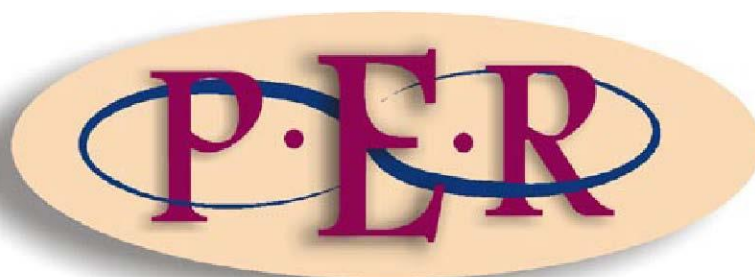


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REASSESSING JUDICIAL INDEPENDENCE AND IMPARTIALITY AGAINST THE BACKDROP OF JUDICIAL APPOINTMENTS IN SOUTH AFRICA

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1 Introduction

Two decades ago, in 1994, South Africa formalised the first stride of its constitutional transition when the *Interim Constitution*¹ came into force. Two years later the *Interim Constitution* was replaced by the so-called final *Constitution*, which came into force in February 1997 and is often praised as one of the best constitutions in the world. The *Constitution* is the supreme law of the country and provides for a strikingly wide purview of judicial review,² probably an important reason why it is held in such high esteem.³ The courts in South Africa are assigned powers to review and to declare administrative and executive conduct, as well as legislation, in all spheres of government, unconstitutional and invalid. Such extensive powers should make them more powerful than the judiciaries in most other jurisdictions. The Constitutional Court is the apex court in relation to all constitutional matters and in a number of constitutional issues it exercises exclusive jurisdiction. It may also exercise appeal jurisdiction in relation to matters not constitutional in nature on the grounds that a matter raises an arguable point of law of general public importance. Except for this particular power, the Supreme Court of Appeal (SCA) is the highest court in all matters not of a constitutional nature and also has sweeping jurisdiction in constitutional matters, with a few exceptions which fall within the exclusive jurisdiction of the Constitutional Court. The High Courts are not courts of final instance, but in all other respects the subject matter of their

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¹ *Constitution of the Republic of South Africa* 200 of 1993, hereinafter referred to as the *Interim Constitution*.

² *Constitution of the Republic of South Africa*, 1996 hereinafter referred to as the present Constitution or the *Constitution*.

³ See for example Fombad 2011 *Buff L Rev* 1007-1108, stating at 1105: "South Africa's Constitution clearly stands out as an exemplar of modern constitutionalism and provides a rich source from which many African countries can learn."

jurisdiction is essentially the same as that of the SCA.⁴ Especially in view of the South African courts' broad review powers relating to legislation and executive acts, the judiciary has become a potentially important political actor which the other branches of government should heed. That fact, together with the justiciable Bill of Rights in the *Constitution*, has rendered the South African *Constitution* a splendid example of liberal constitutionalism.⁵ The constitutionally endowed strength of the courts underscores the crucial importance of judicial appointments, which is a particularly sensitive and often controversial issue in which all political actors and notably the ruling party and political branches of government have an important stake. Government (that is the ruling party in the legislature and the executive) would evidently prefer a politically sympathetic judiciary which defers to governmental decisions.

The draftsmen of the *Constitution* took great pains to secure the integrity of the judiciary. Hence, section 165(2) provides that the courts are subject only to the Constitution and the law, which they are required to apply impartially and without fear, favour or prejudice. Section 165(4) requires organs of state,⁶ through legislative and other measures, to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. These five qualities are closely related and interdependent, and to a considerable extent they overlap with and imply one another. If judicial independence is in place, that would

⁴ The jurisdiction of these superior courts is provided for in ss 167-169 of the *Constitution* as amended by the *Constitution Seventeenth Amendment Act* of 2012, which has amended s 167 of the *Constitution* by adding subsection 167(3)(b)(ii).

⁵ Due to, among other things, the inclusion of a number of socio-economic rights in the *Constitution*, as well its transformative character the *Constitution*, can certainly not be described as exclusively liberal democratic. See in this regard the celebrated discussion by Klare 1998 *SAJHR* 146-188. However, it does have all the markings that are usually associated with liberal constitutionalism and has for that reason attracted wide acclaim, both locally and internationally, from liberal-minded people both in law and in politics.

⁶ In terms of s 239 of the *Constitution* an organ of state (is): (a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

ordinarily go a long way towards securing the courts' impartiality, dignity, effectiveness and accessibility.⁷

It is significant to observe, however, that although ordinarily implying one another, the five qualities may in given circumstances be conflicting. A fiercely independent and impartial judiciary, ruling left, right and centre against the executive, might prove to be largely ineffective if the executive decides to ignore those rulings instead of abiding by and giving effect to them. On the other hand, a pliable, less independent and pro-government judiciary with a propensity for ruling in favour of government might be very effective, in that government would be predisposed to give effect to its congenial judgments.

It stands to reason that the qualities featuring in section 165(4) might be regarded as crucial ingredients of the present dominant credo of liberal constitutionalism. Liberal constitutionalism sets a high premium on the actual power of the judiciary, believing in a rather literal and not merely metaphorical sense in the separation of powers, and in the courts as actually as powerful, indeed even more powerful, than the legislature and the executive. In the run-up to the South African constitutional transition and in the years that followed, this confidence in the capacity of the judiciary assumed the status of a basic credo underpinning the new public order. Hence, the general truism put forward by liberal constitutionalism was that a Bill of Rights such as the one contained in Chapter 2 of the *Constitution*, which provides for a wide variety of civil, political and socio-economic rights, together with a truly powerful judiciary would go a very long way towards safeguarding and promoting all legitimate interests of all individuals. In this way the obedient legislature and executive as well as the ruling party would be contained and a balanced and smoothly functioning and caring politico-constitutional order would be secured.⁸ All of these projections must of course be based on the assumption that the judiciary will be sufficiently capable to perform its functions in a fully independent and

⁷ In prominent non-South African, notably North American, scholarship, some of which will be referred to below, insistence on these qualities is found to be less pronounced, if not absent. Hence, it is found that where scholars would seemingly be dealing with independence, they are on closer analysis actually dealing with the related quality of judicial impartiality.

⁸ Also see, for example, Malan 2008 *THRHR* 415-437.

impartial manner and in accordance with the imagery of liberal constitutional thinking.⁹

In South Africa the Judicial Service Commission (JSC) is the most important body for assisting and protecting the independence, impartiality, dignity, accessibility and effectiveness of the courts. Its role in the appointment (as well as the disciplining and removal) of judges¹⁰ is at the centre of its mandate. The JSC is independent from the executive.

The JSC is without a doubt one of the most crucial bodies for securing a system of liberal constitutionalism.¹¹ It makes recommendations to the President for judicial appointments to the benches of the country's superior courts (the Constitutional Court, the SCA and the High Courts and other specialised courts, such as the Labour Courts and the Labour Appeal Court). To that end it conducts public hearings of candidates for such appointments.¹² If the broad review powers of the South African courts with their actual and potential political implications are taken into account, the composition of the JSC and its decisions pertaining to recommendations of candidates, disciplining of judges, *etcetera* – provided for in the *Constitution* and other legal instruments referred to below – are obviously of political significance, rendering the JSC nothing less than an important political body. Due to its composition and broad responsibilities in relation to the structure of the judiciary and because it arguably neutralises executive control over judicial appointments, the JSC is regarded as exemplary for similar organs in constitutional democracies.

The JSC is not part of the executive. However, the way in which it is composed would ordinarily secure a dominant position for the ruling party, once again attesting to the political nature of the JSC. In compliance with the *Constitution*, the majority

⁹ Other constitutional strategies, such as the protection of communities through their own (self-governing) institutions, devolution of power and certain levels of federalism might not necessarily be entirely out of kilter with the basic assumptions of liberal constitutionalism. (Sometimes they are in fact regarded as superfluous or out of step with the principles embodied in such constitutionalism.)

¹⁰ Ss 174 and 177 of the *Constitution* and the *Judicial Service Commission Act* 9 of 1994.

¹¹ On paper the JSC is a fine example of modern democracy at work, Calland *Zuma Years* 280.

¹² In terms of the JSC's own procedures, the creation of which is authorised by s 178(6) of the *Constitution*.

of at least twelve of its twenty-three members will be politicians appointed by the President from the ranks of the majority party in the national legislature, namely:

- (a) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
- (b) three of the six persons designated by the National Assembly from its members;
- (c) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
- (d) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly.¹³

On the decision-making of the JSC it is significant to observe that the *Promotion of Administrative Justice Act 3 of 2000 (PAJA)* provides that decisions: "relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the JSC in terms of any law" fall outside the definition of administrative action.¹⁴ In consequence the decisions of the JSC concerning such matters are not subjected to the wide and strict requirements for the validity of administrative action provided for in the Act. Certain misgivings have been raised in this regard¹⁵ but they are not really convincing. To my mind the reason for excluding the decisions of the JSC from the ambit of strictly reviewable administrative action under PAJA should be quite clear, namely that the appointment of judges, more specifically judges that have the power to review legislative and executive decisions (which at times may be of a political nature), is in itself political in nature and for that reason government has an interest not to allow these decisions to be subject to the strict requirements that govern administrative actions. Moreover, such decisions

¹³ Respectively s 178(1)(d),(h),(i) and (j) of the *Constitution*.

¹⁴ S 1(gg) of PAJA.

¹⁵ Some commentators describe the exclusion of these decisions from the definition of administrative action as enigmatic and whimsical, especially when compared to similar decisions by the Magistrates' Commission in relation to the lower (the magistrates') courts, which do constitute administrative action (Hoexter *Administrative Law* 214), while others regard the exclusion as unfortunate (Pfaff and Schneider 2001 *SAJHR* 77).

of the JSC are still subject to review albeit on less strict grounds in terms of the principle of the rule of law, more specifically the principle of rationality.¹⁶

In view of the sweeping nature of judicial review in South Africa, the mandate of the JSC lies at the very heart of the present South African constitutional order. Hence, the JSC's due discharge of its responsibilities by interviewing and recommending suitable candidates for judicial appointment is of pivotal importance for the well-being of the constitutional order in general.

The malfunctioning of the JSC owing to incidents such as applying inappropriate criteria for judicial appointments or recommending unsuitable candidates and the eventual appointment of such candidates could erode the very basis of the constitutional order, because the crucial judicial responsibility of reviewing public decision-making will not be as competently performed as envisaged in the *Constitution*.

Tension about the way in which the JSC discharges its responsibilities surfaced fairly soon after the *Constitution* took effect in 1997. The JSC was criticised on a number of occasions for not recommending for appointment to the bench candidates with impeccable liberal credentials (or then with impeccable human rights credentials) and a history of participation in the struggle of the present ruling party, the African National Congress (ANC), against white minority rule (the anti-apartheid struggle).¹⁷ In April 2013, as South Africa entered the twentieth year of its celebrated constitutional democracy, this tension, which is discussed in 3 below, erupted into a full-scale public wrangle. In the one camp of this clash are those who could be referred to as the transformationists, and in the other camp the liberals. The discussion below explains what is meant by these epithets, which are used to distinguish the camps in the wrangle discussed here and not as designations that claim to reflect the ideological sympathies of each participant in the two opposing camps.

¹⁶ There is an expanding rationality jurisprudence. This includes judgments relating to the JSC. Some of these judgments are dealt with in 4.3 below.

¹⁷ See for example Rickard *Sunday Times* (2002) 16; Rickard *Sunday Times* (2004) 16 (this view was rejected by Ntsebeza *Sunday Times* 19). Also see Gordon and Bruce *Transformation and the Independence of the Judiciary* 32-33, 47-49.

The transformationists are by and large (regarded as) part of the post-1994 ruling elite under the leadership of the ANC. They include the majority of the members of the JSC, including the present Chief Justice (and *ex officio* chairman of the JSC), Mogoeng. Their supporters are insisting on the preference of "transformation" and "representivity" as deciding criteria for judicial appointments.

Transformation is the master concept of the ANC's ideological project and of the present South African politico-constitutional order. In terms of this project, at times also referred to as the national democratic revolution, all structures of power, including the army, the police, the public service, intelligence structures, parastatal institutions, agencies such as regulatory bodies, the public broadcaster and the central bank, must be placed under control of the ruling party.¹⁸ The transformation drive also expands to the judiciary. In that context (as explained in more detail in 4.1) it entails that, firstly, the composition of the judiciary must reflect the national population profile (that is, in typical present-day South African parlance, it must satisfy the *representivity* principle¹⁹), and, secondly, that individual judges must subscribe to and pursue the same ideological goals as the ruling party. The liberals include the critics of the (majority of the) JSC. They cannot subscribe to this definition of transformation as that would obviously amount to a full-scale contradiction of the notion of a powerful (independent and impartial) judiciary. They argue, among other points, that the professional competence of candidates for judicial appointment must be the deciding factor in judicial appointments. The liberals reproach the JSC for its alleged preference for recommending less competent but pliant pro-government candidates. They have misgivings about the JSC's propensity against liberal and independent-minded candidates, who are regarded as the foremost subscribers to the values underpinning the South African Constitution²⁰

¹⁸ Stated on numerous occasions in ANC policy and discussion documents, for example ANC 1998 <http://www.anc.org.za/ancdocs/pubs/umrabulo/articles/sprst.html>.

¹⁹ This means in a nutshell that all bodies, institutions and organised spheres are required to reflect that national population profile. On the issue of representivity see the discussion by Malan 2010 *TSAR* 427-449.

²⁰ These are the values provided for in ss 1, 36 and 39 of the *Constitution*. S 1 provides, among other matters, for the following founding values: (a) human dignity, the achievement of equality and the advancement of human rights and freedoms; (b) non-racialism and non-sexism; (c) the supremacy of the *Constitution* and the rule of law; (d) and universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to

but who are at the same time prepared to make rulings against government and in so doing to uphold these values.

The present discussion emanates from this acrimonious dispute. The discussion begins in part 2, in which the seemingly clear constitutional criteria and the JSC's own criteria for judicial appointments are dealt with. This approach is necessary because the conflict between the liberals and transformationists revolves largely around the interpretation of these criteria. In part 3 the views of the parties to the dispute are presented and the question arises as to how such a bitter quarrel could have erupted on an issue which was thought to have been clearly settled, namely the interpretation and application of the said criteria. This question is canvassed in part 4, where it is pointed out that the two camps differ fundamentally on the meaning and consequences of the two foundational notions of the present constitutional order, namely on judicial independence (as an incidence of the separation of powers) and on judicial impartiality and legally principled judicial reasoning. In part 4.1 the doctrine of judicial independence (and separation of powers) is discussed, and in part 4.2 judicial impartiality (and legal reasoning) receive attention. The liberal view of the powerful judiciary, a product of judicial independence and impartiality, is subjected to critical assessment. A similar assessment of the transformationist views on the judiciary is contained in part 4.3.

2 Criteria for judicial appointments

Section 174(1) and (2) of the *Constitution* prescribes the criteria for judicial appointments, and the JSC has also set its own further criteria, giving more detailed content to the constitutional provisions.

Section 174(1) and (2) reads as follows:

- (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
- (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

ensure accountability, responsiveness and openness. Both ss 36(1) and section 39(1) provide for the values of openness and a democratic society based on human dignity, equality and freedom.

The JSC's further criteria for judicial appointments were adopted in 1998. At a special meeting in September 2010 the JSC resolved to publish these criteria.²¹

In the document containing the JSC's criteria, the criteria laid down in the *Constitution* are first reiterated and rephrased as follows:

1. Is the particular applicant an appropriately qualified person?
2. Is he or she a fit and proper person, and
3. Would his or her appointment help to reflect the racial and gender composition of South Africa?

It then proceeds with the following list of so-called "Supplementary Criteria" namely:

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

These provisions must be read with section 165(4) of the *Constitution*, in terms of which the JSC (like all other organs of state) is entrusted with the responsibility to assist and protect the independence, impartiality, dignity, accessibility and effectiveness of the courts.

²¹ JSC 2010 <http://www.justice.gov.za/saiawj/saiawj-jsc-criteria.pdf>. According to the JSC the decision to publish the criteria was in line with its principle that the process of judicial appointments should be open and transparent to the public so as to enhance public trust in the judiciary.

3 The falling-out of April 2013

As mentioned above, the falling-out of April 2013 was preceded by a gradually mounting tension amongst members of the JSC. Only a few years after the *Constitution* had come into operation it was becoming clear that neither section 174(1) and (2) nor the JSC's additional criteria had succeeded in forging consensus on important issues amongst members of the JSC. The tension resulted from differences of opinion with regard to the interpretation of the relevant criteria for the appointment of judges, the nature and content of the hearings for judicial appointments, and the recommendations made for the appointment of candidates. The JSC was repeatedly criticised for its failure to recommend arguably exceptionally suitable candidates for judicial appointments. Among them were counted highly esteemed and experienced senior counsel with impeccable records as human rights lawyers. For many years while the reviled white minority was governing the country some of these candidates had zealously participated in the litigation struggle against that government. Their commitment to the values of the *Constitution* was entirely beyond reproach. Yet, even though they were pedigreed transformation candidates, they did not find favour with the JSC allegedly for the simple reason that they were white men.²²

The JSC is also condemned for grilling these independent-minded applicants during its interviews with irrelevant (or less relevant) politically charged questions, such as the candidates' commitment to "transformation", instead of focussing on what is really pertinent, namely the candidates' professional competence and suitability for a judicial position in accordance with the criteria stated earlier. Moreover, some candidates, especially those viewed as strongly independent-minded (more often than not white males) are subjected to prolonged and gruelling examinations in

²² Most notably among them is Geoff Budlender, a stalwart in the anti-apartheid struggle. Budlender appeared before the JSC on several occasions but it consistently declined to recommend him for appointment. The list also included Willem van der Linde, Torquil Paterson, Jeremy Gauntlett and, most recently, Judge Clive Plasket. The name of Supreme Court of Appeal Judge Azhar Cachalia can also be mentioned in this regard. He was not recommended for appointment to the bench of the Constitutional Court, allegedly for his independent-mindedness.

contrast to the purportedly pliable and conformist candidates, whose interviews tended to be brief, cordial and rather affable.²³

On two occasions the JSC also suffered blows at the hands of the SCA, who set aside decisions of the JSC, holding that it had acted irrationally. These decisions are discussed in part 4.3. They contributed to the tension around the judicial appointments.

In April 2013 the simmering criticism against the JSC boiled over and resulted in a full-scale, acrimonious public clash when one of the commissioners, Advocate Izak Smuts SC (a white male and exponent of the liberal camp) released a document in which the JSC's application of its appointment criteria was openly challenged.²⁴ The document (the Smuts memorandum) caused battle lines to be drawn openly and the JSC's conduct to be debated in the media. Smuts eventually decided to resign from the JSC, stating that his understanding of the role and duties of the JSC and even of basic rights, such as human dignity and freedom of speech, was so different from that of the majority of the JSC that he could no longer play an effective role in it.²⁵

All the matters raised in the Smuts memorandum basically revolve around the criteria for judicial appointments. Smuts takes issue with the JSC, firstly, for allowing its determination of the suitability of a candidate to be informed by considerations of "transformation" which, according to Smuts, is neither constitutionally nor legislatively mandated; and secondly, for the undue value that the JSC attaches to representivity which, under section 174(2), is but a secondary factor to be borne in mind when judicial appointments are considered. In his view "transformation" introduces a purely subjective element to which any meaning that would suit the fancy of the person favouring that meaning could be attached.

²³ For criticism of alleged failure to appoint suitable candidates, see for example Rickard 2012 www.iol.co.za/the-star/how-biased-commission-picks-judges-1.1314419#.UuZQ69L8Jkg; Rickard *Sunday Times* (2004) 16; Rickard *Sunday Times* (2002) 16; and Calland 2013 <http://mg.co.za/article/2013-04-12-00-jscs-attitude-opens-door-to-conservatism>.

²⁴ Smuts 2013 <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=368104&sn=Marketingweb+detail> (copy obtained from the JSC on file with author).

²⁵ Rabkin 2013 <http://www.bdlive.co.za/national/law/2013/04/12/smuts-resigns-from-jsc-in-wake-of-furore-over-document>.

As to representivity, Smuts cautions against appointments being made simply to ensure racial and gender quota representation. He points out that the imperative of section 174(1) requires the JSC to establish that a candidate for judicial appointment is appropriately qualified and a fit and proper person. On the other hand, he suggests that section 174(2) is not a constitutional imperative which enjoins the JSC to promote the appointment of black and female candidates as a matter of course. According to Smuts, section 174(2) merely requires that "the need for the judiciary to reflect broadly the racial and gender composition of South Africa *must be considered* when judicial officers are appointed" (Smuts' emphasis). In his view the JSC would fail in its duty if it considered only the need for such representivity without also considering other vital issues pertaining to a candidate's suitability and propriety, issues such as the existing experience of judicial officers on the particular bench under consideration, the needs in terms of special expertise of that bench, the mean age of judges on that bench, and the likelihood of the retirement of experienced judges in the near future.

Smuts is of the view that the currency of transformation and representivity as factors to be considered by the JSC has established a perception that the JSC has in general taken a principled stance against the appointment of white male judges, unless exceptional circumstances should dictate otherwise. If the majority of the JSC is of the view that for the foreseeable future, white male candidates are to be considered for appointment only in exceptional circumstances – an approach that Smuts considers unlawful and unconstitutional – the JSC should in his opinion come clean and say so in order to avoid white male candidates being put through the charade of an interview before being rejected.

Smuts' memorandum was met with annoyance, if not anger, from the majority of his then colleagues on the JSC, both for the content of the memorandum and for its release to the media. It led to discord within the JSC and unleashed an acrimonious public wrangle in which the Chief Justice, judges and retired judges representing either the transformationist or the liberal camps took hard and apparently irreconcilable stances against one another. Smuts was attacked by, among others, the member and the spokesperson of JSC, advocate Dumisa Ntsebeza SC, and the

deputy president of the Black Lawyers' Association (BLA),²⁶ Kathleen Dlepu. Chief Justice Mogoeng, as chair of the JSC,²⁷ took the opportunity to make plain his and the majority of the JSC's views on the criteria for judicial appointments. Mogoeng is clearly of the opinion that the two considerations mentioned in section 174(1) and (2) respectively are equally important and that the need for racial (and gender) representivity in section 174(2) (the consideration of transformation) may in given circumstances override the fit and proper criterion under 174(1). Speaking at a media conference, the Chief Justice is reported to have said that when it came to the appointment of judges, it was "not all about merit".²⁸ According to him, "(t)ransformation is just as important"; and the *Constitution* did not require that the "best of the best" be appointed as judges. He denied that the JSC was pursuing a political agenda and maintained that there were very few constitutional democracies that have a body (similar to the South African JSC) making recommendations for the appointment of judges. He stated: "Go to America, go to Germany, go to Russia, go to the UK, it is a politician's work, so the question of political influence does not even feature." He declared that appropriately qualified persons of all races, who were fit and proper, were encouraged to accept nomination for appointment as judicial officers and added that white males were regularly recommended for appointment and that the JSC had never pursued a "so-called covert political agenda".

JSC spokesman Ntsebeza, a senior advocate and vocal champion of the transformationist camp, questioned Smuts' *bona fides* and said that Smuts had supported Eastern Cape High Court Judge, Clive Plasket, (a white male) from his (Smuts') home town. Plasket was one of the judges who, during the JSC's session in April 2013, was not recommended by the JSC for appointment to the SCA. At the time Smuts had questioned the interview process. Ntsebeza said Smuts' criticisms were "despicable" and "an insult to Judge (Nigel) Willis", a white male judge who was recommended instead of Plasket.²⁹

²⁶ The Black Lawyers' Association (BLA) describes itself as a voluntary association of black lawyers in South Africa. BLA 2013 <http://www.blaonline.org.za/>.

²⁷ S 178(1)(a) of the *Constitution*.

²⁸ Du Plessis 2013 www.citypress.co.za/politics/appointing-judges-not-about-merit-alone-mogoeng.

²⁹ Sunday Independent 2013 <http://www.iol.co.za/sundayindependent/advocate-under-fire-over-jsc-1.1499914#.VIGLDLUaL-c>.

The deputy president of the BLA, Dlepu, supporting Ntsebeza, said that the real reason why Smuts resigned was that he did not support transformation. Dlepu added that the BLA did not see anything wrong with the JSC and that the body was only fulfilling its constitutional mandate, namely to bring about transformation, which was highest on the agenda.³⁰

Smuts' views resonated with those expressed by retired Constitutional Court judge Johan Kriegler,³¹ Richard Calland,³² retired judge of the Appellate Division (the predecessor of the SCA) JJF Hefer,³³ and Advocate Paul Hoffman,³⁴ who not only supported the stance taken by Smuts but also took the opportunity to criticise the JSC.

Calland criticised the JSC for its uneven handling of candidates appearing before it and for the unjustifiable recommendations for judicial appointments after the hearings of April 2013. He referred to the severe cross-examination of Judge Plasket as a candidate for the SCA. Plasket, who is widely and highly respected in the legal profession in South Africa, was cross-examined by the JSC for almost an hour and a half on the question of the transformation of the judiciary instead of on his suitability as a judge of the SCA, where Plasket had acted with distinction.³⁵ He was not recommended for appointment. Another candidate for the SCA was Judge Halima Sandulkar, an Indian woman. She also had acted on the bench of the SCA. When her interview started, she was informed that her colleagues on the SCA bench did not regard her as suitable for appointment – something that had also been conveyed to her by the president of the SCA, Judge Lex Mpati,³⁶ a few days prior to her interview. Nevertheless, the JSC, after what Calland³⁷ described as a bland and uneventful interview, recommended her appointment to the SCA bench. The third

³⁰ Sunday Independent 2013 <http://www.iol.co.za/sundayindependent/advocate-under-fire-over-jsc-1.1499914#.VIGLDLUaL-c>.

³¹ Kriegler *Sunday Times* 5.

³² Calland 2013 <http://mg.co.za/article/2013-04-12-00-jscs-attitude-opens-door-to-conservatism>.

³³ Hefer 2013 <http://152.111.1.88/argief/berigte/beeld/2013/05/01/B1/11/gvregter.html>.

³⁴ Hoffman 2013 www.rapport.co.za/Weekliks/Nuus/RDK-moet-gou-leer-lees-20130419.

³⁵ See also Du Plessis 2013 <http://www.citypress.co.za/politics/appointing-judges-not-about-merit-alone-mogoeng>.

³⁶ Mpathi is a highly esteemed black judge who was appointed to the bench and eventually as president of the Supreme Court of Appeal after the beginning of the constitutional transition.

³⁷ Calland 2013 <http://mg.co.za/article/2013-04-12-00-jscs-attitude-opens-door-to-conservatism>.

candidate, Judge Nigel Willis, was cordially received by the JSC and treated in a way that was exactly the opposite to the way in which Plasket had been treated. JSC member Ntsebeza, who had severely cross-examined Plasket about his interpretation of section 174(2) of the Constitution, for example, did not ask Willis a single question. After the fairly short and relaxed interview, Willis was recommended for appointment. He was viewed by Calland as much less suitable than Plasket for appointment on the SCA bench, and had, unlike Plasket, not acted in that capacity.³⁸ Calland's³⁹ explanation for the different approaches followed during the respective interviews presents an opportunity to introduce the last charge which, for the purposes of this discussion, was levelled against the JSC. This charge in part accounts for the description of the struggle around judicial appointments as a clash of transformationists versus liberals. Calland⁴⁰ maintains that there is a dominant nationalist ANC caucus that forms the majority of the JSC who prefers pliant appointees – either black or white – and which is strongly dismissive of liberal-left white men. Calland⁴¹ contends that for ideological and political reasons the JSC was against Plasket, an experienced administrative and human rights lawyer, who, while serving on the bench at the Eastern Cape High Court, had on several occasions no other option but to rule against the provincial government. Calland⁴² declares: "The ANC wants pliant, weak judges. The nationalists on the JSC would prefer to avoid liberal-left white men. There is a happy marriage of convenience between the two."⁴³ Calland⁴⁴ claims this as the reason why Willis found favour with the JSC and Plasket did not. Calland⁴⁵ states:

These days the ANC wants obedient judges who 'know the limits of judicial power'. It is not being a white man that is a disqualifier for judicial appointment. It is being

³⁸ A corroborating and detailed description of the way in which these three candidates for appointment on the SCA were treated by the JSC also appeared in Tolsi 2013 <http://mg.co.za/article/2013-04-12-jsc-conflict-laid-bare-by-inconsistency>. Also see Du Plessis 2013 <http://www.citypress.co.za/politics/appointing-judges-not-about-merit-alone-mogoeng>, which noted that Plasket was "grilled" by commissioners Fatima Chohan-Khota, Dumisa Ntsebeza and Ngoako Ramathlodi.

³⁹ Calland 2013 <http://mg.co.za/article/2013-04-12-00-jscs-attitude-opens-door-to-conservatism>.

⁴⁰ Calland 2013 <http://mg.co.za/article/2013-04-12-00-jscs-attitude-opens-door-to-conservatism>.

⁴¹ Calland 2013 <http://mg.co.za/article/2013-04-12-00-jscs-attitude-opens-door-to-conservatism>.

⁴² Calland 2013 <http://mg.co.za/article/2013-04-12-00-jscs-attitude-opens-door-to-conservatism>.

⁴³ Calland 2013 <http://mg.co.za/article/2013-04-12-00-jscs-attitude-opens-door-to-conservatism>.

⁴⁴ Calland 2013 <http://mg.co.za/article/2013-04-12-00-jscs-attitude-opens-door-to-conservatism>.

⁴⁵ Calland 2013 <http://mg.co.za/article/2013-04-12-00-jscs-attitude-opens-door-to-conservatism>.

a white man with a commitment to progressive values of the Constitution and the protection of human rights that will destroy your prospects.

An anonymous columnist of *City Press* agrees.⁴⁶ The JSC, he/she states, is prepared to appoint white males, but not when they are known for having the independence to rule against government when it violates the *Constitution*.⁴⁷ The same fate befalls black judges who are known for not being pliant to government.⁴⁸ Kriegler's⁴⁹ criticism of the JSC's undue emphasis on transformation, and more notably of representivity when deciding on judicial appointments, goes back to 18 August 2009 when he stated:

But, from where I look at the judiciary today, and the way I have been watching the Judicial Service Commission this ethnic/gender balance in section 174 of the Constitution has become the be-all and the end-all when the JSC makes its selections. And if it is not the be-all and end-all, at the very least it has been elevated to the overriding fundamental requirement.

In his *Sunday Times* article Kriegler⁵⁰ emphasised experience, technical skills, the ability to quickly grasp and deal with facts and the ability to deal with a broad field of litigation as (some of) the core competencies without which the judicial office cannot properly be discharged. These abilities require not only solid knowledge of the substantive law but also long-standing practical court experience. Kriegler⁵¹ states: "However much book-learning you have, to find your way in the civil and criminal courts with their myriad byways and hurdles you need a thorough grounding in the actual practice of the court over which you aspire to preside." After expanding on the need for practical know-how, procedural rules, the ability to absorb and sift facts quickly and then to apply applicable legal principles to the facts, Kriegler⁵² concluded that it was folly to expect inexperienced lawyers, whatever their

⁴⁶ Advocate (Columnist) 2013 <http://www.citypress.co.za/columnists/which-white-judges>.

⁴⁷ Advocate (Columnist) 2013 <http://www.citypress.co.za/columnists/which-white-judges>.

⁴⁸ The name of Judge Mandisa Maya is mentioned in this regard. "Maya is a black, female judge on the SCA with vast experience, and who is universally acclaimed for her fairness and ability. The president's failure, twice, to appoint her to the Constitutional Court is simply inexplicable." Advocate (Columnist) 2013 <http://www.citypress.co.za/columnists/which-white-judges>.

⁴⁹ Kriegler 2009 <http://web.wits.ac.za/NR/rdonlyres/101A7678-21DB-4FB1-A360-EC30A868D864/0/JudgeKrieglerPubliclecture18August2009.pdf>. See on the issue of representivity the discussion by Malan 2010 *TSAR* 427-449.

⁵⁰ Kriegler *Sunday Times* 5.

⁵¹ Kriegler *Sunday Times* 5.

⁵² Kriegler *Sunday Times* 5.

academic qualifications, to assume the duties of trial judges. The job simply cannot be handled without some grounding in practice.⁵³ The obvious subtext of Kriegler's argument is that representivity should never trump these crucial criteria of suitability. A similar view was expressed by Marinus Wiechers,⁵⁴ an often quoted emeritus professor of constitutional law. Contrary to the Chief Justice's view, Wiechers maintained that the best of the best had to be appointed as judges and added that when the quality of the judiciary deteriorated, people would lose respect for the law, which would be fatal. Wiechers⁵⁵ acknowledged that the Constitution was a transformative document even though "the constitution does not render transformation an active legal term". A retired judge of the former Appellate Division, JJF Hefer,⁵⁶ emphasises that the appointment of candidates as judges other than those who are most suitable, something which is implicitly acceptable to the Chief Justice, is "neutralising" the judiciary. Hefer⁵⁷ points out that the appointment of "a second team of judges" instead of the most competent ones, is causing loss of trust in the judiciary. Moreover, it burdens the competent ones with an undue extra workload.⁵⁸ In his article in the *Sunday Independent* Smuts⁵⁹ rehearses most of his arguments in his memorandum and alludes amongst other things to the appointment of inadequately competent judges as the reason for the problem of reserved judgments, something which the JSC has also recognised as a major problem.

4 Analysis and critique – why both camps are largely wrong

Why are the transformationists and the liberals holding their respective views and why are they at each other's throats? What are the underlying assumptions of their

⁵³ Kriegler *Sunday Times* 5.

⁵⁴ Gerber 2013 http://www.netwerk24.com/nuus/2013-04-10-bestes-nie-altyd-regters?redirect_from=beeld.

⁵⁵ In the original Afrikaans: "...hoewel die Grondwet 'n transformerende dokument is, beskryf dit nie 'transformasie' as 'n regsaktiewe term nie". Gerber 2013 http://www.netwerk24.com/nuus/2013-04-10-bestes-nie-altyd-regters?redirect_from=beeld.

⁵⁶ Hefer 2013 <http://152.111.1.88/argief/berigte/beeld/2013/05/01/B1/11/gvregter.html>.

⁵⁷ Hefer 2013 <http://152.111.1.88/argief/berigte/beeld/2013/05/01/B1/11/gvregter.html>.

⁵⁸ Hefer 2013 <http://152.111.1.88/argief/berigte/beeld/2013/05/01/B1/11/gvregter.html>.

⁵⁹ Smuts 2013 <http://www.iol.co.za/sundayindependent/jsc-at-crossroads-of-transformation-1.1503772#.UuZTxl8Jkg> and Smuts *Sunday Times* 5. Kriegler shares this view in Kriegler *Sunday Times* 5.

positions pertaining to the institutional position, relationship and role of the judiciary vis-à-vis the political branches of government, namely the legislature and the executive? What are these assumptions about the place and role of the judiciary in the broader constitutional order in present-day South Africa and, for that matter, in any constitutional order that subscribes to the *trias politica* and the independence and impartiality of the judiciary? How valid and realistic are these respective assumptions and positions?

The answer to these questions will reveal the reason for the conflicting views of the respective camps on the role of the JSC, because the mandate of the JSC is intimately related to the core constitutional mechanisms of the separation of powers, the independence and impartiality of the judiciary, and judges' proper discharge of their judicial functions.

Both the transformationist and liberal camps with equal solemnity avow the values of the *Constitution*, the principle of the separation of powers and the pivotal importance of the independence, impartiality, dignity, accessibility and effectiveness of the courts. They obviously have no differences on the principle flowing from the rule of law that the courts are subject only to the *Constitution* and the law, and that they (the courts) must apply the law impartially and without fear, favour or prejudice.⁶⁰ Yet, when it comes to what all this means in practical terms and how the JSC should be discharging its responsibilities, their feelings and reasoning are at odds. On close analysis the camps quarrel about two closely related matters: judicial independence (and by implication the separation of powers) and judicial impartiality and its incidence of legal (more in particular judicial) reasoning.

What now follows is a discussion of what these concepts mean, realistically speaking, and what part they may realistically be expected to play within any politico-constitutional order, including that of present-day South Africa. Judicial independence will serve as the starting point of the discussion, and will be followed by a discussion of judicial impartiality. Judicial impartiality would not be possible,

⁶⁰ Rather meticulously, this logical incidence of the rule of law was also expressly written into the *Constitution*, namely in s 165(2).

especially where the state is a party to litigation, for example, unless the court is independent from the legislature and the executive; that is, insulated from external interference in conducting its judicial responsibilities.

Judicial independence is invariably closely intertwined with and in fact an incidence of the doctrine of the separation of powers. For that reason an assessment of judicial independence will necessarily imply references to the latter. Hence the subheading *Judicial independence (and separation of powers)* (part 4.1). In its turn, the notion of judicial impartiality largely overlaps with and is premised on the basic assumptions of sound legal reasoning, which is aimed at the *objective* application of the law, free from contamination by any non-legal considerations. For that reason the discussion is conducted under the subheading *Judicial impartiality and legal reasoning* (part 4.2).

It is impossible to deal with the vast literature on judicial independence and impartiality. It is also unnecessary and in fact a little insulting to remind legal scholars in an esteemed academic journal of the rudimentary tenets of contemporary constitutional law. What is more important and in step with the aim of this discussion is rather to make certain submissions as to what these tenets are not – what they do not and cannot entail. That would reveal the (degree of) validity or invalidity of the views held by the respective camps in the present dispute.

It is submitted that for the contemporary South African discourse certain perspectives are more relevant and more insightful than others. The former group will be focussed on in this discussion in order to reveal the merits of the different assumptions and positions. The discussion in part 4.1 and part 4.2 provides the basis for the critique on the stance of the liberal camp. The discussion will show that the liberal view is unrealistic and rather mythical, premised on an excessive and unfounded conviction that cannot be sustained by constitutional realities, even in jurisdictions where judicial independence and impartiality enjoy a high premium. However, from the critique in part 4.3 on the views of the transformationists it would be clear that their views are also seriously flawed and can most certainly not be subscribed to.

4.1 Judicial independence (and separation of powers)

Trias politica, the prerequisite framework for judicial independence, entails a separation of the personnel and a separation of the functions of the legislature, the executive and the judiciary. The three branches must be staffed by different people⁶¹ who may not perform any function in more than one branch.⁶² Where this principle in many jurisdictions is often not strictly applied in relation to the executive and the legislature, most notably in Westminster-like constitutional dispensations, it is ordinarily applied with strict consistency in relation to the judiciary.⁶³

The meaning and implications of the principle of judicial independence have in recent times featured prominently in South African case law.⁶⁴ Encompassing personal, that is, individual as well as institutional or structural independence, judicial independence comprises the independence of individual judges.⁶⁵ It covers issues such as their security of tenure and a basic degree of financial security, as well as institutional independence of the court in which the individual judge presides. It implies that the courts must stand in an independent relationship to the legislature and the executive, and that judges must be in a position to discharge their functions free from interference of whatever nature and from whatever source.⁶⁶

⁶¹ The Westminster system, like the present South African constitutional order, provides an exception to this rule as the members of the executive are selected from among the senior politicians in parliament, and therefore occupy positions in both the legislature and the executive.

⁶² It is conceded that the application of the principle could be complicated because the distinction between these functions is sometimes not all that clear. See for example Marshall *Constitutional Theory* 99.

⁶³ Members of the legislature and the executive shall not occupy positions on the bench or perform judicial functions, and judges shall never perform any function other than a judicial function. A good example demonstrating this in South African jurisprudence is the judgment in *Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC).

⁶⁴ In South African case law this was discussed in detail in *Van Rooyen v The State* 2002 5 SA 246 (CC). See also *De Lange v Smuts* 1998 3 SA 785 (CC).

⁶⁵ Volumes have been written on this and the basic principles of judicial independence have also found a place in a number of international, regional and supranational instruments such as the *Commonwealth (Latimer House) Principles on the Three Branches of Government* (2003), and *Basic Principles on the Independence of the Judiciary* (1985) approved by General Assembly of the United Nations on 13 December 1985.

⁶⁶ See in this regard the observations made by Larkins as well as the sources he refers to in Larkins 1996 *Am J Comp L* 610, and the citations. One should, however, be realistic about the ambit of this facet of independence, since it is common also in jurisdictions that serve as eminent examples of judicial independence for the executive to have the final say in judicial appointments. See in this regard the useful comparative survey in the Constitutional Court

However, judicial independence does not imply more than that. It would be unrealistic and incorrect to portray the judiciary as the supreme power centre in the constitutional system which the weak political branches must obey. Judicial independence does not imply a judiciary in the nature of a threatening opposition to the political branches.⁶⁷ The judiciary, even one with sweeping powers of review such as the present South African judiciary, cannot on its own be an effective mechanism for the protection of individual and communal interests. It falls well short of securing a balanced constitution. However, such a mythical image of a supposedly all-powerful judiciary is often presented. This image of the courts is an implied cornerstone of liberal constitutionalism, a notion which enjoys particular support in the United States⁶⁸ and to which post-1994 South Africans are no strangers. This accounts for the aggrandising terms in which the judiciary, and in particular the Constitutional Court, is sometimes described.⁶⁹ Judicial interpretations of provisions of the Bill of Rights relating to individual interests have been commended as the foolproof package for effectively safeguarding all interests, thus rendering redundant any additional constitutional mechanism for constraining the power of a legislature and executive controlled by an overwhelmingly dominant ruling party.⁷⁰ There is no justification for this soothing aggrandisement of the supposedly powerful judiciary. The judiciary is simply just too weak for that. In the final analysis it is appointed and financed by the political branches, devoid of its own resources and dependent upon the goodwill and cooperation of the legislature, executive, state administration and the public in general to give effect to its rulings. The frailty of the judiciary has already been eloquently acknowledged by classical thinkers of modern constitutionalism. Thus, Alexander Hamilton⁷¹ in the 78th Federalist Paper contrasting the weak judiciary with the powerful legislature and the executive, stated:

judgment in *Van Rooyen v The State* 2002 5 SA 246 (CC) para 107. The same applies for South Africa, where the way in which the JSC is composed by virtue of s 178 of the *Constitution* secures a comfortable majority for the ruling party. See the references in Du Toit *Nuwe Toekoms* 259-265.

⁶⁷ Devenish 2003 *THRHR* 87.

⁶⁸ Peretti "Does Judicial Independence Exist?" 122.

⁶⁹ See for example the remarks by Calland *Zuma Years* 280.

⁷⁰ Mechanisms such as minority rights and minority institutions, territorial and corporal federalism, internal (local) self-determination, etc.

⁷¹ Hamilton, Madison and Jay *Federalist Papers* 465.

The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacy of its judgments.

Baron de Montesquieu at times rather frankly acknowledged the weakness of the judiciary. Of the three powers, Montesquieu⁷² stated, "the judiciary is in some measure next to nothing". The weakness and the dependency of the courts as described by Hamilton⁷³ were also echoed by a former South African Chief Justice. Moreover, the dependence of the courts upon organs of state and on the executive and the legislature is graphically acknowledged by the South African *Constitution* itself in section 165(4), which enjoins organs of the state, through legislative and other measures, to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. That assistance is the crutch without which the judicial function collapses and court orders fade into unfulfilled judicial wishes. The judiciary is in fact nothing less than helpless when politicians refuse to comply with the *Constitution* or disregard the courts.⁷⁴ The very weakness, that is, the fundamental dependence of the (South African) judiciary, was clearly demonstrated in the large-scale non-compliance with court orders owing to the laxity, incompetence or spite of the state administration⁷⁵ referred to in part 4.3.

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

⁷² Montesquieu *Spirit of Laws*.

⁷³ See the illuminating remarks by former Chief Justice Mahommed 1999 *SALJ* 855.

⁷⁴ Grimm "Constitutions, Constitutional Courts and Constitutional Interpretation" 23.

⁷⁵ This came to light prominently in *Nyathi v Member of the Executive Council for the Department of Health Gauteng* 2008 9 BCLR 865 (CC) and in the academic debate on the solutions for the failure of organs of state to comply with court orders.

especially in a constitutional order such as that of South Africa, where the ruling party has since 1994 been overwhelmingly dominant, commanding around two-thirds of popular support.

Taking into account their dependence, the courts must go about matters strategically rather than on the basis of legal principle alone. Thus, in the United States, federal courts carefully heeding the response of the political branches often have to play a "separation of powers game" in order to secure the support of Congress.⁷⁶ Devoid of the active cooperation of the political branches and at least an acquiescent public response, court judgments will have no impact and might assume the character of judicial yearnings instead of really binding judgments. Judgments that are regarded as having brought about considerable social change are capable of actually bringing about such change only if they fit into an already existing socio-political trend where they enjoy the support of the political branches and a sizable percentage of the public.⁷⁷

The same largely holds true for the South African courts. Judgments of the Constitutional Court regarded as ground-breaking could have gained effectiveness only with the support of the ruling party and a considerable segment of the public. The Court's ruling against the death penalty⁷⁸ and its decisions in various cases in favour of the equal protection of gay and lesbian persons, including its ruling that it was constitutionally unacceptable for the South African law not to give recognition to same-sex marriages,⁷⁹ serve as examples. Moreover South African courts, having repeatedly borne the brunt of executive wrath⁸⁰ in spite of their careful conduct,

⁷⁶ Peretti "Does Judicial Independence Exist?" 112-113.

⁷⁷ See in this regard the incisive analyses by Rosenberg *Hollow Hope*.

⁷⁸ *S v Makwanyane* 1995 3 SA 391 (CC).

⁷⁹ *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC). See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 2012 12 BCLR 1517 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC); *Satchwell v President of the RSA* 2002 9 BCLR 986 (CC).

⁸⁰ Examples of these are: The annual "8 January statement" of the ANC which in January 2005 castigated the courts to such an extent that even Chief Justice Chaskalson had to enter the debate. See ANC 2005 <http://www.anc.org.za/show.php?id=55>. The statement basically insisted that the courts should align themselves with the ruling party and the masses of the people. This episode is discussed in Malan 2005 *De Jure* 99-115. In 2011, in a decision that was regarded among many as an onslaught against the courts, government decided to audit the judgments of the Constitutional Court and the Supreme Court of Appeal.

have in recent years gained first-hand experience of their precarious position. In consequence their judgments in politically charged matters have to a considerable extent been tactically and pragmatically premised in order to maintain their own safety vis-à-vis the political branches.

Terri Peretti,⁸¹ referring to political science research done in the United States on the behaviour of the federal courts, observes that the behaviour of the courts has been strategic rather than based upon legal principle. In politically charged matters the courts have carefully heeded the way in which the legislature and the executive would respond to their rulings. Their judgments have ensured the approval and enlist the support of the political branches without the risk of antagonising them.⁸² The assumption that independent judges (always) use their freedom to decide impartially and exclusively according to the law is contradicted by empirical evidence. Political attitudes exert a substantive influence on judicial decisions.⁸³

Concerning South Africa, Theunis Roux⁸⁴ has conducted insightful studies on the behaviour of the Constitutional Court. Analysing a number of judgments of the Court on politically controversial issues, Roux⁸⁵ shows how what he calls pragmatism in judicial conduct rather than legal principle determines the outcome of judicial decisions in politically controversial cases. The Court, through legally convincing reasoning, guards its own legitimacy and also takes care of two additional considerations: its own institutional security, and public support.⁸⁶

In view of the considerations explained by Roux, the institutional security of the court has been a particularly sensitive issue, arguably the most important of the three factors. This could be ascribed to the dominant position of the ruling ANC. One may assume that the judiciary, especially the Constitutional Court, had to find its way carefully within the context of an overwhelming one-party domination. It could

⁸¹ Peretti "Does Judicial Independence Exist?" 111-113.

⁸² Peretti "Does Judicial Independence Exist?" 111-113.

⁸³ Peretti "Does Judicial Independence Exist?" 111.

⁸⁴ Roux 2009 *ICON* 106-138.

⁸⁵ Roux 2009 *ICON* 106-138.

⁸⁶ See in general the instructive discussion by Roux 2009 *ICON* 106-138. See also the more detailed discussion in Roux's recently published book Roux *Politics of Principle*.

not afford to forfeit the trust and support of the ruling party. It could therefore risk handing down judgments that did not enjoy the support of the majority of the public but were in line with the thinking of the ruling party and would enlist the support of the party. By the same token, it also gave judgments that were favourable to government on matters that were ideologically important to the ruling party in spite of the fact that its legal reasoning was jurisprudentially questionable and caused the court to incur severe criticism within the legal community.⁸⁷ The risk in terms of the court's institutional security and thus of forfeiting the support of the ANC by ruling against government in these scenarios was markedly higher than the risk of attracting firmly legally premised (theoretical) criticism from among the ranks of a number of (academic) lawyers and from sectors of the media and the opposition parties, which, compared with the ruling party, were neither powerful nor influential. Roux also demonstrates how the Constitutional Court used political rhetoric in its judgments as a device for aligning itself with the ruling party, thus further shoring up its own institutional security. The gist of Roux's analysis is that the Constitutional Court acted strategically, that is, pragmatically, rather than in a principled manner, both in cases where it used its reasoning skills to avoid confrontation with the ruling party (in the political branches of government) and in more routine (politically non-controversial) cases where, in Roux's words, it has developed context-sensitive standards.

The bottom line is that the courts cannot run the risk of arousing the antagonism of the political branches by taking decisions based solely on the purity of impeccable legal reasoning, particularly not when the ruling party is so overwhelmingly potent. Hence, particularly in these conditions, it would be unrealistic – and Roux's analysis underscores this – to assume that the outcome of cases is purely and solely determined by the applicable law. Although the doctrine of judicial independence in its purest form dictates that courts should be insulated from politics or any other external interference or pressure, the dynamics of the political situation in which courts are required to function demonstrates that this is impossible. Courts must be

⁸⁷ *New National Party of South Africa v Government of the Republic of South Africa* 1999 3 SA 191 (CC); *United Democratic Movement v President of the Republic of South Africa* 2003 1 SA 495 (CC).

alive to the risks of their political situation, to the political wishes and preferences of the political branches, and their judgments must respond to these. If they fail to do so and deliver judgments that meet with the outright displeasure of an overwhelmingly strong ruling party and with the accompanying executive rejection or failure to abide, the court is powerless to do anything about it. The law then spoken by the court remains unfulfilled wishes and the effectiveness of the courts, for which the judiciary depends on the executive, falls by the wayside. In order for a functioning judiciary to be secured within the politico-constitutional situation, courts are left with no option but to compromise on their doctrinal political insularity, that is, on their independence. If the judiciary loses legitimacy with the political branches and (in imitation of Moerane's⁸⁸ metaphor) ceases to be a cog in the state machine working in harmony with the other cogs, it runs the risk of losing the support of the political branches and its own effectiveness.

Viewed against this background there is considerable sound substance in the assertion of the political scientist Francis Fukuyama⁸⁹ that in the final analysis the separation of powers between an executive and the judiciary is only metaphorical and the power of the judicial branch as custodians of the law relies only on the legitimacy that it can confer on the rulers and on the popular support it receives as the protector of a broad social consensus. Fukuyama's observation echoes the assertion of Alexander Bickel⁹⁰ that the court usually relies on its own mystique and on the skilled exertion of its educational faculty. However, Bickel⁹¹ adds that in an enforcement crisis of any proportions the judiciary is wholly dependent on the executive.⁹² Thus, as Owen Fiss⁹³ reminds us, judges "speak the law" and can only hope that there will be voluntary compliance with what was ordered. With their power limited to the speaking of the law only and the moral authority they would hope to command, it should be clear that the position of the judiciary is inherently weak and precarious. It is thus rather unrealistic, and in view of its dependence,

⁸⁸ Moerane 2003 *SALJ* 711.

⁸⁹ Fukuyama *Origins Of Political Order* 282.

⁹⁰ Bickel Least *Dangerous Branch* 252.

⁹¹ Bickel Least *Dangerous Branch* 252.

⁹² Bickel Least *Dangerous Branch* 252.

⁹³ Fiss 1993 *U Miami Inter-Am L Rev* 64.

illogical to think of the judiciary as a powerful institution "competing" on an equal footing with the other two branches and with socio-political forces such as a powerful political party, when their very ability to "compete" largely depends upon the assistance, protection and support of the "competitors".

Aside from the above assessment there is a much more fundamental reason – and in this regard there is a clear overlap between judicial independence and impartiality – why judicial independence is distinctively less far-reaching and a less effective instrument for keeping the legislature and the executive in check than what orthodox doctrine proclaims. This is the reality of the *actual unity of the three (separate) powers* rather than their doctrine-proclaimed separation. The three powers are separated in terms of institutions, personnel and functions but usually firmly unified in one single power elite: integral segments of one and the same dominant political leadership, informed by the same ideological assumptions, committed to achieving the same goals, yet organised on the basis of a division of labour performed in separate branches. The courts ordinarily play their part as one of the branches, yet are distinctly the weakest within the overarching dominant elite. They do so in close conformity with the rest of the elite and they are incapable of doing anything outside the consensus which is prevalent within that political elite.⁹⁴ The analysis of the US political scientist Robert Dahl of the position of the US Supreme Court is particularly instructive also for South Africa (and certainly for many other constitutional dispensations that assign an important role to an independent judiciary). Dahl⁹⁵ observes:

Except for short-lived transitional periods when the old alliance is disintegrating and the new one is struggling to take control of political institutions, the Supreme Court is inevitably a part of the dominant national alliance. As an element of the political leadership of the dominant alliance, the court of course supports the major policies of the alliance.

As an essential part of the dominant political leadership the courts will obviously not disrupt the dominant position of that political leadership. Neither is it capable of

⁹⁴ See in this regard the illuminating discussion by Dyzenhaus 1982 *SALJ* 380 *et seq*, especially 388-389.

⁹⁵ Dahl 1957 *JPL* 293.

doing so, as that would defeat the court's own legitimacy within the dominant elite,⁹⁶ apart from the fact that it lacks the institutional capacity to do so. The judgments of the courts on politically sensitive issues can hardly go beyond or challenge the consensus that prevails within the dominant elite. That is not to say that the views of the courts will always be precisely the same as that of the executive and the legislature, because hermeneutical experience shows that the consensus within the dominant elite will ordinarily offer a limited number of (interpretive) options to the courts. Judgments are therefore the product of a selection from options available within the thinking of the dominant elite. It is against this backdrop that Dahl⁹⁷ observes:

It follows that within the somewhat narrow limits set by the basic policy goals of the dominant alliance, the Court *can* make national policy. Its discretion, then, is not unlike that of a powerful committee chairman in Congress who cannot, generally speaking, nullify the basic policies substantially agreed on by the rest of the dominant leadership, but who can, within these limits often determine important questions of timing, effectiveness and subordinate policy.

The court may adjudicate on hiccups, differences and aberrations *within* the broad assumptions of the dominant elite. On the one hand – because of its weakness – it will be incapable, and on the other hand – because it is imbedded in a common power elite – it will usually be unwilling to pass judgments that would disrupt the basic ideology or derail the core goals of the dominant elite. It can make corrections within the framework of the ideological assumptions and policy goals of the dominant elite, but it cannot and will not disrupt or frustrate the framework as such. The judgments of the Constitutional Court in which it ruled against the executive on socio-economic matters and which caused the greatest controversy attest to this. They includes high-profile cases such as the *Grootboom*⁹⁸ and particularly the *TAC*⁹⁹ judgment and, it is submitted, the ensuing judgments on socio-economic issues that went against the executive as well. These cases involved the enforcement of the rights to housing and to health care, food, water and social security in terms of sections 26 and 27 of the *Constitution*. These second-generation rights are at the

⁹⁶ Dahl 1957 *JPL* 293.

⁹⁷ Dahl 1957 *JPL* 294.

⁹⁸ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

⁹⁹ *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC).

centre of the ideology of the present dominant leadership embodied in the ANC. They were included in South Africa's justiciable Bill of Rights because the ANC strongly campaigned for their inclusion.¹⁰⁰ The fact that they are provided for in the *Constitution* does not run counter to the ideological convictions of the dominant elite; on the contrary, they are part of the juridical embodiment of the ANC's ideological convictions. Moreover, the differences that the court was called upon to settle in these cases were not between the dominant leadership and some outside contender, but between sections *within* the ruling elite, as well as between segments of the leadership of the ruling elite and a large section of its very own support base. Those on whose behalf these cases were pursued and who eventually were due to benefit from favourable judgments were largely constituent parts of the dominant leadership's own support base. The judgments passed by the court fell squarely within the limits set by the assumptions and policy goals of the dominant elite.¹⁰¹

As a product of the constitutional order that took effect in 1994,¹⁰² the Constitutional Court is an integral part of the dominant political elite. Right from the outset the bench of the Constitutional Court and in due course the incumbents of all South African courts broadly shared with the legislature, the executive and the ruling party which dominated these branches the same ideological assumptions, and they are committed to basically the same goals. The Constitutional Court was established because the new power elite, embodied in the ANC, could for quite understandable reasons not tolerate the frustration of having to grapple with the apex court, responsible for adjudicating constitutional and occasionally politically sensitive matters, being staffed with incumbents who either entirely, or mostly, formed part of

¹⁰⁰ ANC 1993 <http://www.anc.org.za/show.php?id=231>www.anc.org.za/ancdocs/policy/bill_rights.

¹⁰¹ The above is borne out by the fact that at the time of the Constitutional Court judgment in the *TAC* case the relevant authorities were already starting to implement policies in line with what the court eventually ordered. See *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC) paras 118 and 132.

¹⁰² During the constitutional negotiations in the beginning of the 1990s the ANC strongly favoured a newly created constitutional court and was specifically against the idea of simply making it the existing courts responsible for constitutional matters or for allowing a constitutional court to be a section of the then Appellate Division. See ANC 1992 <http://www.anc.org.za/show.php?id=227>.

the pre-1994 political leadership dominated by the erstwhile governing National Party.¹⁰³

The new ANC-centred power elite set out to transform the judiciary (alongside the rest of the South African public order). There is largely consensus among the ANC and academic commentators about what the transformation of the judiciary entails. On 17 February 2003 Mr JH de Lange,¹⁰⁴ an articulate and influential ANC MP, at that stage Chairperson of the Justice Portfolio Committee and later deputy minister of justice (also a former member of the JSC) stated in the National Assembly that the transformation of the judiciary comprised two components: firstly, the realisation of the objective of the equitable representation of blacks and women, described as *diversity, personnel or symbolism transformation*, and, secondly, transformation relating to the intellectual and ideological approach adopted by judges and magistrates when implementing the letter and spirit of our *Constitution* – referred to by De Lange as *intellectual content or substantive transformation*. The litmus test, according to De Lange,¹⁰⁵ for intellectual transformation:

... would be how individual judges and magistrates will pursue their legitimate and genuine constitutional obligations, without wittingly or unwittingly going out of their way to frustrate or undermine the legitimate and genuine choices and aspirations of the majority of South Africans to create a fully functioning democracy and a socio-economic and ideologically transformed country.

MTK Moerane,¹⁰⁶ a prominent senior advocate and former member of the JSC, added factors such as the enhancement of accessibility to justice and the reorganisation of the courts to the concept of transformation. Nevertheless, although phrased in more subtle terms, he shared the views of De Lange that in its composition the judiciary should eventually reflect South African society, particularly in regard to race (and gender), and that measures should be taken to ensure that the holders of judicial office are persons who espouse and promote the values

¹⁰³ Ss 98 and 101 of the *Interim Constitution* went so far as to completely exclude the Appellate Division (the predecessor of the SCA), which was dominated by judges appointed by the previous power elite under the National Party, from jurisdiction on constitutional matters.

¹⁰⁴ Hansard (2003-02-17) 128-124.

¹⁰⁵ Hansard (2003-02-17) 128-124.

¹⁰⁶ Moerane 2003 *SALJ* 711.

enshrined as fundamental rights in the *Constitution*.¹⁰⁷ Similar views on the meaning of transformation were expressed by a broad spectrum of commentators comprising what has been referred to above as the liberal and transformationist camps.¹⁰⁸

This transformation drive would ensure that eventually the entire judiciary, comprising all courts (not only the Constitutional Court), would form and would be perceived to form an integral ingredient of the same coherent political leadership, sharing with the ruling party in the legislature and the executive the same ideological convictions. Mainly owing to the security of tenure of incumbents of the bench this is a protracted process. The result is that after almost two decades of ANC rule the judiciary, judged by its racial composition, still looks somewhat anomalous compared to the popularly constituted branches, although by far not as anomalous as when the *Interim Constitution* entered into force back in 1994. Whereas the new political leadership has for years now been firmly established, the transformation of the judiciary – its recomposition in order to bring it in line with the legislature and the executive – is still not fully complete.

As Dahl¹⁰⁹ indicated, the judiciary is, except for brief transitional periods, an integral part of the dominant political leadership. In making this observation Dahl¹¹⁰ echoed what Montesquieu had said two centuries before. "The three powers," Montesquieu¹¹¹ noted, "should naturally form a state of repose or inaction." Montesquieu¹¹² then insightfully added: "Just as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert."¹¹³ Alexander Bickel,¹¹⁴ commenting on an erroneous mechanistic view of the separation of powers, also underscored the intimate relationship between the three branches. Although one might refer to the *machinery* of government, this metaphor is not

¹⁰⁷ Moerane 2003 *SALJ* 711.

¹⁰⁸ See for example Wesson and Du Plessis 2008 *SAJHR* 193; Budlender 2005 *SAJHR* 716 *et seq.* Transformation in view of the ruling ANC also includes affirmative action, black economic empowerment and cadre deployment, that is, deploying party operatives in the public service, police, army, etc.

¹⁰⁹ Dahl 1957 *JPL* 293-294.

¹¹⁰ Dahl 1957 *JPL* 293-294.

¹¹¹ Montesquieu *Spirit of Laws* 160.

¹¹² Montesquieu *Spirit of Laws* 160.

¹¹³ Montesquieu *Spirit of Laws* 160.

¹¹⁴ Bickel *Least Dangerous Branch* 261.

really tenable. Referring to US Chief Justice Taft, Bickel¹¹⁵ then highlighted the intimacy of the three branches whose functions can often not be rigidly compartmentalised:

The Court often provokes consideration of the most intricate issues of principle by the other branches, engaging them in dialogues and 'responsive readings'; and there are times also when the conversation starts at the other end and is perhaps less polite. Our government consists of discrete institutions, but the effectiveness of the whole depends on their involvement with one another, on their intimacy, even if it is often the sweaty intimacy of creatures locked in combat.

The pattern of appointment of federal judges in the United States confirms this intimacy. Political considerations are the crucial factor in judicial appointments and appointees ordinarily give judgments that are congenial to the views of the administration that made these appointments. Social research on the selection and appointment of federal judges shows that politics dominates the selection of judges despite the myth that judges should be selected strictly on the basis of merit¹¹⁶ and that political and ideological compatibility outweighs other considerations, even merit.¹¹⁷ Having regard to the social research done in the United States, Peretti¹¹⁸ therefore states:

The evidence is overwhelming that politics pervades the judicial selection process. Exhorting presidents and senators to ignore political factors and instead select judges based on their objective qualifications and capacity for independence thus defies the historical pattern. More importantly, it defies logic. Politicians interested in re-election and policy success cannot reasonably be expected to ignore such splendid opportunities to please their constituents, help their party and realise their policy goals. Until the selection process is radically altered, the call for merit and independence as selection criteria is futile; absent fundamental change, it is about as effective as urging the sun not to shine.

Dieter Grimm¹¹⁹ is therefore spot on when he states that "(t)he recruitment of judges is the open flank of judicial independence".

As to the South African context, Moerane¹²⁰ uses a mechanistic metaphor which would not be to the liking of Bickel. Yet he also highlights the intimacy, and even

¹¹⁵ Bickel *Least Dangerous Branch* 261.

¹¹⁶ Peretti "Does Judicial Independence Exist?" 105, quoting O'Brien *Judicial Roulette* 35.

¹¹⁷ Peretti "Does Judicial Independence Exist?" 105, referring to the research of, amongst others, Abraham *Justices, Presidents and Senators* 2-3.

¹¹⁸ Peretti "Does Judicial Independence Exist?" 109.

¹¹⁹ Grimm "Constitutions, Constitutional Courts and Constitutional Interpretation" 25.

more so the unity, of the relationship and refers to the judiciary as a cog in the state machine working in harmony with the other cogs.¹²¹ When the transformationists are pushing for the appointment of (transformation) candidates forming part of the present power elite instead of the appointment of liberal candidates (or then candidates with an impeccable pro-human rights record) they are not acting out of the ordinary. To the contrary, they are broadly acting quite rationally to achieve what political elites ordinarily seek to achieve and do achieve, namely to establish a single coherent power elite, comprising all sectors of governmental power, composed from among the ranks of the same power elite, united in a broad ideological consensus and free of discord on fundamental assumptions and goals.

Liberal constitutionalism cannot countenance this realistic and debunking account of the separation of powers and of judicial independence. According to liberal constitutional doctrine, the powers that are separated under the doctrine of *trias politica*, a substantive part of which vests in the judiciary, are very real indeed – they are real and wide in range. Far from being a mere norm or ideal, judicial power and independence are undeniably real in terms of this notion. The debunking by Terri Peretti and Owen Fiss¹²² (a political scientist and a legal scholar, respectively) of the independence of the judiciary as a rather mythical notion is incompatible with the liberal notion of constitutionalism because the entire constellation of liberal constitutionalism rests on a questionable belief in the actual separation of powers accompanied by the actual independence, potency and effectiveness of the courts.

The liberal indignation about the JSC's transformationist stance and the critique levelled against the transformationists, as discussed in part 3 above, have frustrated the members of the liberal camp in their deeply-rooted but unrealistic belief in the real independence of the judiciary, a belief which must apparently be ascribed to their being totally oblivious to the limited preserve of the separation of powers and judicial independence, and their not realising that, though separated in structure, staff and functions, the judiciary, as a rule, forms an integral part of one

¹²⁰ Moerane 2003 *SALJ* 711.

¹²¹ Moerane 2003 *SALJ* 711.

¹²² Fiss 1993 *U Miami Inter-Am L Rev* 62.

harmoniously unified power elite in a country. Any lack of fully appreciating this reality would inevitably result in reposing too much reliance in separation of powers and judicial independence as strategies of constitutionalism. It is submitted that this explains the present liberal disappointment in the transformationists' unashamed push for often technically questionable appointments of politically compliant transformationist judges.

The separation of powers and judicial independence are by far not the competent instruments and strategies of constitutionalism which liberals believe them to be, in order to keep the political branches in check. The judiciary is not required to and is not able to challenge or balance the power from outside the dominant political elite, neither in present-day South Africa nor anywhere else.¹²³

4.2 Judicial impartiality and (pure) objective legal reasoning

Adjudication and impartiality are inextricably linked. Adjudication always requires that a dispute between two or more vying parties must be decided by a neutral third party's (the adjudicator's) applying legal norms to a set of facts. The adjudicator is required, in the words of Baron de Montesquieu,¹²⁴ to demonstrate a "certain coolness, an indifference, in some measure, to all manner of affairs". He/she must command the trust of the parties and must have the knowledge, acumen and judgment¹²⁵ to adjudicate the dispute in a proper manner without delay, and to make a ruling binding on the parties. The adjudicator must have no stake in the outcome of the case. That the adjudicator must not be the judge in his/her own case – *nemo iudex in sua causa* – lies at the very core of the idea of (universal) natural justice. He/she must not even be perceived to take sides or to have a stake in the

¹²³ The judiciary might be such a competent challenger when there is a split in the power elite and when it takes sides against one section of that elite. However, even in such a case it cannot act on its own. It would still need support; most probably that of the strongest group in such a conflict.

¹²⁴ Montesquieu *Spirit of Laws* 80.

¹²⁵ In the context of Classical Greek notions it is submitted that adjudication requires three aspects of legal competence that a lawyer, more particularly a judge, must possess in order to be capable of discharging the responsibility of adjudication. Firstly, the judge must have knowledge (*episteme*) of the applicable legal rules and principles; secondly, skills (*techne*), ie he/she *must be conversant with the techniques of adjudication, including truth-seeking through various techniques of examination, etc, and lastly judgment, (phronesis) ie the ability to pass fair judgment with patience, moderation and wisdom.*

outcome of the case. Once a reasonable apprehension arises that the adjudicator could be biased, he/she should recuse him/herself from the matter and be replaced by another.¹²⁶ Party detachment remains important when government – a state organ – is one of the parties to a dispute. The adjudicator must not be biased in favour of government (and obviously also not be biased in favour of the adversary).¹²⁷

Genuine adjudication, which attests to the impartiality and party detachment of the adjudicator, will eventually be gauged by reasons advanced in support of the ruling. The findings, argumentation and conclusions of the courts must be strictly law-based.¹²⁸ As indicated before, the South African *Constitution* also accounts for this crucial aspect of the rule of law when it expressly states that the courts are subject only to the *Constitution* and the law, and requires the courts to apply the *Constitution* and the law impartially and without fear, favour or prejudice, and also enjoins organs of state to promote, among other things, the impartiality of the courts.¹²⁹ The adjudicator, properly discharging his/her responsibilities, will decide a case exclusively on the law that applies to the facts of the case. These facts are determined through legal reasoning by the adjudicator, who must advance the reasons for the factual findings.

This brief account of impartial judicial reasoning will show why the notion of legal reasoning should be considered as it is being done here, namely as a logical incidence of judicial impartiality. With the law being the sole determinant of legal reasoning and outcomes, the identity, social, economic and political standing and the power relations of the parties whose dispute is to be decided will be entirely

¹²⁶ There is a rich jurisprudence on this. In South Africa, following English precedents, it is not required for recusal that there must be a real likelihood of bias; a reasonable suspicion will suffice. See for example *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union* 1992 3 SA 673 (A).

¹²⁷ On the notions of the neutrality and party detachment see for example Larkins 1996 *Am J Comp L* 608 and Fiss 1993 *U Miami Inter-Am L Rev* 62.

¹²⁸ Grimm "Constitutions, Constitutional Courts and Constitutional Interpretation" 26 refers to this as internal independence, requiring the judge to decide on the basis of the applicable positive law and not anything else. As Grimm indicated, his is also a matter of professional ethics.

¹²⁹ Respectively s 165(2) and 165(4) of the *Constitution*.

irrelevant, thus of no moment to the legal reasoning engaged in by court, and to the conclusions it reaches.

Pure legal reasoning, uncontaminated by considerations of a non-legal nature, have been asserted and defended by various scholars, some of the most well-known ones being Herbert Wechsler,¹³⁰ Robert Bork¹³¹ and Ronald Dworkin.¹³² Their views will now be dealt with briefly.

In Wechsler's¹³³ view all issues, including challenges to legislation duly passed by the legislature, can be decided by courts without entering the political arena. This is done by applying neutral legal principles. Courts are required only to be faithful upholders of the rule of law and to be consistent in their faithfulness to the relevant text of the *Constitution* (and other relevant legal rules and principles). The way in which the best judgment can be ensured is through "reason called law". Elaborating on this reasoning in a manner that is reminiscent of Dworkin's argumentation on the integrity of law, Wechsler refers to the (general) postulates behind the wording of the *Constitution* and of the weight of history in the proper interpretation of the constitutional text. Principled decisions are, according to Wechsler, reached through general, neutral, and impersonal legal reasoning, while discounting any non-legal consideration. A decision not arrived at through such reasoning would be a wrong decision.¹³⁴

Robert Bork's¹³⁵ argumentation builds on that of Wechsler. A principled judgment based on the applicable law is justifiable precisely because it is based on law and nothing else. Courts deliver law-based judgments, including judgments against the decisions of a popularly elected government. Judges are not undemocratic wielders of power nullifying the wishes of the popularly composed legislature. Judgments are

¹³⁰ Wechsler 1959 *Harv L Rev* 1-35.

¹³¹ Bork 1971 *Ind LJ* 1-35.

¹³² Dworkin propounds his views in this regard – on the integrity of law - in many publications, possibly most relevantly in Dworkin *Taking Rights Seriously*.

¹³³ Wechsler 1959 *Harv L Rev* 16.

¹³⁴ Wechsler 1959 *Harv L Rev* 17, 19-20.

¹³⁵ Bork 1971 *Ind LJ* 1-35.

not based on the will of the judges but on their principled reasoning premised on the *Constitution* and the law.

Ronald Dworkin,¹³⁶ whose work was often quoted during and immediately after South Africa's constitutional transition in the 1990s, is arguably the most ardent recent exponent of and firm believer in pure and legally reasoned judicial decision-making. In Dworkin's¹³⁷ view, law is a complete, loophole-free system which comprehensively covers all situations so that gaps in the law which may require the exercise of judicial discretion will never arise. Law consists in the first place of a system of rules to be applied by courts when they adjudicate. Where the rules are inadequate – where there is no ready-made rule that regulates the situation on which a decision is required – the court must resort to the application of general principles on which the legal order is based. The need to exercise a discretion, which would be an unjustifiable usurpation of (law-making) power by the judiciary, would never occur.

These and similar accounts of judicial decision-making should not strike one as quaint.¹³⁸ They are widely accepted as alternatively formulated versions of constitutionalism, which are echoed also in, for example, the oath taken by judicial officers in South Africa¹³⁹ in terms of which they undertake to administer justice to all persons alike without fear, favour or prejudice, in accordance with the *Constitution* and the law. The *Constitution* and the law are the sole determining factors in judicial decision-making and the identities, background or power, *etcetera*. of the parties involved in a matter will not make any difference. The bottom line is

¹³⁶ Dworkin 1977 *Taking Rights Seriously*.

¹³⁷ Dworkin 1977 *Taking Rights Seriously*.

¹³⁸ The existence and the practical value of these principles are not to be denied. However, they can most definitely not fulfil the very far-reaching function that Dworkin claims they can. HLA Hart can be agreed with in his statement that Dworkin's inexorable faith in the comprehensive value of legal principles underpinning the constitutional order to such an extent that no field is not legally regulated makes of Dworkin *the most noble dreamer of them all*. See Hart "American Jurisprudence through English Eyes" 137.

¹³⁹ S 6 of Schedule 2 to the *Constitution*.

that judges will base their decisions on the applicable law and the relevant facts and not on any predilection, loyalty or bias in favour of one of the parties.¹⁴⁰

The fact that government is a party to a dispute with political consequences should obviously not make any difference to the way in which the matter is approached. Principled legal reasoning exclusively based on the *Constitution* and the law will once again follow its (legally based) course.¹⁴¹

The courts will in this case have to maintain detachment from government as one of the parties in exactly the same way as they would be detached from the parties in any other case. Impartiality and "neutral reasoning" will in this case require an additional element described by Fiss¹⁴² as *political insularity*. In order to obtain this quality, judges must continue to decide issues on the basis of the relevant facts and the applicable legal principles. This element must not be used as a tool to further the aims of politically powerful organs of state or of a ruling party.¹⁴³ It must give expression to the very heart of the judicial function, namely that courts must decide what is just. They must not exercise the choice of the best public policy or the best course of action preferred by the majority of the public. Courts must not adjudicate the (conflicting) rights of the parties on the feasibility of public policy.¹⁴⁴

This is as far as a "pure", objective doctrine of judicial impartiality and legal reasoning goes. The question, however, is how realistic these notions of pure legal reasoning, impartiality, party detachment and political insularity are. Do these notions really offer a reliable account of what is happening when courts adjudicate, or are they rather divorced from the process of adjudicating as such, especially

¹⁴⁰ Larkin 1996 *Am J Comp L* 609.

¹⁴¹ This rule of law has its own faith-strengthening mantra captured in phrases such as "the law taking its course", "entrenched rights," "enshrined rights" and many other phrases. The common factor is that these phrases inculcate and inspire faith in the strength and objectivity of the law, the constitution and the courts to such an extent that what on close analysis is nothing more than normative or rather idealist doctrine is portrayed as undeniable facts of social and political life.

¹⁴² Fiss 1993 *U Miami Inter-Am L Rev* 59-60. See also Larkins 1996 *Am J Comp L* 609.

¹⁴³ Fiss 1993 *U Miami Inter-Am L Rev* 59-60. See also Larkins 1996 *Am J Comp L* 609.

¹⁴⁴ Dworkin's works, Dworkin *Taking Rights Seriously* and Dworkin *Law's Empire* bound of arguments in support of this proposition, for example *Taking Rights Seriously* 22 and 82 and *Law's Empire* 218, 223, 243, 244, 381 and 410. See also Fiss 1993 *U Miami Inter-Am L Rev* 59-60.

when courts are dealing with politically charged questions in which government has a stake? To what extent can courts indeed be expected to and in fact be capable of maintaining full impartiality, specifically in cases involving important political questions? Are courts really as politically insular as the constitutional doctrine of impartiality requires? Are courts' reasoning in all cases premised purely and exclusively on the law or are extra-legal considerations such as political loyalty and expediency rather than legal principle sometimes, specifically in politically charged matters, allowed to come into play?

In general, the singular response to all of these questions would be that the judiciary's impartiality can never be allowed to extend beyond the basic ideological assumptions and ideals of the ruling elite. The bottom line therefore is that judicial impartiality is relative to and conditioned by the ideological needs of the regime.¹⁴⁵ Drawing upon the detailed social science research on judgments (voting patterns) of judges of the federal courts in the United States and upon insightful analyses of the jurisprudence of the South African Constitutional Court, judicial impartiality proves to be an ideal which is rather distanced from the manner in which judicial decisions are actually arrived at, specifically in politically charged cases. By the same token, legal reasoning in such cases is not a purely legal matter and judgments are often determined by political considerations that extend beyond the rules and principles of positive law. Viewed somewhat differently, judicial reasoning in politically charged matters assumes a political character in that considerations of politics play a prominent part, alongside applicable positive law, in the reasoning and the judgments of the courts.

In present-day South Africa, it is rather common to require, in JSC parlance, candidates for judicial appointments to be "transformation candidates", or to require them to be "transformed" candidates,¹⁴⁶ thereby indicating that they must fully subscribe to the values of the *Constitution*.¹⁴⁷ These values do not have a single

¹⁴⁵ Fiss 1993 *U Miami Inter-Am L Rev* 60 speaks here of the regime-relativity of judicial independence. It is submitted that notionally it would be more correct to speak of the regime-relativity of judicial impartiality.

¹⁴⁶ Moerane 2003 *SALJ* 713.

¹⁴⁷ These values are referred to in para 1.

neutral and objective meaning. They are interpreted values, more in particular values interpreted by the dominant interpretive community composed of the ruling elite. In more concrete and realistic terms, candidates are required to subscribe to these values as interpreted by the ruling elite. The resultant interpretation will obviously not be an impartial one and will not be at variance with the one subscribed to by the ruling elite. This means that the courts can be impartial only *within* the ideological assumptions of the ruling elite. Courts therefore do not adjudicate on the ideological preferences of the ruling elite and other competing ideological trends. It follows that impartiality does not mean full-scale neutrality which must be maintained irrespective of whatever possible persuasions and beliefs may be relevant. On the contrary, the court is continually and intensely, albeit subtly, engaging with the ruling elite in the political branches and with the public, and finds its own ever-changing equilibrium and its politically fluctuating "impartiality" within the boundaries of the acceptable convictions set by the ruling elite. The judiciary's "impartiality" – a relative impartiality – is always conditioned by this engagement. Bickel¹⁴⁸ puts it as follows with regard to the Supreme Court of the United States:

The court placed itself in a position to engage in a continual colloquy with the political institutions, leaving it to them to tell the Court what expedients of accommodation and compromise they deemed necessary.

As long as forty years ago, Martin Shapiro,¹⁴⁹ calling for what he referred to as a "political jurisprudence," urged his readers to be alive to the political partiality of the impartial judiciary. Shapiro¹⁵⁰ rejected the trite doctrine that legal reasoning was conducted solely on the basis of neutral legal principles which would ensure the sustainability of a pure form of judicial impartiality. Shapiro¹⁵¹ argued that:

(t)he argument that there are neutral principles in-dwelling in the law itself and discoverable by a specifically judicial or lawyer-like mode of thought, is basically an attempt to return jurisprudence to the position of splendid isolation that it enjoyed in the heyday of analytical jurisprudence.

¹⁴⁸ Bickel *Least Dangerous Branch* 252.

¹⁴⁹ Shapiro 1963-1964 *Ky LJ* 296.

¹⁵⁰ Shapiro 1963-1964 *Ky LJ* 296.

¹⁵¹ Shapiro 1963-1964 *Ky LJ* 302.

In politically sensitive matters, the courts will therefore assume the character of political actors¹⁵² within the broader power base of the elite.

Quite significantly, the South African Constitutional Court,¹⁵³ by implication, also emphasised the impossibility of complete judicial impartiality when stating that judicial impartiality was regime-relative and defined – conditioned and restricted – within the ideological assumptions of the political order in which the judiciary operates. The Court began by defining the scope of judicial impartiality in a way that resonates with the rather absolutist assumptions of liberal constitutionalism, thus having an encompassing applicability in criminal and civil cases as well as in quasi-judicial and administrative proceedings.¹⁵⁴ However, the Court then went on to recognise that absolute neutrality on the part of a judicial officer can hardly ever be achieved.¹⁵⁵

One way of portraying this phenomenon of the courts sharing with the political branches the same ideological convictions and showing sympathy for the executive (and the legislature) in their judgments (yet not necessarily partiality or with conscious bias) is to describe it as executive-mindedness. Accordingly, judges would share with the executive the same (if not necessarily pure) sense of justice and would accommodate it in their judgments. This is how Edwin Cameron¹⁵⁶ describes this phenomenon with regard to the judgments of former South African Chief Justice LC Steyn. Cameron is of course not correct in his suggestion that Steyn's closeness to the executive and his cooperative participation within the ruling elite in the 1960s in South Africa was extraordinary. On the contrary, Steyn was rather emblematic of a general phenomenon which Cameron fails to appreciate, namely that judiciaries would ordinarily form an integral part of the ruling elite and would share with the

¹⁵² Shapiro 1963-1964 *Ky LJ* 296.

¹⁵³ *President of the Republic of South Africa v SA Rugby Football Union* 1999 7 BCLR 725 (CC).

¹⁵⁴ *President of the Republic of South Africa v SA Rugby Football Union* 1999 7 BCLR 725 (CC) para 35. Rather significantly the court did not proceed to state that this also holds true for cases involving high politics, the credibility of senior and revered politicians and alleged impertinent over-cosy relationships between these politicians and members of the presiding bench.

¹⁵⁵ *President of the Republic of South Africa v SA Rugby Football Union* 1999 7 BCLR 725 (CC) para 42. This the court stated with reference to observations by Benjamin Cordozo and *dicta* from the jurisprudence of the Canadian and United States Supreme Courts.

¹⁵⁶ Cameron 1982 *SALJ* 38-75. Justice Steyn was Chief Justice from 1959-1971.

other branches the same ideological convictions (and sense of justice) and their judgments would by and large attest to that.¹⁵⁷

The way in which the Constitutional Court has gone about its business since its inception also attests to this. On various occasions it has declared legislative provisions and executive acts unconstitutional. None of these judgments, however, has had the effect of impeding, in any significant way, the ideological objectives of the dominating elite. Many of the legislative provisions that were ruled unconstitutional originated from the era before the ANC came into power in 1994. Some rulings against government were of no, or rather limited, political significance to government. Some of the others were in favour of sections of the ruling elite's own support base and did not run counter to but rather brought coherency in the ideological assumptions of the ruling elite. The successes in court of a number of individuals against organs of state, for example, in affirmative action disputes, has had no effect at all on the general policy pursued in terms of government's own interpretation of that policy. Thus, the jurisprudence of the Constitutional Court and other courts has left government largely free to pursue its ideological preferences and objectives undisturbed.

The insights into the limited scope of judicial impartiality discussed in this section resonate with and affirm the conclusion reached under the previous heading on the equally limited scope of judicial independence. As submitted there, the separation of powers is superseded by a more profound reality, namely the unity of powers. The ideological unity of the three (separate) branches of governmental power acknowledges the fact that the three powers are separate (sets of) bodies, each with its own personnel and functions, yet unified in a single power elite system, informed by the same ideological assumptions, committed to achieving the same goals, and yet organised on the basis of a division of labour pertaining to each of the respective branches. The insights into the regime-relativity and ideological relativity of judicial impartiality and the pragmatic instead of objective and principled – solely legally based – foundation of legal reasoning underscore the political role of the judiciary,

¹⁵⁷ See in this regard the illuminating discussion by Dyzenhaus 1982 *SALJ* 380 *et seq*, especially 388-389.

which plays its part, as pointed out in the previous section, in close conformity with the rest of the power elite of which it forms an integral part.

In the absence of unprofessional or irresponsible conduct on the part of the judge (and the possibility of such conduct is negligibly slim) a judge will never disclose in a judgment or outside court that a judicial decision was motivated by political considerations such as pressure, or the desire or need to protect the institutional security of the courts, to give effect to or defend a policy that government regards as important, to show that the court shares the ideological preferences of the political branches, *etcetera*. Judges, being senior members of the legal profession and well-versed in the rhetorical and doctrinal strategies of the legal discourse, can avail themselves of many techniques to express themselves convincingly in legal terms, and credibly to sustain the impression that their judicial decisions were genuinely and objectively reached and based on the applicable law and nothing else.¹⁵⁸ Thus viewed, articulated legal reasoning is in itself a redoubtable political strategy for its ability to hide any extra-legal political considerations and motivations that might have been harboured when a politically sensitive decision was made. Liberal constitutionalism cannot allow for such a possibility. Trapped in their unrelenting belief in absolute judicial impartiality in terms of the doctrine of the rule of law, proponents of liberal constitutionalism can but respond with indignation when their beliefs are upset.

4.3 The transformationists

In the discussion above, criticism is levelled at the orthodox doctrine of the separation of powers, in particular with regard to judicial independence and judicial impartiality. It is pointed out that the separation of power is not as potent a notion and strategy of constitutionalism as the liberal camp would have it to be; that actual judicial independence and impartiality do not find undiluted application in practice; and that a more realistic approach to account for the obvious deviations from the

¹⁵⁸ See in this regard, among others, Kennedy *Critique of Adjudication* 1-2, who observed that judges work in an environment "saturated by ideology". However, says Kennedy, "...they always aim to generate a particular rhetorical effect namely that the decisions were necessitated solely by legal considerations without any regard to ideology".

orthodox approach should be recognised. These submissions do not imply total support for the transformationists. On the contrary, in the discussion below it will be argued that they also have it wrong.

Two sets of judgments will now be considered in order to understand the transformationists' irritation with certain judgments. This might also explain the anxiety of the transformationists about what might be forthcoming from the courts. These cases represent notable examples of the transformationist views on the role of the courts, on judicial independence and impartiality, and on the JSC's conduct with regard to the evaluation of aspirant judges. The first is a collection of high-profile judgments of the Constitutional Court and the SCA that were decided against leading figures of the ANC and in some cases also against the JSC itself. The second set of judgments relates to the competency or otherwise of the state administration under the ANC government.

4.3.1 *The high-profile judgments*

The most prominent among the high-profile judgments involving ANC leadership figures and the JSC are *Glenister v President of the RSA*,¹⁵⁹ *Democratic Alliance v President of the RSA*,¹⁶⁰ *Democratic Alliance v Acting National Director of Public Prosecutions*,¹⁶¹ *Freedom Under Law v Acting Chairperson of the Judicial Service Commission*¹⁶² and *Judicial Service Commission v Cape Bar Council*.¹⁶³

The first three cases, that of *Glenister*, *Democratic Alliance v President of the RSA* and *Democratic Alliance v Acting National Director of Public Prosecutions* are all acts from the same drama in which, on closer analysis, the interests of Mr Jacob Zuma (the president of the ANC since December 2007 and, since April 2009, president of

¹⁵⁹ *Glenister v President of the RSA* 2011 3 SA 347 (CC).

¹⁶⁰ *Democratic Alliance v President of the RSA* 2012 12 BCLR 1297 (CC).

¹⁶¹ *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 6 BCLR 613 (SCA) followed by *Zuma v DA* (836/2013) 2014 ZASCA 101 (28 August 2014) in which the SCA repeated its initial order.

¹⁶² *Freedom under Law v Acting Chairperson of the Judicial Service Commission* 2011 3 SA 549 (SCA).

¹⁶³ *Judicial Service Commission v Cape Bar Council* 2012 11 BCLR 1239 (SCA).

the country) were at stake. All three somehow related to criminal investigations and decisions on the institution of prosecutions.

In June 2005 former president Thabo Mbeki relieved Zuma, at that stage the deputy president of South Africa, from his position in the face of criminal charges against him and a statement by the national director of public prosecutions that there was a *prima facie* case against Zuma for various charges of white-collar crime. The investigation of these charges was conducted in the midst of a mounting power struggle in the ruling party between Zuma and Mbeki, Zuma's predecessor. At the national conference of the ANC in December 2007 Zuma trumped Mbeki in the election for the leadership of the ANC and in September 2008 Mbeki was recalled by the ANC as president of the country. The path was then clear for Zuma to take over the presidency. However, the obstacle posed by the spectre of criminal prosecutions could defeat that aim.

Two factors would be decisive. The first was the investigation of Zuma by the Scorpions (the common name for the Directorate of Special Operations, a crime-fighting unit with the specialised mandate to combat white-collar crime). Allegations were rife that that unit was politically enlisted for using criminal prosecution as a political stratagem against Zuma. The second factor related to the question of whether or not the national director of public prosecutions would prosecute Zuma. The incumbent at that stage and the head of the Scorpions (respectively Bulelani Ngcuka and Leonard McCarthy) were intimately involved in the investigation against Zuma. However, both were (alleged to be) prime Mbeki protégés balefully conniving against Zuma.¹⁶⁴ Eventually, soon after Zuma became the leader of the ANC, both vacated their positions. The position of national director of public prosecutions was temporarily filled by Mokotedi Mpshe. In April 2009 Mpshe, in a highly controversial decision, dropped the charges against Zuma, arguing that the criminal investigation against Zuma had been politically contaminated beyond redemption.¹⁶⁵ Mpshe based his decision on evidence of the Scorpions' alleged machinations against Zuma. The

¹⁶⁴ There was also judicial support for this allegation in *Zuma v National Director of Public Prosecutions* 2009 1 BCLR 62 (N).

¹⁶⁵ Mpshe 2009 <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=124273&sn=Detail>.

merits of Mpshe's decision could not be judged as Mpshe chose not to make the evidence available to the public. A new national director of public prosecutions, Menzi Simelane, was eventually appointed whilst the Scorpions was disbanded and replaced by a new agency, commonly known as the Hawks. Against this background, the three judgments will now be reflected on briefly.

4.3.1.1 *Glenister*

Chapter 6A of the *South African Police Service Act*,¹⁶⁶ which created the Directorate of Priority Crime Investigation (Hawks), was the subject matter of the *Glenister* judgment. In a split judgment, Deputy Chief Justice Moseneke, speaking for a small majority of five against four and referring to relevant international law binding upon South Africa, ruled that Chapter 6A had failed to secure for the Hawks the required measure of independence from executive control, resulting in its lacking the necessary capability to avoid the infringement of constitutional rights by the perpetrators of white-collar crime. The minority judgment delivered by Chief Justice Ngcobo was satisfied that in terms of the legislation which provided for its establishment, the Hawks was sufficiently independent from the executive and the legislation could therefore not be ruled unconstitutional.

The judgment was met with criticism from the ranks of government and from the transformationists in general. It was argued that the majority had disregarded the doctrine of the separation of powers and infringed upon the domain of the legislature and the executive. It was further claimed that the majority judgment was premised on untenable reasoning and among other things, cherry-picking from international treaties to suit the conclusion it wanted to motivate. The judgment was further criticized for undermining the rule of law and the court's own legitimacy. In the opinion of Ziyad Motala, one of the most vocal transformationists, the judgment represented a low-water mark in South Africa's constitutional jurisprudence.¹⁶⁷ This judgment in all likelihood also put paid to the career prospects of Justice Moseneke.

¹⁶⁶ *South African Police Service Act* 68 of 1995.

¹⁶⁷ See for example Motala 2011 <http://www.timeslive.co.za/opinion/columnists/2011/03/26/divination-through-a-strange-lens>. Motala is professor of law at Howard Law School in the United States and extraordinary professor of law at the University of the Western Cape.

Even though he had at the time already been serving on the bench of the Constitutional Court since the end of 2002, he was in September 2011 for a second time overlooked for appointment as chief justice when Judge Mogoeng, appointed to the bench of the Constitutional Court only in October 2009 and therefore by far Moseneke's junior, was appointed as chief justice. Before Mogoeng's appointment President Zuma announced in public that Mogoeng was his favourite for the position. (On a previous occasion Judge Ngcobo had also been appointed over the head of Judge Moseneke. However, having served on the Constitutional Court bench since 1999, Ngcobo was Moseneke's senior.)

4.3.1.2 Democratic Alliance v President of the RSA

In the judgment of *Democratic Alliance v President of the RSA* the Constitutional Court set aside the appointment of Simelane as national director of public prosecution, an appointment alluded to earlier. Simelane had been appointed despite the Ginwala Commission of Inquiry's finding that he had been dishonest and had lacked integrity in the execution of his duties in his previous capacity as director-general of the Department of Justice.¹⁶⁸ He was appointed merely on the ground that the President acted on the advice of the Minister of Justice, who regarded Simelane as "the right person for the job". The Court found that the decision to appoint Simelane was irrational and hence incompatible with the principle of legality in that evidence showing that Simelane was in fact not fit and proper for the position concerned had bluntly been ignored. In view of the proven evidence against Simelane the Court held that he (Simelane) was not a fit and proper person for appointment as required by section 179 of the *Constitution*. It was clear that Simelane had been the favourite of the governing party as national director of public prosecutions and such support could go a long way to secure his appointment. This was underscored by the fact that the SCA in a unanimous judgment¹⁶⁹ had already made a finding similar to the one contained in the ensuing judgment of the Constitutional Court. Government nevertheless further pursued the matter by way of its failed appeal to the Constitutional Court.

¹⁶⁸ Ginwala 2008 http://www.justice.gov.za/commissions/2008_ginwala.pdf paras 320-322.

¹⁶⁹ *Democratic Alliance v President of the RSA* 2012 3 BCLR 291 (SCA).

The judgments of the SCA and the Constitutional Court provoked much annoyance from the government and the transformationists in general, as was clearly attested to by the failed attempt to have the SCA judgment overturned by the Constitutional Court. The transformationists' view was that the judgments of the SCA were excessively activist, unduly trespassing on the terrain of the executive, and therefore once again flying in the face of the doctrine of the separation of powers. Ziyad Motala,¹⁷⁰ criticising the judgement of the SCA, the reasoning and conclusion of which were confirmed by the Constitutional Court, argued that the court had made the mistake of accepting the findings of the Ginwala Commission of Inquiry without considering that it was not a genuinely independent and impartial (judicial) body. Therefore, according to Motala,¹⁷¹ "(t)he court in effect performed the role of a political protection agency for the opposition party, which found things in the report to further its political objectives". (The opposition party referred to is the Democratic Alliance, which was the applicant in the litigation.)

4.3.1.3 Democratic Alliance v Acting National Director of Public Prosecutions

The decision of the acting *National Director of Public Prosecutions*, Mokotedi Mpshe, to discontinue the criminal prosecution against Mr Zuma, did not sit well with the official opposition, the Democratic Alliance. Clearly suspecting the decision to have been based on considerations other than purely legal ones, the DA wanted to obtain all of the information on which Mpshe's decision was based, thus seeking to establish whether there were substantive grounds for discontinuing the prosecution against Zuma and also to get to the bottom of what might have been the true political reasons for letting Zuma off the hook. The DA therefore sued for access to all of the information which allegedly formed the basis of Mpshe's decision, including the recordings of the conversations referred to above. The SCA ruled that at least some of the material including the recordings referred to above had to be made available.

¹⁷⁰ Motala *Sunday Times* 5.

¹⁷¹ Motala *Sunday Times* 5

4.3.1.4 SCA judgments against the JSC

Two high-profile judgments also went against the JSC. In 2012 the JSC suffered a thrashing when the SCA in *Judicial Service Commission v Cape Bar Council* held unconstitutional the JSC's decision to leave two vacancies on the bench of the Western Cape High Court unfilled instead of appointing clearly suitable and competent white male candidates.¹⁷² In what constituted a stern rebuke for a body with the high standing of the JSC, the court held that this decision of the JSC, for which it was not capable of providing reasons, was irrational and therefore incompatible with the principle of legality and the rule of law.¹⁷³ This decision followed hot on the heels of another judicial blow to the JSC at the hands of the SCA in *Freedom under Law v Acting Chairperson of the Judicial Service Commission*. The case concerned a decision of the JSC not to conduct a formal inquiry into alleged gross misconduct of the Judge President of the Western Cape, Judge John Hlophe, a prominent black judge. The JSC decision was in response to a complaint of the justices of the Constitutional Court that he (Hlophe) had improperly tried to influence their decision in a case, at that stage pending in the Constitutional Court, relating to the prosecutorial access to evidence in a criminal investigation on charges of corruption against Zuma. (This case relates to the saga surrounding the criminal prosecution against Zuma referred to in the paragraphs immediately above.)¹⁷⁴ The SCA ruled that the JSC's decision not to hold a formal inquiry into the alleged misconduct of the judge president and to regard the matter as finalised was irrational, contrary to the rule of law and for that reason unconstitutional. The JSC was ordered to hold a formal enquiry.

There was another negative transformationist response against the JSC, this time from the transformationists within the ranks of the JSC itself,¹⁷⁵ who are reported to have rather aggressively interrogated Plasket (an acting judge on the SCA bench and

¹⁷² *Judicial Service Commission v Cape Bar Council* 2012 11 BCLR 1239 (SCA).

¹⁷³ *Judicial Service Commission v Cape Bar Council* 2012 11 BCLR 1239 (SCA), specifically paras 37-51.

¹⁷⁴ *Thint (Pty) Ltd v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions* 2008 12 BCLR 1197 (CC).

¹⁷⁵ Calland 2013 <http://mg.co.za/article/2013-04-12-00-jscs-attitude-opens-door-to-conservatism>.

a candidate for permanent appointment to the SCA) about the SCA judgment in *Judicial Service Commission v Cape Bar Council*.

4.3.2 *The courts and administrative incompetency under ANC administration*

A prominent feature of public governance under the ANC government since the constitutional transition started in 1994 is the relentless deterioration of the public administration and the rising tide of corruption in South Africa, specifically in the public sector. The extent of the corruption in the public sector prompted Kgalema Motlanthe¹⁷⁶ in his then capacity as general secretary of the ANC to state: "The rot is across the board ... Almost every project is conceived because it offers certain people a chance to make money." A dilapidated state administration results in public service delivery of a dismal quality, especially on municipal level. So-called service delivery protests, one of the consequences of deteriorating public services, have become so common that they consume a substantive amount of police resources which have to be enlisted to control and quell these often violent protests.¹⁷⁷ Maladministration, corruption and various forms of white-collar crime in and around the state administration are pillaging the fiscus.

Numerous court orders are granted against organs of state but these orders are ignored and never complied with, frequently, it is submitted, owing to the laxity and incompetence of the state administration.¹⁷⁸ The failure to comply with court orders

¹⁷⁶ Quoted by Plaut and Holden *Who Rules South Africa?* 288. These authors insightfully discuss the corruption problem in South Africa on 266-304 of this book.

¹⁷⁷ See for example the discussion by Burger 2013 <http://www.beeld.com/opinie/2013-09-18-kommentaar-en-ontleding-n-toenemende-polisie-probleem>.

¹⁷⁸ Possibly the most serious and publicised incident of this nature was the saga around the failure of the education authorities to comply with orders of the High Court directing them to supply school books to learners in the Limpopo province during 2012. On 17 May 2012 after the school year had already commenced in January the North Gauteng High Court granted an order directing the Department of Basic Education (DBE) and the member of the Executive Council: Limpopo Department of Education to supply school books to schools in the Limpopo Province which had until then not been provided with school books. According the order, full compliance was required by 15 June. The order was not complied with. Following negotiations between the parties (mainly between the first NGO-applicant known as Section 27 and the education authorities) it was agreed that the date for final delivery of the books would be postponed. On 5 July, this agreement was also made an order – the second order - of the court. This second order was, however, also flouted, thus giving rise to another application granted on 4 October that the books be supplied by 12 October and that the respondents also filed an affidavit describing how the books for the following school year (of 2013) would be dealt with. In this

also gave rise to debates on how, possibly by way of innovative judicial interventions, these failures could be remedied. This question was dealt with by the Constitutional Court in *Nyathi v Member of the Executive Council for the Department of Health Gauteng*¹⁷⁹ in which in a majority judgment the Court ruled section 3 of the *State Liability Act*¹⁸⁰ (which prohibits the attachment of state assets in the execution of judgments) constitutionally invalid. The Court rebuked the state for its failure to comply with a court order, and expressed dissatisfaction with the laxity of public officials and the flawed conduct in the office of the state attorney.¹⁸¹ As illustrated in the school book saga (as related in note 147), among many other similar cases,¹⁸² the *Nyathi* judgment did not bring an end to poor public services, which seem to be dragging on unendingly and unaffected by whatever the courts might have to say.

The *Nyathi* judgment and the various other cases in which court orders about poor services were granted against the state did not draw the same flak from government as the first set of cases dealt with above. These cases were nevertheless politically significant because they caused huge embarrassment to government. Moreover, the transformationists' discomfort and irritation with the courts and the altercation between the transformationists and the liberals in the JSC, discussed in part 3

matter the courts therefore had to be approached repeatedly with a view to ordering the respondents to comply with a court order already made on previous occasions, thus making a travesty of the very idea of a (binding) court order. All three orders in this matter were made under North Gauteng High Court case number 24565/2012. I wish to express my appreciation to Ms Nikki Stein, attorney of Section 27, for providing me with the first and third orders (and underlying judgments) as well as the founding affidavit for the third order.

¹⁷⁹ *Nyathi v Member of the Executive Council for the Department of Health Gauteng* 2008 9 BCLR 865 (CC).

¹⁸⁰ *State Liability Act* 20 of 1957.

¹⁸¹ See for example paras 52, 60 and 63 of *Nyathi v Member of the Executive Council for the Department of Health Gauteng* 2008 9 BCLR 865 (CC). In para 60 Madala J, speaking for the majority of the Court, stated: "In more recent years, and in particular the period from 2002 onwards, courts have been inundated with situations where court orders have been flouted by State functionaries, who, on being handed such court orders, have given very flimsy excuses which in the end only point to their dilatoriness. The public officials seem not to understand the integral role that they play in our constitutional State, as the right of access to courts entails a duty, not only on the courts to ensure access, but on the State to bring about the enforceability of court orders."

¹⁸² Another highly publicised case was the failure of the Municipal Council of Carolina (Gert Sibande Municipality) in the Mpumalanga province to comply with a court order of the North Gauteng High Court to supply clean water to its inhabitants. The order was granted on 10 July 2012. The municipality failed to comply with the order and even wanted to appeal in spite of the fact that it bore the constitutional duty to provide clean water. See for example Tempelhoff *Beeld* 4.

above, have caused government repeatedly to reproach the courts for not being sufficiently in step with the transformationist agenda of the ruling party.¹⁸³

Against this background, the transformationist position on judicial independence and impartiality as reflected in part 3 above can now be considered.

4.3.4 Transformationists' view critiqued

There are three main points of critique against the transformationists' view.

First: the transformationists have erroneously embraced the liberal imagery about the power of the judiciary.

Secondly: the transformationists have adopted an excessively wide definition of the ideology of transformation, calling for a very close relationship between the judiciary and the ruling party (and the legislature and the executive). Linked to this is the transformationists' pronounced tendency to protect the ruling party on matters of poor public administration as if these were matters of ideology.

Thirdly: the transformationists have failed to account for the distinctive professional nature of the judiciary.

The first point leads to the two other points. The first point is therefore at the centre of the critique against the transformationists. All three points will now be dealt with in more detail.

As regards the first point: The transformationists have bought into and now share with their liberal adversaries the ardent belief that the judiciary, as a political force, is as powerful as if not more powerful than the legislature, the executive and the ruling party (the ANC). This belief is harboured despite the strength displayed by the ANC during the first two decades since the constitutional transition. As should be evident from the discussion in the preceding sections on judicial independence and judicial impartiality, the liberal belief in the power of the courts is unfounded in view of the inherent frailty of the judiciary. The transformationists in close accord with the

¹⁸³ See for example Gordon and Bruce 2007 *Transformation and the Independence of the Judiciary* 32-33, 47-49.

liberals nevertheless seem to cling to this unfounded belief. This explains the excessive drive of the transformationists for the appointment of judges who endorse the transformationist agenda, who would pose no threat to frustrate that agenda, and who would in their rulings be inclined to spare the government and the ruling party any embarrassment. Had the transformationists not deceived themselves into the aggrandised belief in the political power of the judiciary, and had they instead developed a more realistic understanding of the separation of powers and judicial independence, impartiality and reasoning, as explained in part 4.1 and part 4.2, they would have spared themselves the unnecessary effort to ensure adherence to that belief. Had they realised that the courts were in fact not as powerful as trite doctrine proclaimed, they would have been much more relaxed in their approach to judicial appointments. Had they realistically grasped the actual political frailty of the judiciary, the judiciary's dependence on the political branches and the regime-relativity of judicial impartiality, they could have proceeded confidently in appointing judges on no other ground but merit.

But do the judgments discussed in this section not lend credence to the belief that the judiciary is indeed politically powerful and therefore capable of disrupting the ideological programme of the ruling elite?

The answer to this question must be an emphatic negative. A significant feature of the judgments, viewed from the vantage point of judicial independence and impartiality, is that none of them was ideologically sensitive, nor could any of them have posed a real threat of hampering the pursuit of the transformation ideology. The subject matter of these judgments was good public governance and sound public administration, not political ideology. Broadly speaking, the first set of cases centred on the conduct of the prosecutorial authority in combating white-collar crime, and the second set focuses on the rendering of public services. These cases might be viewed as, at most, marginally ideologically significant, and therefore not related to any ideological preferences of the ruling elite. They were in fact typical examples of the courts using their limited adjudicatory power to correct hiccups, differences and aberrations *within* the broad assumptions of the dominant elite, thus leaving the achievement of the broad ideological goals undisturbed. The power that

the judiciary did exercise in these cases was clearly within the typical, narrow preserve of judicial authority. These and similar other judgments provide no basis for the belief that South African courts are capable of exerting sufficient power to be of real political significance. In consequence, there is no reason for the transformationists to anxiously fend off the appointment of competent applicants (who are feared to be less sympathetically disposed towards the ruling party and the executive) and to show them the door in favour of less competent ones.

What the transformationists are in fact doing – and this leads to the second point of critique – is that they confuse matters of good governance with questions of ideology. Hence, the transformationists define the ideological programme of transformation in such broad terms that questions of good governance and sound public administration, which are ideologically insignificant, are perceived as important ideological matters. As pointed out in parts 4.1 and 4.2 the judiciary is ordinarily integrated with the political branches (and with the ruling party) in a single power elite; and judicial impartiality is politically relative and ideologically conditioned. Courts therefore cannot and will not ordinarily take sides against the political branches on issues of politics and ideology. It is therefore normal to expect the courts to broadly share the same views as those of the ruling party and the executive. The combating of crime and corruption and the promotion of sound public administration are not ideologically sensitive. These are questions on which one would usually expect consensus and not discord. These questions relate to issues on which courts should be able to decide without the risk of embarking upon a collision course with the ruling party and the political branches. These issues therefore fall to be dealt with in a category separate from those dealing with matters of ideology and high politics. Courts should be risk-free in dealing with these issues and be able to pass judgment impartially in terms of the *Constitution* and the law without fear, favour or prejudice. This is what one would expect in the normal course of events. However, this is not the realm within which South African courts operate, as illustrated by the judgments in the following cases, which have already been discussed: *Glenister*, *Democratic Alliance v President of the RSA* and *Democratic Alliance v Acting National Director of Public Prosecutions*.

These judgments would in the normal course of events not have been of any real political significance. Yet, since the president of the ANC and the country had a real interest in the outcome of these cases, keen political attention was stirred up by questions such as how the courts would approach these cases, who the judges would be and what their attitudes about this non-ideological issue would be.

Furthermore, with rampant corruption, maladministration, poor public services and the pillaging of the fiscus, and high political figures facing criminal prosecution, these issues have become political issues instead of matters of public governance. In the eyes of the transformationists these issues have become high political matters. Where courts would ordinarily be on firm ground when required to deal with issues of this nature, they now run the risk of treading on a dangerous political quagmire. Their decisions on questions that seem to be politically neutral could have severe political consequences, among others, consequences detrimental to the ruling party, which is finding it difficult to get these administrative and governance ailments under control. The importance of the selection of judges should therefore be obvious, because, as described in parts 4.1 and 4.2, judges are required to be part of and to share the assumptions of the ruling elite. In abnormal circumstances there is a political need for an inordinate level of judicial sympathy with the ruling party and the political branches on issues of sound public administration. Such sympathy could be of assistance to safeguard the ruling elite against the challenges of its political opposition and adversaries.

There is an additional – and in South African a very crucial – reason why judgments revolving on bad public services and poor public administration are politically and ideologically significant and potentially dangerous to the ruling party. Many cases relating to the failure to provide public services might result from government's ill-conceived programmes of affirmative action (construed on the principle of representivity)¹⁸⁴ and by the ruling party's programme of cadre deployment, which generally is part of the transformation drive. It enjoys strong support from the

¹⁸⁴ On the issue of representivity see the discussion by Malan 2010 *TSAR* 427-449.

ANC.¹⁸⁵ Political allegiance to the ANC of appointees in the public sector is a crucial factor in staff employment in that sector, especially in senior positions.¹⁸⁶ The aim is to secure party control in all spheres of South African society.¹⁸⁷ Cadres are deployed for their services to the party and not primarily for their experience and competence as public office bearers. Appointments made to serve the party best might be detrimental to the public administration. Court judgments critical of poor public services and public governance may be regarded as reproaching the policy of cadre deployment. These judgments are therefore politically and ideologically much more sensitive than one might think, specifically in the perception of the ANC. That is why the transformationists have a direct stake in fending off judicial interference pertaining to bad public services, as that might be perceived as a disguised onslaught on the core components of transformationist ideology, namely affirmative action¹⁸⁸ and cadre deployment. This perception is obviously strengthened by the fact that the applicants in many of these cases are either declared political opponents of the ANC, such as the Democratic Alliance, or non-governmental bodies that are perceived to be such political opponents.

The extremely broad scope of the transformationist ideology, encompassing also matters of good governance, causes the transformationists to be rather petulant, because they view criticism of poor governance as matters of politics and ideology. It is submitted that petulance is also a feature of the transformationist majority in the JSC. In the context of the judiciary the JSC is the crucial forum in which these supposed onslaughts against the ruling elite must be fended off. It is the place

¹⁸⁵ Staff Reporter 2011 <http://mg.co.za/article/2011-09-14-mantashe-defends-anc-cadre-deployment>.

¹⁸⁶ Cadre deployment, even though wide-spread, runs counter to clear constitutional provisions relating to public administration (s 195(1) of the *Constitution*).

¹⁸⁷ See for example Wesson and Du Plessis 2008 *SAJHR* 193; Budlender 2005 *SAJHR* 716 *et seq*. Transformation in view of the ruling ANC also includes affirmative action, black economic empowerment and cadre deployment, that is, deploying party operatives in the public service, police, army, etc.

¹⁸⁸ Affirmative action is allowed in s 9(2) of the *Constitution*. There is a trend, however, to pursue affirmative action in disregard of any other considerations, even if the individual rights of persons are adversely affected by such measures and also when such measures are in disregard of efficient public services. See in this regard the judgment of the SCA in *Solidarity v South African Police Service* 2014 2 SA 1 (SCA).

where the "right" appointees can be selected to help protect the ruling elite against this challenge.

The excesses of the transformationists on the JSC clearly displayed by the Chief Justice's dismissal of the idea that the best candidates should be appointed, and the anxious transformationist responses to the judgments discussed in this part, should be viewed in this light. The candidates who are not to the liking of the transformationists but fully subscribe to the values of the *Constitution* of which the ANC is the principal author cannot easily be regarded as enemies of the ANC. Some in fact have impeccable ANC struggle credentials. The judgments that went against the JSC, discussed in this section, were also not ideological but merely resulted from the JSC's own excessive ideological behaviour, which from the point of view of good governance was clearly irrational. The decisions in two cases – the one about Judge President Hlophe and the other one about the appointment of two (white) judges to the bench of the Cape High Court – could have been averted simply by dealing with them as matters of good public governance, and not as the JSC treated them, as matters of transformationist ideology.

The first two points of critique against the transformationists can therefore be summed up as follows: the transformationists accept the liberal view that the perceived great power of the courts is at least on a par with that of the other branches. Hence, they view having the courts in the wrong hands to be a grave threat to the ruling elite organised around the ANC, which defines their ideology in such broad terms that it includes issues of good governance, which have nothing to do with ideology. This perceived danger has to be fended off at all cost. Therefore the most intimate relationship possible must be established between the courts and the rest of the ruling elite so as to ensure the ruling party licence to pursue its ideology and protection against judicial censure in matters of good governance. The effect of all this is the perpetration of an undue assault on judicial independence and impartiality of such severity that the courts will not be willing and able to perform their responsibilities. In consequence, the courts will be weakened and relegated to the position of an affable and predictable ally within the ruling elite where they will

be entrusted with the responsibility to render the necessary judicial protection and support to the ruling party and its leaders.

In this context the third point of criticism can now be attended to. Believing that the court has vast political powers, defining the ambit of the ideology of the ruling elite in particularly broad terms, and fearing that the supposed judicial power could harm the ruling party, the transformationists put an excessively high premium on the need that the courts should be under the control of and judges politically sympathetic towards the ruling party. They do that at the risk of diminishing the professional qualities required on the bench in all the fields of legal practice, including fields of law in which issues of ideology can hardly play any part. This is a serious mistake. Not only is it wrong to believe that the courts are politically powerful (as both the transformationist and the liberals believe), it is also wrong to underestimate the need for professional competence and experience on the bench. The judiciary is one of three powers, but it differs significantly from the other two in that it is not a collection of politicians in the first place. The judiciary is an assemblage of professional senior lawyers at the pinnacle of their legal careers. The judges have to take care of the rights of people. They are the guardians of the right to access to justice and they must be able to dispense justice with knowledge, wisdom and sympathy. They must be wise and competent enough to deserve our trust and respect as public office bearers who have the responsibility to take decisions that profoundly impact on the lives of the parties in the cases they adjudicate. To that end their political sympathies are entirely marginal. Judges do have power. However, unlike the power of the executive and the legislature, their power is not to be found in any ability to make and execute broad policy decisions, which no court should ever be required to do. Through their legal knowledge, wisdom and reasoned decision-making they earn respect and high esteem and command moral authority. That is the source of the courts' power.¹⁸⁹ Without that they have hardly any power at all. If this is not realised and political considerations instead of professional competence receive preference in judicial appointments, the bench is bound to fail the public, who seek access to justice from professionally competent judges. The

¹⁸⁹ See in this regard Bickel *Least Dangerous Branch* 252.

transformationists on the JSC do not seem to have an adequate appreciation for this. They are not only placing an undue value on political considerations and downplaying the need for the professional nature of the judiciary, they are also running the risk of causing the courts to forfeit the essential characteristics of a well-functioning judiciary. In this context the transformationists have a serious blind spot. When thinking of the power of the bench they seem to confuse it with the kind of broad policy powers of the political branches.¹⁹⁰

It is submitted that the transformationists are causing the enervation of the judiciary in the constitutional order. Their erroneous conceptions of the supposedly formidable power of the judiciary will cause an untenable close integration of the judiciary with the ruling party and the political branches. Their expansive definition of the ideology of transformation causes them (unwittingly) to exclude the exercise of judicial power in relation to matters that are on proper analysis not matters of ideology but of good public administration. Their inclination, as a result of the poor state of public administration, is to fend off judicial censure that could cause embarrassment to the ruling party. Their failure to appreciate the distinctive professional nature of the judiciary causes them to push for judicial appointments of candidates lacking the necessary professional qualities for the bench. These misconceptions and wrong responses all have the same mutually reinforcing effect, namely to integrate the judiciary so closely with the ruling party and the political branches that the independence and impartiality of the courts are dispensed with.

For the reasons submitted above the courts are unable to be as independent and impartial as trite liberal doctrine proclaims. Their independence is limited, and their impartiality is regime-relative and ideology-conditioned. This view of the limited extent of the actual (albeit yet weak) form of independence and impartiality of the judiciary is not shared by the transformationists. They seem to insist on a still weaker form of independence to be brought about by development of such a close relationship between the bench, the ruling party and the political branches that the bench could be at risk of forfeiting its distinctive, august professional character.

¹⁹⁰ Kriegler *Sunday Times* 5.

5 Conclusion

Disagreement and conflict are part and parcel of the human condition. For that reason adjudication is crucially important in human life. We therefore need judges that we can trust. That trust, however, is not based on their power but on their knowledge, wisdom and good judgment; that is, as Hamilton said, not their force or will but merely their judgment.¹⁹¹ In the absence of their wise judgment the basis of our trust in them is bound to evaporate and their power to fall by the wayside. We will then have to settle our disputes in ways other than through the courts – through laudable means such as arbitration, negotiation and reconciliation, or less laudable means such as self-help, including violence. In the circumstances the citizens have a critical interest in the maintenance of professional courts where competent judges preside. If we compromise on this, we are bound to lose the courts, and in a country struggling with crime the price might be anarchy. The *Constitution* wisely acknowledges the importance of the courts; hence provisions such as section 165(2) and 165(4) referred to above.

Traditionally courts are not there to settle disputes surrounding high politics. Courts are at their best and function most comfortably when their judgments are in the field of private law, commercial disputes, criminal law, *etcetera*, where their judgments do not have any notable political implications. They are at their best in various respects when they are free to give judgments based on legal principles without having to be wary of possible negative political reactions; and when they have the best chances to ensure executive participation in the execution of their rulings, as these have no political consequences for the political branches.

Since their rulings in cases of this nature pose no threat – real or supposed – to the political branches, the most professional and experienced lawyers – the best of the best – can be appointed to the bench regardless of how their political views might incline them to rule on political matters, simply because there are no political matters to rule on.

¹⁹¹ Hamilton, Madison and Jay *Federalist Papers* 465.

It is not always easy to distinguish between matters of (high) politics and non-political matters. The propensity of the ruling elite in South Africa to define their ideology so broadly that it includes matters which would in the normal course of events be regarded as non-political bears testimony to that. Regardless of this grey area between political and non-political issues, there is clearly still a difference between the two and there are numerous matters – the vast majority in fact – that are of no moment politically. It is on these non-political issues – the run-of-the-mill legal disputes – that judicial power reigns at its best. This is the kind of power that derives from the respect and high esteem of the courts, thanks to the professional skill, knowledge and wisdom of the incumbent judges.

In South Africa we have entrusted the courts with much more power than the power required to deal with these run-of-the-mill legal issues. With their sweeping powers of review on sensitive issues (including political ones), the courts became important political actors, thus placing them in a potentially awkward and uncomfortable relationship with the political branches and the ruling party. According to the trite liberal imagery about the power, independence and impartiality of the courts, the powerful judiciary would obviously be able to stand its ground also on matters of high politics on which it would make rulings followed by due compliance by the co-operative political branches (and an obedient ruling party).

Some of the latest battles between the liberals and transformationists in and around the JSC on judicial appointments are discussed above. From that discussion it is clear that the belief in the power, independence and impartiality of the courts has been fundamentally flawed. A realistic insight into the notions of judicial independence and impartiality, as discussed in parts 4.1 and 4.2, reveals that the high expectations about the part that the courts would play in controlling the political branches and in achieving a balanced constitution were in fact unfounded. Moreover, as described in part 4.3, the courts are also confronted with situations typical of South Africa under its present ruling elite: the bad state of public administration, senior figures in the ANC being under criminal investigation yet still being supported by the ruling party, and the very broad definition of the ideological programme of the ruling elite. The transformationist response to the challenges

posed by these situations is to push for sympathetic judges and a deferential judiciary that would give the ruling elite the required leeway to pursue its ideology, and as far as possible spare the ruling party any embarrassment, even on matters of poor public administration. Most significant is the fact that the transformationists are even prepared, as pointed out above, to compromise on the quality of judges in order to accommodate their transformationist agenda. This is really ominous because it not only detracts from the political role which the *Constitution* has assigned to the courts. It goes further than that: it erodes the very basis of judicial power, namely the trust in and high regard for the judiciary. This erosion not only affects the extensive politically related powers which the *Constitution* optimistically assigns to the courts, it also undermines the trust in the courts in relation to its core functions, namely to skilfully adjudicate the run-of-the-mill disputes that ordinarily require most of the attention of the courts. Devoid of the best that the legal profession can offer, trust in and high esteem for the courts are bound to fall by the wayside, causing distrust of the courts and rendering them unable to discharge their core responsibilities to the public.

This is a bitterly ironic course of events. In an attempt to control the political branches and to protect basic rights, that is, to allay the fears of the public, the powers of the courts have been expanded to turn the judiciary into a seemingly powerful political actor. These new politically related powers have added to the core of traditional responsibilities the courts have always had and comfortably discharged. These new powers have won the South African courts awe and respect and the *Constitution* high accolades. But two decades into the new South Africa those additional powers are under threat. Even more serious is the fact that the insistence of someone with the authority of the Chief Justice on not elevating the best lawyers to the bench is also eroding not only the additional powers of the bench – the powers that are arguably on the marginal outskirts of judicial authority – but also the traditional core of judicial authority on which all citizens depend.

This unpleasant irony was bound to play itself out in South Africa as a result of two forces as discussed in this article:

- (a) the trite liberal imagery of the aggrandised judiciary premised on long-cherished misconceptions surrounding the basic notions of constitutional law, most notably judicial independence (as an incidence of the separation of powers) and judicial impartiality (and the faith in principled judicial reasoning); and
- (b) the transformationists' acceptance of this imagery, their expansive definition of transformationist ideology, their misconceptions of the professional foundation of judicial power, and their enlisting of the courts to guard the ruling party against the consequences of (the ruling party's self-inflicted) malfunctioning public administration.

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LIST OF ABBREVIATIONS

Am J Comp L	American Journal of Comparative Law
ANC	African National Congress
BLA	Black Lawyers Association
Buff L Rev	Buffalo Law Review
DBE	Department of Basic Education
Harv L Rev	Harvard Law Review
ICON	International Journal of Constitutional Law
Ind LJ	Indiana Law Journal
JPL	Journal of Public Law
JSC	Judicial Service Commission
Ky LJ	Kentucky Law Journal
MP	Member of Parliament
PAJA	Promotion of Administrative Justice Act
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SC	Senior counsel
SCA	Supreme Court of Appeals
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal of Contemporary Roman Dutch Law)

TSAR

Tydskrif vir die Suid-Afrikaanse Reg
(Journal of South African Law)

U Miami Inter-Am L Rev

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REASSESSING JUDICIAL INDEPENDENCE AND IMPARTIALITY AGAINST THE BACKDROP OF JUDICIAL APPOINTMENTS IN SOUTH AFRICA

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SUMMARY

The South African Judicial Service Commission (JSC), considered to be exemplary for its independence, plays a pivotal part in judicial appointments. Yet the Commission has long been marred by tensions that have lately erupted into a full-blown conflict between those who could here be referred to as the transformationists, on the one hand, and the liberals, on the other. The transformationists, who may generally be regarded as falling within the sphere of influence of the ruling elite under the African National Congress (ANC), are bent on pursuing the policy of transformation. Hence they insist that the composition of the bench must reflect the national population profile and on individual judges' pursuing the ruling party's ideological goals. The liberals reject this as a threat to judicial independence and the professional competence of the judiciary. On close analysis the clash is based on incompatible interpretations of judicial independence and impartiality. This article is a critique of these interpretations against the backdrop of an assessment of what these notions can reasonably be expected to achieve.

It is argued that the liberals are harbouring unrealistic views about judiciaries, believing them to wield power which may even extend over matters of political significance, powers on a par with or even outweighing those of the political branches. However, on proper analysis it is clear that the judiciary is in fact, firstly, inherently weak and dependent on the support of the political branches; and, secondly, it is integrated into the ruling elite with whom they share the same ideological assumptions without any inclination to oppose them. Hence, the impartiality of the courts, when it comes to politically sensitive issues, is distinctively politically (regime) relative and ideologically conditioned.

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Ironically the transformationists have bought into the liberals' erroneous belief in the potency of the courts (in the above-mentioned sense) and they fear, without foundation, for the political risks the courts might be posing to the ruling elite. This fear is based on an exaggerated vision of the far-reaching consequences that they ascribe to judicial independence and impartiality, believing it to render the judiciary a formidable political force on a par with the political branches. The transformationists would therefore go to extreme lengths to secure an amenable judiciary. This is exemplified by their rather improper insistence that the best candidates need not be appointed, thus compromising even the (limited) independence and impartiality which courts, on a realistic assessment, should have. In doing this the transformationists show a serious lack of appreciation of the distinctive professional nature of the judiciary, whose independence, impartiality and effectiveness are rooted not in political might but in the exceptional professional competence of the incumbents on the bench, who should be drawn from the best candidates the legal professional can produce.

KEYWORDS: dominant/ruling (political) elite; ideological assumptions; judicial appointments; judicial independence; judicial impartiality; judicial service commission; liberals; liberal constitutionalism; party detachment (of the judiciary); political insularity (of the judiciary); pure legal reasoning; representivity; separation of powers; transformation(ist/s).