is still disproportionately high compared to the percentage of the South African population that is white, the judiciary has made a lot of progress in the past decade in racial transformation. According to the 2004 JSC Annual Report, “[p]rior to 1994 there were two black male judges, two white female

judges and the rest were all white male judges. As at June 2004 there were 76 black judges, 126 white judges and 26 women judges of whom 13 are white and the rest black” (Judicial Service Commission, 2004: 2). Although the composition of the judiciary has changed significantly since 1994 and although the majority of new judges appointed are now black, the bench is still not demographically representative of South Africa and the issue of racial transformation continues to spark debate.

Explaining the constitutional requirement that the JSC consider race and gender in making judicial appointments, the JSC has said that diversity “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” (Rickard, 4 October 2003). Moreover, the composition of the judiciary affects public perception of judicial independence thus contributing to its legitimacy. According to a 2005 survey of 2000 South Africans, 52% of respondents agree with the statement that a judge’s race influences how he or she decides a case (Research Surveys, 2005). Supporting this finding, a report by AfriMAP and the Open Society Foundation for South Africa found that in some criminal cases, “white male judges and magistrates have been accused of wrongly failing to convict persons charged with inter-race crimes, or failing to impose adequate sentences” (2005: 60).<sup>18</sup>

The reaction to the verdict in the 2005 corruption trial of Durban businessman Schabir Shaik illustrates the ways in which race, and a judge’s background, may be used to undermine popular judicial decisions, even where these are based on careful reasoning. In June 2005, Justice Hillary Squires of the Durban High Court handed down a guilty verdict against businessman Schabir Shaik, finding that he was guilty of two counts of corruption and one count of fraud relating to deal with a French arms company. Shaik was sentenced to 15 years in jail. Although then Deputy President Jacob Zuma was not also on trial, Justice Squires found, among other things, that a “mutually beneficial symbiosis” had existed between Zuma and Shaik, his former financial adviser (*S v. Shaik*, 2005: 76).<sup>19</sup> Presiding over a widely publicised trial against a close friend of an ANC leader, Justice Squires is a white man who served as a judge during apartheid and was a member of the Rhodesian Parliament under Ian Smith: his race and political background quickly became fodder for criticism of his suitability to preside over the case.<sup>20</sup>

The ANC Youth League (ANCYL) and the Young Communist League (YCL) attacked Justice Squires based on his race and his past membership of the Rhodesian Parliament. The president of the ANCYL called Justice Squires an “apartheid judge”, while the national director of the YCL said that he was “a cynical, mad person who is still raw because his apartheid existence came to an end” (*Mail & Guardian Online*, 6 June 2005). In a press statement five days after the verdict, the Cosatu reacted to the Shaik verdict and to demands that Zuma resign as deputy president; it stated:

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<sup>18</sup> A recent instance concerns the case of a farmer who shot and killed an 11-year-old boy, Sello Pete, claiming that he had mistaken the boy for a dog. The magistrate said that the prosecution had failed to substantiate the charge of murder and found the farmer, Marcel Nel, guilty of culpable homicide, sentencing him to a fine of R10 000. Pan Africanist Congress spokesman Mudini Maivha responded to the judgment saying, “The justice system is still what it used to be under apartheid. Our people are still subjected to callous murders without any recourse from the courts” (*Sowetan*, 19 January 2007).

<sup>19</sup> The full paragraph from which this phrase is taken reads: “It would be flying in the face of common sense and ordinary human nature to think that he did not realise the advantages to him of continuing to enjoy Zuma’s goodwill to an even greater extent than before 1997; and even if nothing was ever said between them to establish the mutually beneficial symbiosis that the evidence shows existed, the circumstances of the commencement and the sustained continuation thereafter of these payments, can only have generated a sense of obligation in the recipient.”

<sup>20</sup> Squires was in general careful not to make specific findings against Zuma, who was not one of the accused in the trial. However, from shortly after the judgment it became commonly established in the press and society more generally that Squires had said that there was a “generally corrupt relationship” between Shaik and Zuma, though, in fact, Squires had not used the phrase (see for instance *Mail & Guardian*, 5 June 2005; Sapa, 12 June 2005). Many people, including the Supreme Court of Appeal in its judgment rejecting Shaik’s appeal, referred to the phrase as if it were part of Squires’s judgment. Despite the fact that the exact phrase does not feature in the judgment, it seems clear that many people felt that the phrase reflected the gist of the judgment in relation to its implications for Zuma. In turn, the widespread use of the phrase fed into the generalised perception that the court had in effect made a finding against Zuma.

The events of the past week confirm a long held view by Cosatu that the trial of Schabir Shaik was nothing but a political trial of the deputy president in absentia. The choice of a long retired judge who is a former justice minister of the then Rhodesia indicates the extent to which the country have not succeeded to transform its judicial system (Cosatu, 2005).<sup>21</sup>

Zuma also compared the trial to his own 1963 political trial in which Justice Steyn sentenced him to ten years in jail (Agence France Press, 17 June 2005).

At the same time that some sectors of society questioned Justice Squires's impartiality, other groups defended the rule of law and the need to respect court decisions. In a media release several days after the verdict, the South African Human Rights Commission (SAHRC) (6 June 2006) denounced the race-based attacks on Justice Squires. Acknowledging that judicial transformation is an ongoing process and that the judiciary is not yet demographically representative of the people, the SAHRC argued that is unacceptable to use issues of race to "cast doubt on the work of the Court". While "considered arguments demonstrating how the judge's race or origins unduly influenced his conclusions" are acceptable, the SAHRC explained, arguments that a judge is "biased purely on account of his race or origins" are inappropriate.

Despite widespread agreement about the need for a representative judiciary, many people warn that efforts at transformation could undermine judicial independence. Owing to "South Africa's apartheid legacy, there are a limited number of black, coloured and Indian legal practitioners who have the necessary skills and qualifications for appointment to the bench. These potential candidates often have lucrative legal practices and may be reluctant to take significant salary decreases" to accept appointments as judges (AfriMAP, 2005: 62). Similarly, for a variety of reasons including traditional gender roles, the difficulty of balancing a full time legal practice with raising children, and lack of flexibility in many firms about issues such as maternity leave, there are fewer qualified and experienced women who are willing to make themselves available for appointment to the bench. Thus, balancing the need for racial and gender representivity with the need for a competent, well-qualified judiciary poses a difficult challenge.

Many people both inside and outside the judiciary believe that the JSC has not adequately met the challenge and has focused more on race and gender than on legal competence when making judicial appointments. As evidence of the JSC's attitude, some people point to cases in which experienced and highly-qualified white male candidates have been overlooked in favour of less qualified and experienced black or women candidates. For instance, some people refer to the case of Geoff Budlender, who co-founded of the Legal Resources Centre and has been involved "in some of the most important cases in modern legal history" (Rickard, 18 July 2004). In July 2004, Budlender was rejected for appointment to the Cape High Court in favour of what some people argue was a less-qualified black candidate (ibid). Various commentators and judges have also expressed concern that competent white male judges will stop accepting nominations to the bench due to concerns that they will not be fairly considered, thus impacting on the number of qualified candidates available and reducing the overall competence of the judiciary.

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<sup>21</sup> It is worth noting the entirely different response to the judgment of Justice Van der Merwe, also a white Afrikaans judge, when he acquitted Zuma of rape in May 2006. Because they agreed with the verdict, groups like Cosatu and the ANCYL voiced support for the entire legal process and did not mention the judge's race or background. The different reactions to these two cases demonstrate a cynicism about the judiciary where the response to court judgments and criticism of judges is dependent not on the merits of the judgement but on whether the judgment supports a specific political agenda. Rather than genuinely believing that the impartiality of the judge had been compromised, people used race as a convenient means of attack because the judgment threatened their political agenda. Had circumstances been different and the judge reached a guilty verdict in the rape trial, it is reasonable to assume that attacks would have been made on the judge, similar to those following the Shaik judgment. It also appears that a guilty verdict might have sparked demonstrations, potentially violent, against the findings of the court. While the alacrity with which political role-players attacked Justice Squires is of concern, it needs to be acknowledged that these attacks reflect an underlying perception that the criminal justice system is being used selectively to settle political scores, and that whether the judiciary is impartial or not, it is giving judgment on prosecutions that are being entered into selectively, so as to favour particular interests in the ANC. At the same time that they appear to reflect a cynical attitude toward the judiciary, these attacks may be interpreted to reflect a concern that the criminal justice system is not an independent and impartial instrument of justice.

Aside from the possibility that certain judges will no longer accept nominations, an Idasa report cites two ways in which the focus on transformation could undermine judicial independence: first, appointments based more on a candidate's race or gender than on merit could lead to a situation "in which the new appointees are loyal to those who appointed them", and, second, "attacks on a slowly transforming judiciary can be perceived as attempts to undermine judicial independence, pressuring judges to align with government programmes and policies through their rulings" (Idasa, undated: 60). Having clearly defined criteria according to which judges are appointed provides transparency and helps ensure that political motivations do not play a large role in the process. However, elevating the importance of the race or gender of a candidate above other qualifications could potentially undermine the appointments process and lead to the appointment of judges who, though otherwise unqualified for the job, feel obligated to support the government that appointed them.

Some judges have also argued that appointing less competent judges will actually hinder other aspects of transformation, such as increasing and improving access to justice. One judge believes that the main problem with appointing less experienced judges has to do with "management of cases not with decision-making". Stating that delayed trials are a tremendous barrier to justice, the judge explained that only through experience can judges learn how to manage cases and make decisions quickly (Interview, 27 June 2006). Another judge argued that "people who are appointed without experience and qualifications do no service to people who come before them and can be destructive of the system" (Interview, 4 July 2006). While representivity and public perception of impartiality are important, appointing judges who are unable to perform the job effectively could lead to badly reasoned decisions that do a disservice to the litigants and to the reputation of the judiciary as whole.

Several judges also stressed the need to focus on attitude and dedication to the Constitution in addition to competence. For instance, one judge asserted that instead of making "special efforts to recruit women just because they are women", the JSC should focus on finding well-qualified candidates who are informed about and concerned with women's issues" (Interview, 4 July 2006). Similarly, noting his belief in non-racialism as opposed to multi-racialism, another judge asserted that the JSC should focus on finding people who are committed to the values in the Constitution and look at "what a person stands for and what his belief system is" not at the colour of his skin (Interview, 31 July 2006). Focusing more on an individual's underlying attitudes, understanding of the past and dedication to the new legal order will arguably do more to promote overall transformation and improve access to justice and the protection of the rights of all people than will appointing judges based on their race or gender.

Moreover, some people have alleged that certain elements within the government have used transformation as an excuse for creating a more compliant judiciary. According to these claims, the government's assertions that judicial appointments are based on the need to increase diversity and promote a more rights-oriented judiciary are really pretexts for appointing individuals who are less likely to challenge official policies and programmes. Geoff Budlender (2005) explained that while the government has not directly attacked the judiciary in response to unfavourable judgments, "it is difficult to avoid the uncomfortable feeling that the response of some is ... to try to see to it that judges are appointed who will not rock the boat, and who will be deferential when a case involves what they regard as 'policy' questions which are the exclusive preserve of the executive and legislature". While members of the JSC likely have different motivations for choosing any particular candidate, the "risk that the need for transformation may be manipulated by those who in fact seek a compliant judiciary" (Budlender) plays a role in the debate about judicial transformation and independence.

Judges and others have different opinions regarding the job that the JSC has done thus far in appointing judges, but virtually everyone agrees that race or gender should be only one of many factors that the JSC considers. One judge believes that "on the whole, appointments have reflected a capacity to do the job" but warns that the biggest challenge facing the judiciary is "attaining greater representivity while maintaining what is currently a high degree of professional competence" (Interview, 18 July 2006). Similarly, Norman Arendse, the chairperson of the General Council of the Bar of South Africa, worries that the transformation process will turn into a "pure numbers game" and believes that nominees must meet the JSC's criteria regardless of their race (*Mail & Guardian*, 7 April 2006). Acknowledging that it "takes time for people to have the necessary experience and be in a position where they can accept a place on the bench, former Chief Justice Chaskalson stated in a 2002 interview that the judiciary has "already drawn deeply into the pool of existing candidates" and that transformation "is proceeding as quickly as it can".

In sum, as Justice Mpati (6 October 2004), deputy president of the SCA, explained: “To achieve the objectives of the Constitution we [the judiciary] need to strike a balance – gender and race representivity on the one hand, and competence, integrity and skill on the other.” Striking this balance, however, has proved difficult and has sparked controversy that most likely will continue for the indefinite future. While diversity is crucial to creating a judiciary that is perceived as independent and that has a wide range of perspectives and is more attuned to the problems of all South Africans, race and gender alone do not qualify a candidate for appointment to the bench. In many countries, balancing the need for a judiciary that the public perceives as representative against the need for qualified and experienced judges who have a professional commitment to impartiality and who can manage cases efficiently and make well-reasoned and fair decisions is a challenging task. Under apartheid, the all white and virtually exclusively male judiciary was prone to systematic biases. Reflecting the legacy of apartheid, South Africa’s disproportionately white judiciary suffers from a lack of legitimacy undermining public confidence in the judiciary. At the same time, apartheid has impacted on the pool of candidates now available for appointment to the bench. Thus, while apartheid made the need for diversity on the bench even greater it simultaneously made achieving such diversity difficult. The government, JSC and judiciary must now try to tackle this challenge and create a demographically representative bench while maintaining the high level of competence necessary to fulfil the other demands of transformation.

### 5.3.2 The Judicial Services Commission

The judicial appointment process, which should be transparent and based on well-defined criteria, is an important factor in creating an independent judiciary. To aid in appointing judges, the Constitution established the JSC, a body composed of the chief justice, the president of the SCA, one judge president, the Minister of Justice, two practising advocates, two practising attorneys, one law teacher, six members of the National Assembly, four delegates to the National Council of Provinces, and four persons designated by the President after consultation with the leaders of all the parties in the National Assembly (section 178[1]). At least three of the representatives from the National Assembly must be members of opposition parties, and the National Assembly chooses its representatives (section 178[1][h]). Also, if the JSC is considering matters related to a specific high court, the judge president and premier of the province join the commission (section 178[1][k]). The Judicial Service Commission Act of 1994 regulates matters such as the terms of office and remuneration of the commissioners (Judicial Service Commission Act, 9 of 1994).

The JSC’s role in the appointment process differs depending on the position at stake. When appointing the chief justice and deputy chief justice and the President and deputy President of the SCA, the state President must first consult the JSC (section 174[3]). For appointing other Constitutional Court judges, the Constitution provides that the JSC prepare a list of nominees from which the President must choose his candidates; if the President does not think that any of the nominees is acceptable, he must inform the JSC which will then supplement the list (section 174[4]). Thus, the JSC plays a crucial role in the naming of judges to the Constitutional Court. Similarly, when appointing the judges of all other courts, the President must do so “on the advice” of the JSC” (section 174[6]).

On 27 March 2003, the Minister of Justice published in the Government Gazette the most recent version of the commission’s procedures for nominating judges (Government Notice R. 423, Government Gazette No. 24596). When a vacancy occurs on the Constitutional Court, the JCS announces it publicly and solicits written nominations (section 2[b]). Each letter of nomination along with the candidate’s written acceptances of the nomination, and his or her curricula vitae are then given to the “screening committee”, an ad-hoc sub-committee of the JSC, which prepares a short list of candidates (section 2[c]). At this time, all members of the JSC may also nominate additional candidates and inform the selection committee of the names of candidates who they feel strongly should be included on the short list (section 3[d]). The screening committee then prepares the short list which must include all candidates who qualify for appointment, all candidates placed on the list by a member of the JSC, and all candidates who, in the opinion of the screening committee have a “real prospect of recommendation for appointment” (section 3[e]). All members of the JSC then review the list, and any member may add the name of any candidate who was nominated but not included by the selection committee (section 3[f]). Once the JSC has approved the short-list, the names of nominees are published and the list is distributed to various interested institutions such as the Law Society of South Africa, the Black Lawyers Association and the General Council of the Bar of South Africa (section 3[g]). After interested parties have had an opportunity to submit comments, the JSC conducts public interviews of each nominee (section 3[i]). The commission then deliberates privately and, based on either consensus or majority vote, selects candidates for recommendation (section 3[k]). The JSC then

informs the President of its recommendations, explains the reasons for choosing each candidate and announces publicly its list of recommendations (section 3[m, n]). The procedures for recommending candidates for vacancies on the Supreme Court of Appeal and the high courts is essentially the same except that the regulations do not require the JSC to give the President reasons for its recommendations (section 3[l]).

As the procedure for recommending candidates reveals, the JSC as whole and individual commissioners have a lot of power and influence over who is appointed to the bench. Given the commission's role, some people argue that the inclusion of a significant number of politicians and political appointees is inappropriate and will lead to politically-motivated appointment of judges. Of the 23 members of the JSC, 15 – the Minister of Justice, the members of the National Assembly, the delegates to the National Council of Provinces and the presidential appointees – are politicians while the remaining members are judges, advocates, attorneys and one law teacher. The domination of politicians and political appointees in the JSC has driven allegations that the judicial appointments process gives too much power to the executive and legislature and infringes on the separation of powers. Additionally, because the ANC currently controls the executive, the National Assembly and the National Council of Provinces, it is possible that the ANC would have control over the appointment of a majority of the commissioners.

The Constitutional Court addressed the composition of the JSC and its possible impact on the separation of powers in the *First Certification* judgment. Acknowledging the importance of judicial independence, the Court stated that the “mere fact ... that the executive makes or participates in the appointment of judges is not inconsistent with the doctrine of separation of powers or with the judicial independence” required by the Constitutional Principles in the interim Constitution (paragraph 123). According to the Court, the Constitution's vesting of judicial authority solely in the judiciary and its protection of the courts against interference from other branches of government are sufficient safeguards of judicial independence (paragraph 123). Recognising that the JSC includes representation from the judiciary, the legal profession and opposition parties, the Court determined that the body “provides a broadly based selection panel for appointments to the judiciary and provides a check and balance to the power of the executive to make such appointments” (paragraph 124). Thus, the court agrees that the executive should not have unfettered power to name judges to the bench but believes that the JSC as set out in the Constitution is a sufficient check on the executive's power and does not itself threaten the separation of powers.

Although few people argue that the judiciary should have sole control over the appointment of judges, finding the right balance between politicians, judges, and lay people can be difficult and controversial. As discussed in the section on racial transformation, many people have criticised the JSC for focusing too much on race and too little on merit when making judicial appointments. In tandem with the ANC's statement in January 2005 about the slow pace of transformation and the need to change the “collective mindset” of the judiciary, the JSC's alleged emphasis on race could be seen as indicative of the ANC's influence in the commission, though it may also reflect broader attitudes about the need to prioritise representivity.

The lack of clear standards for assessing the suitability and competence of candidates also increases concerns about the JSC's motivations in appointing judges. The Constitution requires only that judges are “appropriately qualified” and “fit and proper persons” (section 174[1]) but does not include more specific guidelines. According to Advocate Moerane, a member of the JSC, when making appointments the commission considers a variety of factors including the candidate's ability to perform judicial functions, his or her commitment to constitutional values and the symbolic value of the appointment (2003: 713–714). The role of symbolism refers to the notion that when a “candidate otherwise qualifies for appointment, the fact that a particular appointment will have a symbolic value that gives a positive message to the community at large, may tip the scales in favour of a particular candidate” (714). While each of these considerations is important for creating an efficient, effective and transformed judiciary, the way in which the JSC assesses and weighs the factors is not entirely clear and has given rise to many of the previously mentioned concerns about the JSC's standards and about the quality of its nominations. Moreover, during interviews with nominees the JSC often asks about political party affiliation, an inappropriate question that implies considerations other than competence, values and diversity inform the appointment of judges.

Assessing a candidate's ability to perform judicial functions involves a variety of factors, such as technical proficiency, management skills and legal experience, which can be difficult to measure. Consequently, to facilitate the evaluation of a candidate's judicial competence, the JSC generally considers only candidates who have previously served as acting judges,

preferably in the Division to which they are seeking appointment (Moerane, 2003: 713). Acting judges fill temporary vacancies on the bench. For appointments to all courts except the Constitutional Court,<sup>22</sup> the Minister of Justice is empowered to appoint acting judges “after consulting the senior judge of the court on which the acting judge will serve (Constitution, 1996: section 175[2]). Not only does the minister has unfettered control over the appointment of acting judges, but the process involved in making the appointments is not transparent.

The JSC’s emphasis on experience raises some concerns about judicial independence and the separation of powers. First, if acting judges know that the JSC is evaluating their actions on the bench, they may feel pressured – consciously or subconsciously – to make decisions that meet with the JSC’s approval. Moreover, because the minister has unfettered control over acting appointments, the JSC’s virtual rule that candidates for permanent appointment must have had experience as acting judges increases the influence of the minister in judicial appointments: the fact that the minister determines who is able to receive this experience means that the executive indirectly determines who is eligible to be considered for permanent appointment. Perhaps more transparency in the appointment process for acting judges or some role for the JSC in the process would help mitigate the influence of the executive and protect judicial independence. On a practical level, acting appointments often have to be made suddenly and quickly, and the JSC could not reasonably be expected to approve of each individual appointment, but it is possible for the JSC to play some part, for instance by pre-approving lists of candidates from which the minister could then choose when a temporary vacancy occurred.

Concerns about the JSC’s standards and motivations for appointing judges combined with the commission’s high proportion of politicians and presidential appointees have stirred some calls for reform. While he believes that the commission should include politicians and lay people, one judge stated that because the body is heavily dominated by politicians, it is “open to doubt if the JSC has the right balance” (Interview, 18 July 2006). Moreover, because the ANC currently dominates both the executive and legislature, it also controls close to a majority of the positions on the JSC and thus can exert a lot of influence over the appointment of judges.

Despite various concerns about the influence of politics on judicial appointments, in many countries with independent judiciaries and a separation of powers the executive or legislature or both play instrumental roles in appointing judges. According to the AfriMAP (2005) report on the Justice Sector, “there are very few countries in the world where judicial appointments are not politically controlled, and the ANC’s *de facto* control of judicial appointments is therefore not, on its own, a reason to question the independence of the judiciary in South Africa” (57). Although political influence on judicial appointments is not necessarily a threat to judicial independence, concerns about the influence of the ruling party in appointing judges are legitimate and should inform the debate about judicial appointments. Moreover, as Geoff Budlender (2005) explained:

The Constitution requires that government have the self-confidence and courage to appoint people who will read the law honestly and independently, within the framework of a commitment to the transformation goals of the Constitution. The result will, on occasion, be judgments which the government finds uncomfortable or annoying. That is part of the commitment to accountable democratic government.

Thus, to demonstrate its dedication to building a truly democratic state that prioritises the protection of human rights, the government must be willing to appoint judges who will fairly and impartially assess all cases against the backdrop of constitutional values and the goals of transformation.

In spite of formal structural guarantees of judicial independence, judges – through their conduct, impartial decision-making and dedication to the Constitution – ultimately determine the legitimacy and ensure the independence of judiciary. Thus, the judicial appointments process is crucial to maintaining an effective judiciary that enjoys the support and confidence of the people. However, although broad guidelines exist regarding judicial appointments, assessing and deciding among candidates

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<sup>22</sup> The President is empowered to appoint an acting judge to the Constitutional Court “on the recommendation of” the Minister of Justice and “with the concurrence of the Chief Justice” (Constitution, 1996, section 175(1)). The requirement of the chief justice’s concurrence prevents excessive executive influence in the court.

can be difficult and somewhat subjective. Members of the JSC, judges, politicians and the general public will likely have different and equally valid opinions about which candidate is the best choice. Moreover, often conflicting demands from many segments of society may pressure members of the JSC and either consciously or subconsciously influence the commissioners' decisions. Claims that racial transformation is not happening quickly enough compete with claims that the JSC routinely places race about other equally important factors and overlooks well-qualified white males. Similarly, comments by the government or other politicians about the need to transform the mindset and attitude of the judiciary may add pressure to the already difficult appointment process. Moreover, in the background of all of these concerns is the need to appoint properly qualified candidates who will be able to manage a courtroom and provide not only fair and effective but also efficient justice. Balancing the competing demands is difficult, but given the importance of the judiciary in the democratic government, it is crucial to make appointments that will promote the transformation not only of the judiciary but of the country as a whole.

## 6. CONCLUSION

In the past twelve years, the transformation of the South African judiciary has progressed relatively rapidly: race and gender diversity have improved, judges for the most part have proven themselves dedicated to promoting constitutional values, and various courts have made decisions reflecting the independence of the courts within the system of separation of powers. At the same time, there are still major challenges to the transformation of the judiciary. In addition to the question of representation of all sectors of South Africa society, there are barriers to accessing the justice system, poor court management and lack of efficiency affect the delivery of justice, and many people have a sense that the justice system still reflects South Africa's colonial and apartheid legacy and does not as yet, in the cultural sense, fully belong to all South Africans. Moreover, as recent events have revealed, efforts to transform the judiciary can potentially threaten judicial independence; measures aimed at improving service delivery in courts or creating more diversity on the bench and the government's attempt to enact programmes aimed at achieving legitimate and important transformation objectives can inadvertently infringe on judicial independence, itself a crucial component of democratic transformation. Additionally, in any democracy with an independent judiciary, tension will exist between the judicial and the executive and legislative branches. In South Africa, where the social, economic and political legacies of apartheid have created difficult problems that the government must tackle and where the practice of judicial review and the notion of constitutional supremacy are still being developed and are not yet fully entrenched, this tension is perhaps even more pronounced.

Questions of judicial independence have existed since the early days of democracy in South Africa. For example, in 1997 after the Constitutional Court had declared the death penalty unconstitutional and in response to rising levels of violent crime, demands by the public for more rigorous anti-crime programmes and for more severe sentences for convicted criminals increased. Consequently, the legislature passed the Criminal Law Amendment Act (CLAA) (105 of 1997), which created compulsory minimum sentences ranging from five years imprisonment to life imprisonment (section 51[1-2]) for a variety of crimes such as murder, rape, robbery, drug trafficking, corruption, fraud and assault (Schedule II). However, recognising that sentencing is a judicial function and that sentencing officers must have some degree of independence in tailoring punishments to individual circumstances, the government included in the Act a provision that stated:

If any court ... is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence (section 51[3][a]).

While the legislature and executive have legitimate interests in protecting the people and in reducing crime, the government recognised when drafting the CLAA that any legislation aimed at achieving these goals could not infringe on judicial independence.

Moreover, according to the Constitutional Court, which adopted the SCA's interpretation and upheld the constitutionality of the CLAA, the "substantial and compelling circumstances" clause permits a relatively broad degree of discretion by the sentencing court. Interpreting the provision, the Court stated: "If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence" (*Dodo v. The State*, 2001: paragraph 11). Thus, despite claims by some members of the judiciary that mandatory minimum sentences infringe on the independence of sentencing officers and on the separation of powers between the judiciary and legislature, the Act provides for a degree of discretion in sentencing. Passed in response to public pressure, the minimum sentencing legislation is an example of the government's successfully balancing the demands of the public and its legitimate role as protector of public safety against the requirements of judicial independence and of its sensitivity to the need for legislation to conform to the requirements of the Constitution.

In contrast to the minimum sentences legislation, the "justice bills" appeared to reveal a lack of sensitivity on the part of the government to questions of judicial independence. Although the goals of the "justice bills" – improving court efficiency and management, creating a complaints mechanism and a code of conduct, providing judicial education and rationalising the court

system – are crucial to creating an effective judiciary and promoting judicial transformation, achieving these objectives should not excuse and does not require intrusions into judicial independence. Referring to problems of case backlogs, delays, and wasted court hours, former Minister of Justice Maduna (2003) emphasised that in the course of discussing solutions to these problems, one must “guard against undermining the independence of the judiciary and must guarantee the integrity of this arm of state” (669). Transformation, the Minister explained, is meant to strengthen judicial independence and the system as a whole, not detract from the separation of powers (670).

By remaining aware of the potential impact on independence and by consulting the judiciary and other legal groups before making any changes that would affect the judicial branch, the government could help ensure that reforms do not infringe on independence or otherwise weaken the judiciary. Relations between the judiciary and Department of Justice under ministers Omar and Maduna suggest a more appropriate framework for developing legislation and other interventions relating to the judiciary. The recent bills on judicial education and judicial ethics and conduct suggest something of a return to a more consultative style of working, a style which places a strong emphasis on retaining the independence of the judiciary.

Moreover, although an independent judiciary will sometimes rule against the government and frustrate government programmes, the ruling party should recognise that despite temptations to create a more compliant judiciary, preserving independence serves its own interest as well: the ruling party might not always hold power in the country and it “will want to the bulwark of the judiciary to lean against” when another group is in control (Interview, 31 July 2006). Diluted judicial independence and increased scope for executive influence will not disappear when the next administration takes over, and the government must be cognisant of the long-term effects of its policies and the potential that a future government will take advantage of a weakened judiciary and undermine some of the progress that the country has already made in promoting and building a true democracy.

In addition to the need for the executive, legislature and other non-judicial bodies to understand the importance of and protect judicial independence, individual judges must ensure that they decide cases impartially and that all of their decisions are informed by constitutional values and the needs of transformation. Especially in light of the executive-minded apartheid-era bench and resulting lack of trust in the judiciary’s independence, fostering public confidence in the impartiality of judges is critical to building a legitimate and effective judicial branch. Judges must make every effort to conduct themselves, both in and out of the courtroom, in a manner that does not raise questions about their impartiality or suitability for the bench. Judges must also strive to make decisions that promote the transformation of South Africa as a whole and that illustrate their dedication to protecting all individuals. If people do not have faith in the ability of courts to decide disputes impartially or to independently assess the validity of government actions, they will lose faith in the legitimacy of the government as a whole. The rule of law depends on a judicial system that is not only structurally independent but also perceived by the vast majority of the people to be independent.

The rape trial of Jacob Zuma, the former deputy president of the ANC, illustrates the pressures which judges may face from different constituencies, and the need for judicial decision-making of a high quality, if public trust in the judiciary is not to be premised on the racial identity of individual judges. Accused by a 31-year-old family friend of raping her at his home in Johannesburg in November 2005, Zuma stood trial in the Johannesburg High Court and was acquitted on 8 May 2006. While there are some who have raised concerns about specific aspects of the judgment, it nevertheless seems clear that the trial served to demonstrate judicial independence and impartiality in practice. A white man who was in some ways emblematic of the old regime, Justice Van der Merwe presided over the case against Zuma, a black man who was instrumental in the fight against apartheid and in the ANC and was himself symbolic to many people of the new regime. In presenting a clearly written and reasoned decision, Justice Van der Merwe provided an excellent example of how judges should not act on their gut instincts or allow their personal biases to influence their decisions but should follow a procedure in which they apply the law to the facts

presented to the court. Under pressure from Zuma supporters, women's rights activists, political parties and a variety of other sources, the Judge remained impartial and proved that he could apply the law without regard for the race, political affiliation or background of the defendant.<sup>23</sup>

The call for immediate transformation and pressure from all segments of society to remedy the myriad problems left behind by apartheid have sometimes proved difficult to balance against the need to build and protect an independent and empowered judiciary. When analysed in terms of their underlying goals, however, none of the elements of transformation actually conflicts with judicial independence. Transformation is aimed at creating a democratic state based on dignity, equality, human rights, constitutional values and the rule of law; each dimension of transformation – racial and gender representivity, increased access to justice, judicial accountability, the appointment of judges whose underlying attitudes are consistent with constitutional values, and independence – is similarly aimed at achieving these same goals. By upholding constitutional supremacy, ensuring that the rights of all people are protected and guaranteeing that the government will be held accountable for its actions, independence plays a central role in the process of democratic transformation and supports each of the other elements. When the need for racial transformation is used as an excuse for creating a more compliant judiciary – an illegitimate use of transformation – independence is compromised. Similarly, if the need for improved court administration is used to justify unnecessary executive interference in the judiciary, independence is also compromised. However, if one takes as a given that judicial independence must not be compromised and views issues in light of this assumption, conflicts and tensions could be largely avoided. Thus, when making interventions into the judiciary, the government must consider not only the content of the intervention – improving administration, increasing representivity – but also the manner in which the intervention is carried out.

Despite the challenge of balancing different elements of transformation and despite the ongoing need for judicial reform, the South African judiciary has managed not only to defend but also to effectively employ its constitutionally-guaranteed independence. Not only does the judiciary enjoy formal guarantees of institutional independence, security of tenure and financial security, but the judiciary benefits from judges who, as proven by their reaction to the “justice bills”, are willing to defend and fight for judicial independence. Recent events have given rise to legitimate concerns about the government's attitude toward judicial independence and about how to resolve the tensions between independence and other aspects of transformation. So far, however, resistance by the judiciary and other concerned groups and individuals seems to have stopped any potential threats from actually damaging judicial independence or otherwise weakening the judiciary. Although the “justice bills” crisis seems to have ended, the need for judicial reform has not disappeared and the withdrawal of the bills did not eliminate the other possibly less urgent but still relevant challenges to judicial independence. All branches of government and the public at large must thus remain mindful of the importance of judicial independence. They should resist the temptation to weaken independence in the name of transformation, and focus on aligning other aspects of transformation with the need to strengthen judicial independence.

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<sup>23</sup> See, however, the discussion of the different reactions to the judgements in the Shaik and Zuma trials in the section on Appointment of Judges (see Race and Gender Transformation and footnote 20). In the Shaik trial, Justice Squires gave a judgment which was equally carefully reasoned and presented. But the reaction from Zuma's supporters was entirely different. One of the factors which added to the animosity of these responses was a phrase (see footnote 19) which was attributed to Squires but was not actually in the judgment. This indicates that a judge's ability to present him or herself as impartial may only partly be related to the finer details of the judgment and highlights the role of the media in shaping perceptions of public events.

## **APPENDIX A**

### **INTERVIEWEES**

Names are listed in alphabetical order:

Justice Edwin Cameron

Professor Hugh Corder

Justice Siraj Desai

Justice Nathan Erasmus

Justice Louis Harms

Justice Johann Kriegler

Justice Carole Lewis

Justice Robert Nugent

Justice Kate O'Regan

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