PRAXIS OF JUDICIAL INDEPENDENCE IN SOUTH AFRICA: AN IMMINENT CONSTITUTIONAL RECOURSE

BY

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SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

OF

MASTER OF LAWS

SPECIALISING IN CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW

PREPARED UNDER THE SUPERVISION OF PROF EMERITUS HUGH CORDER

THE FACULTY OF LAW

UNIVERSITY OF CAPE TOWN, SOUTH AFRICA

DATE OF SUBMISSION

15 FEBRUARY 2023

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Faculty	LAW
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Total number of pages of the PDF file of your thesis	64
Word count	25162
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DEDICATION

This dissertation is dedicated to my unborn child and to my loving parents, Mr Ntondeni Patrick Ramaru and Mrs Tshilidzi Grace Lethole-Ramaru, as well as to my late uncle, Mr Aaron Lethole, and late grandmother, Vho-Tshinakaho Rambau.

ACKNOWLEDGEMENTS

Special thanks to my supervisor Professor Emeritus Hugh Corder who deserves special recognition for his crucial role in helping me put together this highly beneficial thesis. His knowledge cleared the path and made things simpler for me, enabling me to write down this intriguing piece of work.

May God bless and protect him accordingly!

In addition, I want to thank Fran Saunders for helping me out by editing and proofreading my work. I would also extend my gratitude to my brother and mentor, Advocate Aubrey Ramuhala whom I greatly admire, and for the role he played throughout the course by showing me support when it was not fashionable to do so.

Many thanks brother, God bless you!

ABBREVIATIONS AND ACRONYMS

Constitution	The Constitution of the Republic of South Africa
CAC	Competition Appeal Court
CC	Constitutional Court
CirC	Circuit Courts
CJ	Chief Justice
DCJ	Deputy Chief Justice
DJP	Deputy Judge President
HC	High Court
JP	Judge President
JSC	Judicial Service Commission
LAC	Labour Appeal Court
LC	Labour Court
LCC	Land Claim Court
LRA	Labour Relation Act
OCJ	Office of the Chief Justice
SCA	Supreme Court of Appeal
SALJ	South African Law Journal
SAJEI	South African Judicial Education Institute
TC	Tax Courts

ABSTRACT

In recent years, South African case law has given significant attention to the meaning and implications of the principle of judicial independence. Judicial independence, which includes both individual and institutional or structural independence, includes the independence of specific judges. It encompasses topics such as tenure security, a minimal level of financial security as well as the institutional independence of the court which the particular judge presides over. It indicates that judges must be able to carry out their duties free from interference of any kind and from any source, and that the courts must maintain their independence from the legislature and the executive. The drafters of the Constitution went to tremendous lengths to ensure the independence of the judiciary. To put it bluntly, section 165(2) of the Constitution 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." In terms of section 165(4) of the Constitution "organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts". These five characteristics significantly overlap and imply one another, are tightly related, and are interdependent in many more ways. The impartiality, dignity, efficacy, and accessibility of the courts would typically be greatly enhanced if judicial independence were to be established or present. The courts are responsible for upholding the Constitution in general and the Bill of Rights in particular, with the Constitutional Court serving as the apex court. They have the authority to invalidate any law or conduct that is inconsistent with the constitution. This dissertation explores the extent to which the Office of the Chief Justice (OCJ) supports judicial independence in South Africa. It is widely believed that judicial independence is safeguarded by security of tenure, financial independence, and administrative independence—three attributes designed to support both the institution of the judiciary as a whole and the independence of individual judges. This thesis explores in greater detail the judiciary's structure and the role of the OCJ within it. Furthermore, the OCJ's institutional independence and governance (budget, administration, and tenure security) is discussed in depth, as are the OCJ's role in appointing judges.

KEYWORDS: judicial independence, institutional independence, individual independence, structure of the judiciary, judicial governance

I INTRODUCTION

The notion of judicial independence has been the subject of debate among legal and political scholars in recent years. Section 165 of the Constitution encompasses judicial independence and stipulates that the courts are independent and subject to the Constitution and the law, which must be applied impartially without fear, favour or prejudice.[1] This implies that in the exercise of their judicial powers, courts must be free from any interference or influence, be it political or from the legislative or executive branches of government. To put it bluntly, the executive and legislative branches of government have a constitutional obligation to protect the independence of the courts.[2] As a result, the Constitution establishes explicit and broad rules on judicial independence. Legislation, judicial interpretation, and court practice have all added to the concepts of judicial independence and the separation of powers during the last decade.[3]

The Office of the Chief Justice (OCJ) was established on 23 August 2010 by a proclamation made in accordance with the Public Service Act 103 of 1994.[4] The OCJ was formed to safeguard and provide support to the judicial system to ensure effective and efficient court administration services. This office is also responsible for ensuring that institutional and individual independence is maintained for all members of the judiciary.

Courts are also required to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.[5] Interference from legislative and executive branches of government relates to the division of powers between the three branches of government. This is known as the doctrine of separation of powers.

The principles of judicial independence and separation of powers have been accorded jurisprudential weight by the Constitutional Court in a number of judgments.[6] These have verified that the principles have basic meanings, but that their exact interpretation within every constitutional setting is determined by history, circumstances, and customs.[7]

The doctrine of separation of powers has been integrated into the constitutions of many countries worldwide, including South Africa. Judicial independence is based on this notion. In

[1] Section 165 (2) of the Constitution of the Republic South Africa, 1996 (hereinafter referred as the Constitution).
[2] C Albertyn, 'Current Development "Judicial independence and the Constitutional Fourteenth Amendment Bill' (2006) 22 *South African Journal on Human Rights,* 126 – 143.
[3] Ibid.
[4] CH Powell, 'Judicial Independence and the Office of the Chief Justice'(2019) 9 *Constitutional Court Review*, 499.
[5] See section 39 (1)(a) of the Constitution.
[6] See for example *De Lange v Smuts NO* 1998 (3) SA 785 (CC) ; and *SA Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).
[7] *De Lange* supra note 6 paras 60–61.

In *De Lange v Smuts, NO and Others*[8], the Constitutional Court expressed the view that the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them. No outsider, be it the government, a civic society organisation, individual, or even another judge should interfere in fact, or attempt to interfere with the way a judge conducts his or her case and makes his or her decision. The notion of judicial independence continues to rest on this foundation.

This paper aims to address the following: (i) the structure of the judiciary and the OCJ's role within it, (ii) the institutional independence of the OCJ and its governance (budget, administration, and security), and (iii) the role of the OCJ in the appointment of judges.

Both the current and the previous Chief Justice have spoken on the developing concept of judicial independence in South Africa.[9] A key question is whether this growth is only a matter of form, or if it is also a matter of constructing the judiciary to meet the constitutional need of 'in substance' independence.[10]

(a) Defining relevant concepts and terminology

(i) Judicial independence

Judicial independence is generally regarded as a fundamental value of the rule of law.[11] The concept refers to the separation of the judiciary from other arms of government. That is, judges should neither be improperly influenced by other branches of government nor by private or party interests. The concept of separation of powers relies heavily on judicial independence, which states that governmental power should be divided among the executive, legislature, and judiciary as a check on abuse, and that each power's sphere should be respected by the others.[12] Lord Bingham made the observation "with not unwonted wit and brevity' that 'it is a truth universally acknowledged that the constitution of a modern democracy governed by the rule of law must effectively guarantee Judicial Independence."[13] Former US Solicitor General Archibald Cox (the first special prosecutor in the Watergate case) offered three arguments for judicial independence: 'First, to prevent executive power abuse; second, to prevent legislative

[8] *De Lange* supra note 6.
[9] *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (8) BCLR 810 (CC) (*Van Rooyen*) para 34.
[10] Albertyn, op cite note 2 at 7.
[11] R De Lange and P A M Mevis, 'Constitutional Guarantees for the Independence of the Judiciary' available at *https://biblioteca.cejamericas.org/bitstream/handle/2015/4318/Constitutional-Guarantees-For-Independence-of-Judiciary-Netherlands.pdf?sequence=1&isAllowed=y*, accessed 22 September 2022.
[12] E Cameron, 'Judge of the Constitutional Court of South Africa. "Middle temple and SA conference: Judicial Independence' available at *https://silo.tips/download/judicial-independence*, accessed 08 September 2022.
[13] Thomas Bingham *Business of Judging: Selected Essays and Speeches* (2000) 55.

erosion of fundamental human rights; and third, to assure the public that courts are impartial and fair in their decision-making processes.'[14]

In *De Lange v Smuts NO and Others*[15], in the course of considering section 165 of the Constitution, the court held that judicial independence is "foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law." In the recent Court judgment of *Hlophe v Judicial Service Commission and Others*[16] the court held that "when we read section 178 within the broader scheme of the Constitution, there is a series of interlocking provisions designed to protect judicial independence and to protect the Judiciary from internal and external threats. The JSC was established, and its composition determined, by section 178, with the aim of regulating judicial affairs and ensuring the integrity of the Judiciary." Pertaining to Judicial Independence, the court made the following observations:

> 'A judge must be independent of other judges. The task of judging implies a measure of autonomy which involves the judge's conscience alone. Therefore, judicial independence requires not only the independence of the judiciary as an institution from the other branches of government; it also requires judges being independent from each other. In other words, judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence that might come from the actions or attitudes of other judges. Although a judge may sometimes find it helpful to "pick the brain" of a colleague on a hypothetical basis. judicial decision-making is the responsibility of the individual judge. Including each judge sitting in a collegiate appellate court.'[17]

The court further held that "a judge must have no regard for whether the laws to be applied, or the litigants before the court, are popular or unpopular with the public, the media, government officials, or the judge's own friends or family. A judge must not be swayed by partisan interests, public clamour, or fear of criticism. Judicial independence encompasses independence from all forms of outside influence."[18]

These comments reaffirm the significance of judges being free from all forms of interference. In the first place, it acknowledges that a case may sometimes be of such magnitude and interest to the general public that it requires an individual judge to apply his or her mind

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[14] Cameron, 'Judge of the Constitutional Court of South Africa. "Middle temple and SA conference: Judicial Independence' available at *https://silo.tips/download/judicial-independence*, accessed 08 September 2022.
[15] *De Lange* supra note 6 para 59.
[16] *Hlophe v Judicial Service Commission and Others* 2022 (3) All SA 87 (GJ).
[17] United Nations Office on Drugs and Crime 'Commentary on the Bangalore Principles of Judicial Conduct' available at https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf, accessed 05 September 2022.
[18] United Nations Office on Drugs and Crime 'Commentary on the Bangalore Principles of Judicial Conduct' available at https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf, accessed 05 September 2022.

and the relevant laws impartially without undue influence. Second, a judge is likewise required to stand firm and to promote the rule of law at all times, paying attention to the public uproars and critics.

In its application to the judiciary, the principle of judicial independence is very important. Courts and academics have explored this idea extensively.[19] It entails two things, according to most people: 'First, *institutional independence* – the judiciary must enjoy some organisational insulation, operating in a sphere separate from other branches of government; and second, *decisional independence* – individual judges must be able to make decisions based on facts and the law without being pressured or interfered with.'[20] These two aspects of judicial independence are concerned with the consequences of judicial work. They are of course also necessary if courts and judges are to function independently of outside influences.[21] However, this does not adequately capture what we normally mean. While institutional and decisional independence are required for judicial independence, these two principles do not adequately describe what it entails.[22] This is due to the fact that externalities do not account for factors that are internal to the judging process. These also commonly have an impact on judicial independence.[23] To be really independent, a judge must have more than just institutional and decisional autonomy. What is also required is intrinsic commitment to legal reasoning and legal values, as opposed to pursuing or acquiescing in politically driven outcomes, and a willingness to take a position.[24]

(ii) Institutional independence

The point of departure in this context is that judicial independence is essential for guaranteeing the core values of the rule of law, in the sense that courts may not receive binding instructions from other state organs regarding decisions in individual cases. Independence is, in this sense, primarily institutional independence.[25] In light of this, it is important to consider the aspects that ensure the independence of judges' legal positions such as the fact that their salaries are set

[19] Cameron, 'Judge of the Constitutional Court of South Africa. "Middle temple and SA conference: Judicial Independence' available at *https://silo.tips/download/judicial-independence*, accessed 08 September 2022.
[20] See Bingham op cit note 13 at 56.
[21] Cameron, 'Judge of the Constitutional Court of South Africa. "Middle temple and SA conference: Judicial Independence' available at *https://silo.tips/download/judicial-independence*, accessed 08 September 2022.
[22] Ibid.
[23] Ibid.
[24] Cameron, 'Judge of the Constitutional Court of South Africa. "Middle temple and SA conference: Judicial Independence' available at *https://silo.tips/download/judicial-independence*, accessed 08 September 2022.
[25] De Lange & Mevis, 'Constitutional Guarantees for the Independence of the Judiciary' available at *https://biblioteca.cejamericas.org/bitstream/handle/2015/4318/Constitutional-Guarantees-For-Independence-of-Judiciary-Netherlands.pdf?sequence=1&isAllowed=y*, accessed 22 September 2022.

by law and cannot be changed by the government unilaterally.[26] This is the most vital part in the institution in the sense that anyone who appears before this body can have the assurance that they can work freely without any disturbance from other branches of government. Judges must be able to decide matters freely, honestly and impartially by relying on the law of evidence and merits of a case without fear, favour or prejudice. This is obviously supported by sections 165(2) and 165(3) of the Constitution, which also deal with judicial authority and state that the courts are independent and only subject to the Constitution and the law, which they must apply impartially and without fear, favour, or prejudice; and that no person or state organ may interfere with the operation of the courts.[27]

Speaking on Institutional Independence, Chief Justice Mogoeng Mogoeng asserted that 'this ensured that the courts were 'not directly or indirectly controlled or seen to be controlled' by other arms of government'.[28] Chief Justice Mogoeng Mogoeng made the following observation in this regard: 'the transfer of court administration to the ministry has given rise to an unfortunate public perception that the Minister for Justice and Constitutional Development is the head of the judiciary,' and this 'underscores the critical importance of the debates that have been going on between the judiciary and the executive about judicial self-governance over the years'.[29]

(iii)Individual Independence

It is generally acknowledged that judicial independence is a key tenet of any democracy.[30] Individual independence the necessity that judicial officers behave independently and impartially while handling cases brought before them – is also considered a crucial component of judicial independence.[31] There are different conceptual definitions of judicial independence because the principle is broad and intricate, which makes definitions extremely difficult. The ability of a judge to apply his or her thinking to an issue impartially and independently without undue influence is the first degree of judicial independence, and this is the common thread that

[26] De Lange & Mevis, 'Constitutional Guarantees for the Independence of the Judiciary' available at *https://biblioteca.cejamericas.org/bitstream/handle/2015/4318/Constitutional-Guarantees-For-Independence-of-Judiciary-Netherlands.pdf?sequence=1&isAllowed=y*, accessed 22 September 2022.
[27] L Siyo and J C Mubangizi, 'The Independence of South African Judges: A Constitutional and Legislative Perspective' (2015) 18 *Potchefstroom Electronic Law Journal*, 3.
[28] Kevin O'Reilly, 'Chief Justice Mogoeng seeks judicial independence' available at *http://www.saflii.org/za/journals/DEREBUS/2013/92.pdf,* accessed 23 August 2022.
[29]O'Reilly, 'Chief Justice Mogoeng seeks judicial independence' available at *http://www.saflii.org/za/journals/DEREBUS/2013/92.pdf,* accessed 23 August 2022.
[30] A Cachalia, 'Administrative independence as a guarantee of judicial independence: Experiences from South Africa' (2011) *Advocate*, 22.
[31] Ibid.

connects all the definitions.[32] In addition, judicial independence can be viewed as personal independence; each judge must be free to render a decision in a particular case without interference from anybody else. Influence-peddling is prohibited in all judicial institutions, including those with more than one judge. In accordance with this interpretation of independence, court consultation regarding 'judicial policy' or particular points of reference for the judge would be prohibited.[33]

(iv) Separation of powers

The language and design of the Constitution serve as the foundation for the separation of powers.[34] The Constitution establishes distinct roles for the legislative, executive, and judicial branches.[35] In *Certification of the Constitution of the Republic of South Africa*[36], the court acknowledged the new core premise as 'a separation of powers between the Legislature, Executive and Judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness'.[37] The Court has emphasised the significance of the separation of powers in ensuring that the courts can carry out their constitutional task of safeguarding the lawful exercise of public power, warning that:

> 'The separation required by the Constitution between the Legislature and Executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution, will be undermined.'[38]

The significance of judicial independence is highlighted in Section 165 of the Constitution.[39] It gives the courts exclusive jurisdiction over all matters of justice. Organs of state are required to "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."[40] In *Justice Alliance of South Africa v President of Republic of South Africa and Others*[41], the Court affirmed that 'an essential part

[32] Cachalia, op cit note 30 at 3.
[33] Ibid at 7.
[34] *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* (*Justice Alliance of South Africa*) 2011 (10) BCLR 1017 (CC).
[35] Ibid.
[36] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa (First Certification)* 1996 (10) BCLR 1253 (CC) para 45.
[37] *First Certification* supra note 36.
[38] Ibid.
[39] *Justice Alliance of South Africa* supra note 34 para 34.
[40] Ibid.
[41] Ibid.

of the separation of powers is that there be an independent judiciary'.[42] International law emphasises the importance of the rule of law, the separation of powers, and judicial independence as essential cornerstones of our constitutional democracy.[43] Legal scholars treat the South African judiciary as a branch of the government within the context of the doctrine of separation of powers, which they view as a core feature of the Constitution. The classification of the courts as one of the three branches of government flows from many court judgments where judges alluded to a constitutional arrangement in which the branches of government exercise equal but distinct powers.[44] Klug contends that 'Dikgang Moseneke jurisprudence' depicts a genuine commitment to people and especially institutional integrity. This commitment is largely focused on his concept of separation of powers, which provides a framework and a plan of action for the problems with the Constitutional Court's interpretation of the concept.[45] The Constitutional Court judgments of Justice Moseneke show an ongoing, though not always explicit, concern with the separation of powers as a method of safeguarding the institutional integrity necessary for the execution of the constitutional order promised by South Africa's democratic transition.[46]

The two characteristics traditionally associated with institutional integrity are the lack of corruption and the necessity to protect against it and the requirement that an 'institution' be free from undue outside intrusion.[47] This is crucial for upholding the idea of checks and balances in a constitutional democracy. Justice Kate O'Regan spoke at the FW de Klerk Memorial Lecture in Potchefstroom in October 2005. She used the occasion to address the separation of powers concept, concluding that 'a variety of principles could be identified and "while clearly not absolute, the doctrine . . . rests on a functional understanding of the powers and requires that each institution's character and competence to perform these powers be protected.' She noted that when implementing the theory, the courts "must remain alert to the legitimate constitutional interests of the other arms of government and endeavour to ensure that the manner of their intrusion, while protecting fundamental rights, intrudes in a way that is consistent with those interests."[48] Chaskalson CJ believes that:

[42] *Justice Alliance of South Africa* supra note 34.
[43] Ibid at para 40.
[44] Felix Dube, 'Separation of powers and the institutional supremacy of the Constitutional Court over Parliament and the executive' (2020) 36 *South African Journal on Human Rights*, 1.
[45] Heinz Klug, 'Institutional integrity and the promise of constitutionalism: Justice Moseneke and the Separation of powers' (2017) 1 *Acta Juridica*, 1.
[46] Ibid.
[47] Ibid.
[48] Ibid at 5.

> In a constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, substantial power has been given to the judiciary to uphold the Constitution. In exercising such powers, obedience to the doctrine of the separation of powers requires that the judiciary, in its comments about the other arms of the state, show respect and courtesy, in the same way that these other arms are obliged to show respect for and courtesy to the judiciary and one another. They should avoid gratuitous reflections on the integrity of one another. Regrettably the High Court in its judgment did not consistently fulfil this obligation.

In one of his opinion, Moseneke DP asserts that we have inducted a representative democracy premised on proportional representation and a closed party list. We have established and maintained a functional democratic state with all the customary markers, including multi-partism, regular elections, and rule of law and separation of powers.[49]

It is arguable that a strong and supreme constitution can strengthen and stabilise the government. In the eyes of the populace, institutional structures like the separation of powers, checks and balances, and individual civil, political, and justiciable socioeconomic rights make the government more accountable, consistent, predictable, just, caring, responsive, and legitimate.[50] In *Steenkamp NO v Provincial Tender Board, Eastern Cape,*[51] Justice Moseneke argued that 'administrative justice has become a constitutional imperative since the advent of our constitutional dispensation [and serves as] an incident of the separation of powers through which courts review and regulate the exercise of public power'.

However, Justice Moseneke was anxious that the state organs which were to be held accountable should also be treated with the respect due their constitutional standing. He urged that the Bill of Rights provides a "right to lawful administrative action" to "everyone.' He submits that, "everyone" had a "right to lawful administrative action" under the Bill of Rights Justice Moseneke was concerned that the accountable state organs should be regarded with the deference that came with their constitutional stature.[52] In the case of *Van der Merwe v Road Accident Fund*[53], Justice Moseneke remarked that in the 'proceedings before the High Court, the relevant government Minister was "[f]or some obscure reason" not a party before the court. He then added that the Constitutional Court frequently emphasises that as a matter of fairness in litigation, 'where the constitutional validity of an act of parliament is challenged, the Minister responsible for its administration must be a party to the suit'.[54] Justice Moseneke

[49] Dikgang Moseneke, 'Was it all in vain?' (2018) 69 *New Agenda: South African Journal of Social and Economic Policy*, 1.
[50] Dikgang Moseneke, 'Striking the balance between the will of the people and the supremacy of the Constitution' (2012) 129 *South African law Journal*, 33.
[51] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) BCLR 300 (CC).
[52] Klug, op cit note 45 at 7.
[53] *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC).
[54] Ibid.

briefly analysed this context of the separation of powers, and argued that, ordinarily courts should not pronounce on the validity of impugned legislation without the benefit of hearing the state organ concerned on the purpose pursued by the legislation, its legitimacy, the factual context, the impact of its application, and the justification, if any, for limiting an entrenched right.[55] In *First Certification*,[56] the court held that:

> The requirement of CP VI that there be a separation of powers between the legislature, executive and judiciary is dealt with elsewhere in this judgment. An essential part of the separation of powers is that there be an independent judiciary. The mere fact, however, that the executive makes or participates in the appointment of judges is not inconsistent with the doctrine of separation of powers or with the judicial independence required by CP VII. In many countries in which there is an independent judiciary and a separation of powers, judicial appointments are made either by the executive or by Parliament or by both. What is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive. NT 165 is directed to this end. It vests the judicial authority in the courts and protects the courts against any interference with that authority. Constitutionally, therefore, all judges are independent.[57]

The Constitutional Court held that South Africa adopted its model of separation of powers in direct response to the abuses of power occasioned by the system of parliamentary sovereignty under colonial and apartheid rule. The doctrine found its way into South Africa when Constitutional Principle VI of the Interim Constitution required the drafters of the Constitution to incorporate 'separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'.[58] However, the text of the current Constitution does not mention separation of powers at all, although, during the constitutional certification process, the Constitutional Court was satisfied that the Constitution complies with all the requirements for a separation of powers and that the drafters incorporated it into the text.[59] The Constitutional Court further stated that it is obvious that the notion of separation of powers is a key component of the constitutional framework.[60] Felix Dube[61] states that in the case of *De Lange v. Smuts*, the CC made the following ruling:

> The Constitutional Court first hinted how it intended to mould the doctrine of separation of powers. The Constitutional Court said that it would reflect on South Africa's history in developing a model of separation of powers to ensure that under the current constitutional dispensation, government power is restrained and not abused. This declaration effectively means that the determination of the boundaries of state authority is a matter of final determination by

[55] *Van der Merwe* para 7.
[56] *First Certification* supra note 36.
[57] *First Certification* supra note 36 para 123.
[58] Ibid para 45.
[59] Dube, op cit note 44 at 5.
[60] Ibid.
[61] Ibid

the Constitutional Court and that the Court will develop the doctrine on its terms, guided by the supremacy of the Constitution.

The court acknowledged in *De Lange*[62] the necessity to limit government power and make sure that it is not diluted to the point where it prevents the government from acting swiftly in the public's interest.[63] Dube emphasised the checks and balances and iterated that the proper implementation of separation of powers must be decided by the courts in general and the Constitutional Court in particular, on a case-by-case basis. Furthermore, the courts must deduce from the Constitution's language how checks and balances should be applied. Checks and balances prevent government branches from 'usurping power from one another' and also prevent government institutions and personnel from going beyond constitutional bounds, in contrast to the doctrine of separation of powers, which recognises the functional division and independence of the institutions responsible for law-making, namely the judiciary and the executive branch.[64] As De Vos puts it:

> 'the Constitution sets up three branches of government (the legislature, the executive and the judiciary) and a system of separation of powers between the three branches. It also guarantees the independence of the judicial branch in relation to the other two branches to allow the judiciary to interpret and enforce the law and the provisions of the Constitution without fear, favour or prejudice.'[65]

This authority allows the courts to declare any act or statute deemed to be in violation of the constitution unconstitutional, which serves as a crucial check on both the legislative branch and the executive branch.[66] In *Marbury v Madison*[67], the notion that the courts have the authority to assess and invalidate legislation that violates the Constitution, was established by the then-US Chief Justice Marshall. De Vos further asserts that "as a safeguard for the independence of the courts, the Constitution creates a prohibition against interfering with the functioning of the courts that applies to everyone, including other branches and organs of state. In addition to this, the Constitution places a positive duty on organs of state to take measures to assist and protect the courts in ensuring their independence, impartiality, dignity, accessibility and effectiveness."[68] The institutional independence of the courts is a crucial aspect of independence that these constitutional measures strive to safeguard.[69] It is therefore

[62] *De Lange* supra note 6.
[63] *De Lange* supra note 6 para 60.
[64] Dube, op cit note 44 at 6.
[65] Pierre De Vos *South African Constitutional law in context* (2014) 54.
[66] Ibid 92.
[67] *Marbury v. Madison,* 5 U.S. 1 Cranch 137 (1803).
[68] De Vos, op cit note 65 at 124.
[69] Ibid.

crucial for the courts to ensure that the judiciary, as the last arm of the state, is protected at all material times. In *South African Association of Personal Injury Lawyers v Heath and Others*[70], the court held that :

> '[t]he separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the courts under the Constitution ... Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.'[71]

The personal freedom of judges is a crucial component of judicial independence. If they are to carry out their duties impartially and without fear, favour or prejudice, this is of utmost importance.[72] The Constitution guarantees this independence by stating that judges enjoy security of tenure and that their pay and benefits may not be lowered while they are in office.[73]

II STRUCTURE OF THE JUDICIARY AND THE OCJ ROLE WITHIN IT

(a) Structure of the judiciary

The new constitutional dispensation facilitated the reform of and brought structural changes to the judicial system. Some of the changes included the hierarchical restructuring of the courts. Section 166 of the Constitution establishes the following courts in order of their hierarchy or status, in the Republic:

(a) the Constitutional Court

(b) the Supreme Court of Appeal

(c) the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa

(d) the Magistrates' Courts, and

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[70] *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) BCLR 77 (CC) para 25.
[71] Ibid.
[72] De Vos, op cit note 65 at 126.
[73] Section 176 of the Constitution provides:
'(1) A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.
(2) Other judges hold office until they are discharged from active service in terms of an Act of Parliament.
(3) The salaries, allowances and benefits of judges may not be reduced.'

(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.

Notably, the Constitution established the Constitutional Court with a status ranking above all other courts in the Republic. Being the highest court of the land it has been invested with the autonomy to adjudicate over all constitutional matters and any other matter if it raises an arguable point of law of general public importance – including the power to declare any law or conduct inconsistent with the Constitution invalid and void. In addition to this, the Constitutional Court has the final decision in the constitutionality of an Act of Parliament, a provincial Act or conduct of the President, and the power to confirm any order of invalidity made by superior courts, that is the Supreme Court of Appeal and the High Court. Without this confirmation any order will have no force. In *Von Abo v President of the Republic of South Africa*[74], Moseneke DCJ made the following assertion:

> This Court is the highest court on all constitutional matters and is clothed with both exclusive and concurrent jurisdiction. It enjoys exclusive jurisdiction in regard to specified constitutional matters and makes the final decision on other constitutional issues that are also within the jurisdiction of other superior courts and in particular, the Supreme Court of Appeal and the High Court. The exclusive and supervisory jurisdiction of this Court may be properly gathered by three constitutional provisions. They are sections 172(2)(a) and 167(5) of the Constitution, which regulate concurrent jurisdiction with the High Court and the Supreme Court of Appeal, and section 167(4) which carves out jurisdictional exclusivity for this Court.[75]

This implies that the Constitutional Court retains supervisory power in all constitutional matters and that it will not merely confirm an order declaring a law or conduct of the President constitutionally invalid, but that it will have to be consistent and with the constitution before it may confirm such an order. The Supreme Court of Appeal (SCA) retained the position previously held by the Appellate Division and is regarded as the second highest court.[76] Unlike the Constitutional Court and other courts of a status similar to the High Court, the SCA sits only as a court of appeal and thus may never be a court of first or last instance. The SCA may decide appeals in any matters – including issues connected with appeals, except certain competition and labour matters.[77] Legal disputes in these areas are appealed to specialist courts

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[74] *Von Abo v President of the Republic of South Africa* (Von Abo) 2009 (5) SA 345 (CC).
[75] Ibid para 27.
[76] Supreme Court of Appeal 'history' available at *https://www.supremecourtofappeal.org.za/index.php/history#:~:text=Jurisdiction%20of%20the%20court&text=Originally%20the%20head%20of%20the,the%20President%20of%20the%20SCA*, accessed 14 November 2022.
[77] Supreme Court of Appeal 'history' available at *https://www.supremecourtofappeal.org.za/index.php/history#:~:text=Jurisdiction%20of%20the%20court&text=Originally%20the%20head%20of%20the,the%20President%20of%20the%20SCA*, accessed 14 November 2022.

dealing with labour and competition matters. This is expanded on in the discussion about the High Courts of South Africa (HC) and later on the Magistrate courts. As already pointed out, the SCA may make an order concerning the constitutional validity of an Act of Parliament, a provincial law or conduct of the President, however, such an order will remain of no effect or force until confirmed by the Constitutional Court.[78]

Until 2001, the Chief Justice was the head of the SCA before becoming the head of the Constitutional Court. The SCA is now headed by its President and his or her Deputy President and consists of about twenty other judges of appeal. The creation of a new Constitutional Court is a very important structural improvement. It was decided that a new court should be established to defend the Constitution and the fundamental human rights it upholds; one that is more representative of South Africa's diverse people.[79] Moreover, the other major role played by the CC was the *Certification of the Constitution*.[80] The approval of the 1996 Constitution's final version was significantly influenced by the Court. The Interim Constitution's 34 agreed-upon fundamental principles had to be met in order for the new text approved by the Constitutional Assembly to be certified by the Constitutional Court as compliant. Although the Court certified a modified text, it rejected a small number of the original Constitution's provisions.[81] It is important to note that the CC is the "upper guardian" of the Constitution, and while it typically acts as an appellate court in extraordinary circumstances direct access to the court is permitted, allowing litigants to avoid the lower courts when a crucial constitutional matter is at issue.[82] The Chief Justice (CJ), who also serves as the institutional head of the judiciary, presides over the Constitutional Court. In this regard, as De Vos asserts, the formulation and oversight of norms and standards for the performance of the judicial responsibility by all courts fall under the purview of the Chief Justice.[83]

The Democratic Governance and Rights Unit and Judges Matter discussion document *Report on governance of the judiciary in South Africa*, asserts that:

> It will be apparent from the three phases set out above that the initial establishment of the OCJ was not intended to establish judicial-based court administration. Ebrahim cautions that while the establishment of the OCJ may be a step in that direction, it may be a "distraction" from the project

[78] De Vos, op cit note 65 at 359.
[79] Constitutional Court of South Africa 'History of the court' available at *https://www.concourt.org.za/index.php/about-us/history*, accessed 14 November 2022.
[80] *First Certification* supra note 36.
[81] Constitutional Court of South Africa 'History of the court' available at *https://www.concourt.org.za/index.php/about-us/history*, accessed 14 November 2022.
[82] Aneesa Bodiat 'At South Africa's Constitutional Court, a Democracy Brick by Brick' available at *https://daily.jstor.org/at-south-africas-constitutional-court-a-democracy-brick-by-brick/*, accessed 13 November 2022.
[83] De Vos, op cit note 65 at 361.

> of establishing a judiciary-based system of court administration. Ebrahim argues further that the Superior Courts Act does not make provision for a judiciary-based model of court administration, and "puts court administration firmly under executive control", since the appointment of court staff is made in terms of laws governing the public service, and appointees are thus "employees of the public service." Ebrahim thus contends that the creation of the OCJ "does not obviate the need for the establishment of a court administration system ... that is based in the judiciary itself.[84]

Section 169 of the Constitution establishes the HCs of South Africa with fourteen divisions across the nine Provinces.[85] Mpumalanga was the only Province without a high court for almost three decades; its first high court was only opened in 2019. The HC has been endowed with the power to hear any constitutional matter subject to certain qualifications.

The specialised courts function as follows:

- The Circuit Courts has jurisdiction over civil and criminal matters and serves people in rural areas. It is presided over by a judge of a division of the HC, whilst the judge president of any such division determines the times and place for the sitting of the court.[86] This court normally sits at least twice a year.

- The Tax Courts hears appeal matters related to tax and was established in terms of section 83(3) of the Income Tax Act. It is presided over by a judge or an acting judge of the HC and such presiding officer must be a president of the tax court.

- The Labour Court and Labour Appeal Court have been established in terms of the Labour Relations Act[87] (LRA) and enjoy similar status as the HC. While the LC is empowered by the LRA to adjudicate matters relating to labour disputes between an employer and employee, the LAC has the power to hear appeals against decisions made by the LC and is the highest court for labour appeals.[88]

- According to section 22 of the Restitution of Land Rights Act, the Land Claim Court was established to handle cases involving the legislation that support South Africa's land reform agenda. De Vos claims that the history of apartheid, which left many South Africans penniless when the apartheid government forcibly removed them from their

[84] Judges Matter 'Discussion document on the governance of the judiciary in South Africa' available at https://www.judgesmatter.co.za/wp-content/uploads/2022/08/Governance_Discussion_Document-FINAL.pdf, accessed 08 September 2022.
[85] South African Judiciary 'The South African judicial system' available at https://www.judiciary.org.za/index.php/the-south-african-judicial-system, accessed 14 November 2022.
[86] Ibid.
[87] Ibid.
[88] South African Judiciary 'The South African judicial system' available at *https://www.judiciary.org.za/index.php/the-south-african-judicial-system*, accessed 14 November 2022.

land, is what gave rise to the project.[89] Like the LC and LAC, the LCC has the same status as the HC. Since it does not have its own appeal court, any appeal dispute arising from a decision of the LCC lies with the SCA and sometimes, if necessary, the CC. Although its main office is in Randburg (Gauteng), it can hold hearings anywhere in the country to facilitate and enhance accessibility.

Other specialist courts include the Competition Appeal Courts (CAC). The CAC has been created in terms of section 36 of the Competition Act[90]. It also forms part of the HC and has jurisdiction over appeals against decisions of the Competition Tribunal.[91] The CAC is presided over by a judge of the HC appointed by the President of the country.

Sections 174 and 175 of the Constitution set forth the rules for the appointment of judges and acting judges.[92] The President as head of the national executive has the authority in terms of section 174(3) of the Constitution, to appoint the Chief Justice and Deputy Chief Justice after consultation with the JSC and leaders of political parties represented in the National Assembly (NA). Thereafter, the President appoints the President and Deputy President of the SCA, and these appointments take place only after consultations with the JSC. In accordance with this and all other laws, the Deputy Chief Justice (DCJ), who acts as the second-in-command, is required to "exercise such powers or perform such functions of the Chief Justice as the Chief Justice may assign to him or her; and, in the absence of the Chief Justice (CJ) or if the office of Chief Justice is vacant, exercise the powers or perform the functions of the Chief Justice, as Acting Chief Justice."[93]

(b) OCJ

The Chief Justice's position as head of the judiciary and the Constitutional Court has significantly expanded over the years, as have the associated responsibilities. However, the Chief Justice has not had access to a support system that could offer the capacity and personnel needed for this job. As a result, successive Chief Justices have had to focus their attention away from their primary judicial duties and toward the necessity to complete other administrative

[89] De Vos, op cit note 65 at 363.
[90] South African Judiciary 'The South African judicial system' available at *https://www.judiciary.org.za/index.php/the-south-african-judicial-system*, accessed 14 November 2022. See also Department of Justice and Constitutional Development 'courts of South Africa' available at *https://www.justice.gov.za/about/sa-courts.html*, accessed 14 November 2022.
[91] Competition Tribunal South Africa 'Competition Appeal Court' available at *https://www.comptrib.co.za/competition-appeal-court*, accessed 14 November 2022.
[92] *Justice Alliance of South Africa* supra note 34 para 21.
[93] See section 167(1) of the Constitution read with section 4(2) of the Superior Courts Act 10 of 2013.

responsibilities, and they have mostly relied on support from the executive to make this possible.[94] Important questions about the independence of the judiciary were raised as a result, and the Chief Justices who were affected requested that their office be capacitated to make it easier to carry out their duties and functions. The judiciary also showed difficulties with regard to the apartheid-era court administration structure. The executive controlled and heavily centralised this system.[95]

The construction of a court administration system that complies with the Constitution and the developing system of judicial independence is envisaged by it, has been the subject of ongoing negotiations between the judiciary and the executive.[96] As a result, a two-body structure of judicial governance was advocated by Sandile Ngcobo, a former Chief Justice. He indicated in a 2009 memo to the heads of court that the reform of South Africa's judicial governance structure should aim at enhancing administrative and financial efficacy and accountability as well as ensuring the content and appearance of independence,.[97] Ngcobo emphasised that a more responsive, effective, and efficient court administration system that expands the capacity of the courts and enhances access to justice should be the result of the reform.[98] The memorandum recommended the centralisation of responsibilities to oversee the court system in two interconnected entities, namely the Judicial Council and the independent Administrative Office, as specified in the policy framework.[99] Ebrahim asserts that the Chief Justice made similar proposals in a position paper dated 4 March 2010 attached to the memorandum.[100]

In the end, Chief Justice Ngcobo and the Minister of Justice and Constitutional Development came to an understanding regarding how to handle these issues, which prompted the Minister to write to the Minister for Public Service and Administration about the establishment of permanent capacity for the Chief Justice to carry out his or her functions as Head of the Judiciary and Head of the Constitutional Court and to create a judiciary.[101] As

[94] South African Judiciary 'The establishment of the office of the Chief Justice 2010 -2013' available at *https://www.judiciary.org.za/images/establishment/Establishment-of-the-OCJ-2010-2013.pdf*, accessed 09 November 2022.
[95] Ibid.
[96] Ibid.
[97] Hassen Ebrahim, 'Governance and administration of the judicial system' in Cora Hoexter and Morné Olivier The Judiciary in South Africa (2014) 107.
[98] Ibid.
[99] Ebrahim, op cit note 97.
[100] Ibid.
[101] South African Judiciary 'The establishment of the office of the Chief Justice 2010 -2013' available at *https://www.judiciary.org.za/images/establishment/Establishment-of-the-OCJ-2010-2013.pdf*, accessed 09 November 2022.

Ebrahim puts it, depending on one's perspective, the establishment of the office of the Chief Justice (OCJ) can either be seen as either the first step in a staged process that will ultimately result in a judiciary-based system of court administration or as a diversion from that objective. In either case, the new position will probably have a big impact on the evolving judicial landscape. Its main goal is to support the Chief Justice in carrying out the numerous duties and powers that come with being the leader of the Constitutional Court and the judiciary.[102]

The primary reason for the establishment of the OCJ was to increase the Chief Justice's capacity to carry out the wide range of duties imposed by the Constitution and other laws with regard to his twin responsibilities as head of the judiciary and head of the Constitutional Court. However, the strategy used by the administration does not appear to have been based on an already-existing policy, and in reality, the strategy guiding the establishment and operation of the organisation is still in a draft state and has not yet been made public.[103] The OCJ was created as a temporary solution to serve as a platform for the implementation of judicial reforms that will enhance service delivery and address the administrative issues that have plagued the judiciary for a long time. These issues can negatively affect the execution of justice if they are not resolved. The Chief Justice lacked the necessary capacity to carry out his duties effectively without the assistance of the executive prior to the declaration of the OCJ as a national department. This system had the potential to erode the separation of powers theory and judicial independence. In order to improve administration and ensure the independence of the judiciary, the executive therefore started a process to implement the reforms foreseen by the Constitution.[104]

The OCJ was founded as a national government department in August 2010 in accordance with Public Service 103 of 1994. It was a measure put in place to enhance the judiciary's independence. However, as further progress seems to have stagnated in the decade that followed these initial ground-breaking reforms, debate and confusion concerning the governance of the courts continues.[105] With effect from December 1, 2010, an Interim Strategic Management Team (ISMT) was formed to enable the establishment of the new department in order to carry out the decision to establish OCJ. Judge Yvonne Mokgoro was chosen to serve

[102] Ebrahim, op cit note 97 at 111.
[103] Ibid at 112.
[104] South African Judiciary 'The establishment of the office of the Chief Justice 2010 -2013' available at *https://www.judiciary.org.za/images/establishment/Establishment-of-the-OCJ-2010-2013.pdf*, accessed 09 November 2022.
[105] Judges Matter 'Discussion document on the governance of the judiciary in South Africa' available at https://www.judgesmatter.co.za/wp-content/uploads/2022/08/Governance_Discussion_Document-FINAL.pdf, accessed 08 September 2022 at 2.

as the OCJ's administrative judge and to preside over the ISMT.[106] The OCJ's creation significantly contributes to the spirit of the Constitution, which grants the courts the judicial authority to administer justice. As a result, to ensure that the rule of law is respected, the Chief Justice's function as Head of the Judicial Branch needs to be strengthened. The Department of Justice and Constitutional Development is handing over some of its court administration duties to the OCJ. A draft document has also been provided to the Minister of Justice and Constitutional Development, who is working on developing a court administration model that is compliant with the Constitution. The degree to which the judiciary will be in charge of its operations is a crucial component of this approach.[107] A draft paper has been provided to the Minister of Justice and Constitutional Development, and a court administration model that complies with the Constitution is currently being developed.[108]

Ebrahim notes that the importance of the issue of the best configuration for judicial governance and administration is largely supported by judicial independence. The Constitution's section 165(2) states that the courts are autonomous and exclusively accountable to the law and the Constitution. In addition to institutional independence, which states that the judiciary should be free from control by any other person or institution in carrying out its daily operations, judicial independence also includes personal independence (covering topics like conditions of service and security of tenure), substantive independence (ensuring individual judges are free from influence by any other person or institution when performing judicial functions), and independence in the administration of justice. Administrative and financial freedom are included in this element.[109] As per the previous statement, Ebrahim argued that the judiciary 'cannot be said to be a genuinely independent and autonomous branch of government if it is "substantially dependent on the executive branch not only for its funding but also for many features of its day-to-day functions and operations'.[110]

The ways in which courts are administered vary widely. In the executive-based approach (used in the UK), the executive has the final responsibility for court administration. The administration of the courts is handled by a distinct dedicated state department under a separate department model (as used in Canada), and the judiciary has no control over it. In the

[106] South African Judiciary 'The establishment of the office of the Chief Justice 2010 -2013' available at *https://www.judiciary.org.za/images/establishment/Establishment-of-the-OCJ-2010-2013.pdf*, accessed 09 November 2022.
[107] Ibid.
[108] Ibid.
[109] Ebrahim, op cit note 97 at 102 – 103.
[110] Judges Matter 'Discussion document on the governance of the judiciary in South Africa' available at *https://www.judgesmatter.co.za/wp-content/uploads/2022/08/Governance_Discussion_Document-FINAL.pdf*, accessed 08 September 2022, at 2.

constructivist-based judiciary , the execution of justice is either directly or through autonomous institutions regulated by the courts.[111]. According to some, a judiciary-based system is the most suitable for South Africa because aspects of court administration, such as managing case flow, maintaining records and statistics, and managing information, are 'so closely related to judicial decision-making that they can only be conducted by the judiciary itself'.[112]

It is important to note that three phases made up the original process that the judiciary and government agreed upon:[113]

Phase 1: The establishment of the OCJ as a national department located within the public service to support the Chief Justice as the head of the Judiciary and the head of the Constitutional Court

Phase 2: the establishment of the OCJ as an independent entity

Phase 3: the establishment of a structure to provide for judicially-led court administration.[114]

The OCJ was intended to serve as the "core structure" of phases 1 and 2 and to provide "finance, administrative support, human relations, corporate services, communications, information technology and research assistance, and other required support functions."[115] A complete handover of the OCJ to the Chief Justice was deemed to be both excessively onerous and incompatible with the accountability principle. In order to help the Chief Justice manage the OCJ, "a more representative governance body" was therefore considered. A judicial council with supervisory responsibilities for an independent court administration was a common strategy for achieving this balance between independence and responsibility. This strategy was chosen as an example of global best practice.[116] According to Ebrahim, 'judicial-based court administration' calls for 'the establishment of one or more agencies, independent of the executive but under the jurisdiction of the judiciary, which would assume responsibility for court administration'.[117] In his subsequent argument, he claims that such a system necessitates

[111] Judges Matter 'Discussion document on the governance of the judiciary in South Africa' available at *https://www.judgesmatter.co.za/wp-content/uploads/2022/08/Governance_Discussion_Document-FINAL.pdf*, accessed 08 September 2022, at 3.
[112] Ibid.
[113] South African Judiciary 'The establishment of the office of the Chief Justice 2010 -2013' available at *https://www.judiciary.org.za/images/establishment/Establishment-of-the-OCJ-2010-2013.pdf*, accessed 09 November 2022.
[114] Ibid.
[115] Committee on Institutional Models, *Capacitating the Office of the Chief Justice: and Laying Foundations for Judicial Independence: "The next Frontier in our Constitutional Democracy: Judicial Independence"*, p. 16.
[116] Judges Matter 'Discussion document on the governance of the judiciary in South Africa' available at https://www.judgesmatter.co.za/wp-content/uploads/2022/08/Governance_Discussion_Document-FINAL.pdf, accessed 08 September 2022, at 3.
[117] Ibid.

'the establishment of administrative ability within the judicial branch to assume the responsibility that is currently held in the executive'.[118]

The OCJ has not yet produced an approved strategy plan. However, the 2011 initial draft is informative in this sense. Specifically, it mentions the following strategic goals:[119]

- The establishment of structures to assist the Chief Justice in the performance of functions and leadership roles as head of the judiciary and head of Constitutional Court.
- To put in place the necessary administrative support for the OCJ, including human resource provision, financial management, information system management, communication and relationship management, legal services and relevant auxiliary services.
- To provide a protocol structure that support the Chief Justice in the performance of his duties as head of the judiciary.
- To establish the range of functions necessary to underpin court services and to investigate methods whereby these functions can be transferred in an orderly manner.
- To identify and address existing blockages within court services which could make short – term improvements in the operation of the courts.
- To support the functioning of the JSC and the Constitutional Court and to support the Chief Justice when interacting with superior and lower courts and the organised professions.
- To render regulatory services.'

Ebrahim contends that the OCJ's location is far from ideal at the moment. As stated in the *Discussion Document on the Transformation of the Judicial System,* the establishment of the OCJ under the Public Service Act and its placement within the public sector appear irreconcilable with the judiciary's independence.[120] However, the text states that by giving the OCJ access to resources and qualified employees, the goal is to make it easier for the judiciary to participate in the current reform. In this sense, it appears that the title of Secretary-General was chosen for the new department's leader specifically to dispel the notion that it is an agency under the supervision of the executive.[121]

The OCJ is headed by the Secretary General, who is in charge of numerous support business divisions, according to the 2010–2013 Office of the Chief Justice Report. Budgetary

[118] Judges Matter 'Discussion document on the governance of the judiciary in South Africa' available at https://www.judgesmatter.co.za/wp-content/uploads/2022/08/Governance_Discussion_Document-FINAL.pdf, accessed 08 September 2022.
[119] Ebrahim, op cit note 97 at 112.
[120] Ebrahim, op cit note 97 at 113.
[121] Ibid.

resources are held by the Department of Justice and Constitutional Development under the existing temporary arrangements. However, the OCJ is working to have an independent Budget Vote.[122] A framework for the implementation of initiatives aimed at improving the efficient operation of the courts is provided by the formation of the Office of the Chief Justice. As the Head of the Judiciary, the Chief Justice is in charge of creating case management rules, standards, and guidelines as well as keeping an eye on and assessing the performance of the courts.[123] Section 174 of the Constitution sets forth the rules for the appointment of judges to the Court.[124] As mentioned earlier, the Chief Justice of South Africa is the country's most senior judge, presiding over the Constitutional Court, the country's apex court.[125] In addition to his or her judicial duties, the Chief Justice has a role in the administration of justice, represents the judiciary on national and international levels, which comprises a variety of coordinating and administrative functions, and performs a variety of constitutional duties as well as statutory obligations and functions.[126] As a result of a recent constitutional revision, the Chief Justice has just transitioned from being the de facto head of the judiciary to the de jure head.[127] The South African Judicial Education Institute, the Heads of Courts Forum, and the Judicial Service Commission are all under the Chief Justice's leadership in his official capacity.[128] He also presides as the de facto head of the Office of the Chief Justice.[129]

The Chief Justice of the apex court exercises significant influence on national politics and public policy. Despite this, little attention has been paid to the position's unique administrative dimensions, which allow the chief to exercise his power strategically in this regard.[130] The role of a Chief Justice as contemplated under section 165(6) reads: 'The Chief Justice is the head of the judicial authority and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial function of all courts,

[122] South African Judiciary 'The establishment of the office of the Chief Justice 2010 -2013' available at *https://www.judiciary.org.za/images/establishment/Establishment-of-the-OCJ-2010-2013.pdf*, accessed 09 November 2022.
[123] Ibid at 5
[124] *Justice Alliance of South Africa* supra note 34 para 21.
[125] South African Judiciary 'The establishment of the office of the Chief Justice 2010 -2013' available at *https://www.judiciary.org.za/images/establishment/Establishment-of-the-OCJ-2010-2013.pdf*, accessed 09 November 2022.
[126] South African Judiciary 'The establishment of the office of the Chief Justice 2010 -2013' available at *https://www.judiciary.org.za/images/establishment/Establishment-of-the-OCJ-2010-2013.pdf*, accessed 09 November 2022, at 8.
[127] Ebrahim, op cit note 97 at 111.
[128] Ibid.
[129] Ibid.
[130] Sarah Staszak, 'The Administrative Role of the Chief Justice: Law, Politics, and Procedure in the Roberts Court Era' (2018) 7 *Laws*, 17.

other than the adjudication of any matter before a court of law'.[131] In practice, the Chief Justice of South Africa is already recognised as the judiciary's head, and the judiciary has an evolving, if informal, model of collective leadership in which the heads of courts meet on important issues.[132] Although the judiciary has expressed concerns about concentrating too much power in the Chief Justice, the constitutional recognition of the Chief Justice's leadership role does not preclude collective leadership, nor is it an issue that necessarily impedes the judiciary's independence.[133]

The Chief Justice's role in the supreme court has typically received the majority of focus when discussing his influence on jurisprudence.[134] According to Powell*:*

> The OCJ presents its own vision as a "[a] single, transformed and independent Judicial system that guarantees access to justice for all and describes its mission as being to 'provide support to the judicial system to ensure effective and efficient court administration services." It undertakes to uphold the values of respect for, and protection of, the Constitution, honesty and integrity, openness and transparency, and professionalism and excellence. These values will ensure 'accountability of the Judicial branch of the State to the people of South Africa … public confidence in the Judiciary; and respect for the rule of law.[135]

Similarly to Canada, in order to protect the judiciary's independence, the Chief Justice has a special duty that is not shared by puisne justices.[136] Moreover, The Chief Justice has the authority to assign judges to specific cases which includes the ability to assign him or herself to a specific case.[137]

III INSTITUTIONAL INDEPENDENCE OF THE OCJ

The 2013 Annual Human Rights Lecture was delivered by former Chief Justice Mogoeng Mogoeng in April at the law school of the University of Stellenbosch.[138] The topic of his speech was the ramifications of the Chief Justice's Office for South Africa's constitutional democracy. According to him, in order to protect constitutional democracy, South Africa needs a 'fully independent body of judges'. [139] He drew a clear comparison between the legislature and the executive by stating they are highly recognised and have a stronger voice than that of the

[131] See section 165(6) of the Constitution.
[132] Albertyn, op cit note 2.
[133] Ibid.
[134] Staszak, op cit note 130 at 1.
[135] Powell, op cit note 4 at 3.
[136] P W Hogg, 'The Role of a Chief Justice in Canada' (1993) 19 *Queen's Law Journal*, 253.
[137] Ibid.
[138] O'Reilly, 'Chief Justice Mogoeng seeks judicial independence' available at *http://www.saflii.org/za/journals/DEREBUS/2013/92.pdf*, accessed 23 August 2022.
[139] Ibid.

judiciary itself.[140] For instance, the executive's responsibility is to lead the country and establish policies that are in the interests of the populace and the Constitution. They are able to carry out the obligations outlined by the Constitution and laws, including enforcing laws, formulating and implementing policies, monitoring and coordinating the work of government agencies, drafting and introducing legislation, and more.[141]

The Chief Justice pointed out 'the executive and legislature were free to choose administrative support, job descriptions, and wages; had their own vote accounts; and could select the top priorities for projects'.[142] In my view, the former Chief Justice was correct to have raised these valid and important points. It is vitally important that every department or institution is able to run itself. This is the last arm of the state, which plays a pivotal role in safeguarding our Constitution. To put it bluntly, it is improper for the minister in charge of determining court expenditures to discuss a judicial budget without consulting the CJ. In his lecture the Chief Justice stated that 'the judiciary has been advocating for a fundamental paradigm shift away from the current form of executive administration toward one that is headed by the court for these reasons'.[143]

These remarks are imperative considering the fact that the judiciary is the last arm of the State. As Magabe puts it, "[t]he government's institutions must respect one another and the authority the Constitution has granted them." To achieve this, no state organ should infringe on the authority of the other organs. However, since they are South Africa's primary defenders and stewards of the Constitution, the courts have a great deal of authority. Courts have the authority to rule that any act is unconstitutional.[144] The independence of the country's institutions such as the judiciary guarantees the impartiality of courts and constitutional democracy. Chaskalson CJ also referred to the fact in *Van Rooyen*[145], 'judicial independence and impartiality are also implicit in the rule of law which is foundational to the Constitution, and in the separation of powers demanded by the Constitution. This requirement is buttressed by the provisions of sections 165(3) and (4) of the Constitution'.

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[140] O'Reilly, 'Chief Justice Mogoeng seeks judicial independence' available at *http://www.saflii.org/za/journals/DEREBUS/2013/92.pdf*, accessed 23 August 2022.
[141] Parliamentary Monitoring Group 'The structure of government' available at *https://pmg.org.za/page/structure-of-government*, accessed 11 November 2022.
[142] O'Reilly, 'Chief Justice Mogoeng seeks judicial independence' available at *http://www.saflii.org/za/journals/DEREBUS/2013/92.pdf*, accessed 23 August 2022.
[143] Ibid at 1.
[144] M T Magabe and O O Kola, 'Separation of powers, checks and balances and judicial exercise of self-restraint: an analysis of case law' (2021) 42 *Obiter*, 547.
[145] *Van Rooyen* supra note 9 para 13.

Sections 165(3), and 165(4) of the Constitution also have provisions that are pertinent to these proceedings. The court deposed in *Van Rooyen*[146] that "the Constitution thus not only recognises that courts are independent and impartial, but also provides important institutional protection for courts. The provisions of section 165, forming part of the Constitution that is the supreme law, apply to all courts and judicial officers, including magistrates" courts and magistrates. These provisions bind the judiciary and the government and are enforceable by the superior courts. It is within this context that the issues raised in the present matter must be decided.'

The above sections are crucial for the following reasons, formulated in regard to the English judiciary, but also applicable to South Africa:

(a) It is imperative for those who appear before them and the general public to have confidence that their cases will be decided fairly and in accordance with the law, and it is crucially important for both individual judges and the judiciary as a whole to be impartial and independent of all external pressures as well as of each other.[147]

(b) When performing judicial duties, Judges must be free from any improper influences. Improper influence could mean pressure from the executive or the legislature, from specific pressure groups, from individual litigants, from the media, from self-interest, or from other judges, particularly more senior judges.[148]

It is vitally important that the public must perceive judges to be impartial at all material times. Thus, they must not extort pressure on any person(s) and they must be able to carry out their mandate without fear, favour or prejudice. This necessitates that judicial officers handle cases brought before them independently and impartially, and it necessitates institutional safeguards that shield courts and judicial officers from outside intervention.[149] In *Van Rooyen*[150] the Court emphasised the importance of an independent and impartiality of the court, by relying on remarks made by Ackerman J in *De Lange v Smuts NO and Others*[151], where he stated that "[t]he views of the Canadian Supreme Court in *The Queen in Right of Canada v*

[146] *Van Rooyen* supra note 9 para 18.
[147] Courts and Tribunals Judiciary 'Independence' available at *https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/independence/*, accessed 14 November 2022.
[148] Ibid.
[149] *Van Rooyen* supra note 9 para 14.
[150] Ibid.
[151] *De Lange* supra note 6 para 69.

Beauregard[152], *Valente v The Queen* [153] and *R v Généreux*[154] on the question of what constitutes an independent and impartial court, describing them as being 'instructive'.

In this context, Ackerman J mentioned the following summary of the essence of judicial independence given by Dickson CJC in *Beauregard*[155]. Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them; no outsider! be it government, pressure group, individual or even another judge: should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.[156] As a nation we have seen how judges or judicial officers preside over ground-breaking cases, many of them involving public figures, politicians and even a sitting Head of State. In such an instance judicial officers should be afforded full protection and be guaranteed safety because their lives may be at risk. Being a judge is like being a referee; one needs to be neutral, and it is vitally important that a judge be afforded full protection.

In *Valente,* it was submitted that 'the essence of the security afforded by the essential conditions of judicial independence must be provided or guaranteed, although this need not be done by any particular legislative or constitutional formula'.[157] Additional crucial facets of judicial independence noted in the *Van Rooyen*[158] case were also brought up by Chaskalson CJ who stated that:

> The constitutional protection of the core values of judicial independence accorded to all courts by the South African Constitution means that all courts are entitled to and have the basic protection that is required. Section 165(2) of the Constitution pointedly states that A[t]he courts are independent. Implicit in this is recognition of the fact that the courts and their structure, with the hierarchical differences between higher courts and lower courts which then existed, are considered by the Constitution to be independent. This does not mean that particular provisions of legislation governing the structure and functioning of the courts are immune from constitutional scrutiny. Nor does it mean that lower courts have or are entitled to have their independence protected in the same way as the higher courts. The Constitution and the existing legislation kept in force by the Constitution treat higher courts differently to lower courts. Whilst particular provisions of existing legislation dealing with magistrate's courts can be examined for consistency with the Constitution, the mere fact that they are different to the provisions of the Constitution that protect the independence of judges is not in itself a reason for holding them to be unconstitutional.[159]

[152] *Queen in Right of Canada v Beauegard* 1986 30 DLR (4th) 481 SCC.
[153] *R v Valente* 1985 24 DLR (4th) 161 SCC.
[154] *R v Genereux* 1992 1 SCR 259 SCC.
[155] *Beauregard* supra note 152.
[156] *Van Rooyen* supra note 9 para 14.
[157] *Valente* supra note 153.
[158] Ibid.
[159] Ibid para 22.

Chaskalson CJ further stated that:

> In deciding whether a particular court lacks the institutional protection that it requires to function independently and impartially, it is relevant to have regard to the core protection given to all courts by our Constitution, to the particular functions that such court performs and to its place in the court hierarchy. Lower courts are, for instance, entitled to protection by the higher courts should any threat be made to their independence. The greater the protection given to the higher courts, the greater is the protection that all courts have.[160]

It is important to point out that, in *Valente* as per the Supreme Court of Canada, the court stated that 'institutional independence' is a crucial component of the judiciary's independence. A court has to be impartial toward the executive branch 'with regards to administrative issues immediately affecting the performance of its judicial function'.[161]

These administrative issues included 'judges' assignments, court sittings, and court lists'. Judicial independence, as held in *Valente,* depends on how a court manages its docket.[162] The Chief Justice, or other judges or representatives operating under his or her direction, is responsible for creating court lists, deciding the sequence in which matters will be tried or heard, and allocating judges and courtrooms to various cases.[163] These projects demand resources. The Minister of Justice must provide these resources to the Chief Justice. The Chief Justice's issue is that the legal system offers nothing in return. In this regard, making judgments that are in the government's best interests is the most evident and important motivation for funding and cooperation from the government.[164] As a result, the Chief Justice of the court does not hold a position of obvious power when he or she meets with officials from the government.[165] The fact that the Minister of Justice is the Minister in charge of handling legal matters on behalf of the department further complicates the connection between the Chief Justice and the Minister of Justice. [166] As Hogg puts it, this implies that the Minister of Justice, operating through his or her department and their civil counsel, is the main litigant in every jurisdiction. It is strange that the Minister who is the main litigant in court is also the Minister who provides the courts with their support staff and services and the person who submits and defends the budget for the courts in parliament or the legislature.[167]

It is important to remember that a Chief Justice is not a member of the legislature or the cabinet, and as such, he or she is not answerable to the electorate for issues within the judicial

[160] *Valente* supra note 153 para 23.
[161] Ibid.
[162] Ibid.
[163] Hogg, op cit note 136 at 254.
[164] Ibid.
[165] Ibid.
[166] Ibid.
[167] Ibid.

system. A Chief Justice also cannot speak to the legislature or parliament directly, as is the case in many jurisdictions.[168] Del Sole and other scholars argue that judges are not immune from accountability because of judicial independence.[169] For this reason, judicial governance is crucial to managing administrative tasks and ensuring that there is capable leadership who are qualified to oversee the department.

IV GOVERNANCE OF THE OCJ

The judiciary in South Africa has traditionally been governed in an opaque manner.[170] The executive arm of government, as is typical in parliamentary systems, has controlled and housed the judicial branch's governance and administration, generating concerns about the separation of powers and functions and consequently about the independence of the judiciary.[171] The governance of the judiciary has long been a topic of discussion and contention in relating to the judiciary's management.[172] Judges contend that in order for the principle of judicial independence to be fully realised, they should be in command of all judicial, administrative, and even fiscal and financial activities.[173] The Superior Courts Act addresses judicial governance issues and seeks to improve constitutional compliance.[174]

In the past, the Chief Justice and other heads of court have been in charge of matters specifically related to adjudication, such as the assignment of judges to cases, while the executive branch has traditionally been in charge of the magistracy as well as the administration of superior courts with regard to finances, support staff, and logistics.[175] However, the topic has never been tackled methodically and in depth in law or elsewhere. Instead, our prior constitutions and legislation, such as the *Supreme Court Act 59 of 1959*, have only tangentially addressed the issue of judicial system governance.[176] Unlike section 242 of the Interim Constitution, which only called for the courts to be rationalised to conform to the frameworks

[168] Hogg, op cit note 136 at 255.
[169] Sole Del *et al*, 'An independent judiciary: The role of Chief Justice Cappy' (2009) 47 *Duquesne Law Review*, 547-554.
[170] Ebrahim, op cit note 97 at 99.
[171] Richard Calland, 'Sandile Ngcobo: A short study in judicial leadership'(2017) 32 *Southern African Public Law*, 3.
[172] Judges Matter 'Discussion document on the governance of the judiciary in South Africa' available at *https://www.judgesmatter.co.za/wp-content/uploads/2022/08/Governance_Discussion_Document-FINAL.pdf*, accessed 08 September 2022.
[173] Ibid.
[174] Ebrahim, op cit note 97 at 100. See also Superior Courts Act 10 of 2013.
[175] Ebrahim, op cit note 97 at 99.
[176] Ibid.

outlined in chapter 7 of that constitution, the 1996 Constitution is more ambitious and appears to call for more fundamental reform .[177]

Respect for established statutory and constitutional governance guidelines is the foundation of good governance. One of the main components of good governance is the enshrinement of a culture that upholds human rights, the observance of the rule of law, and giving priority to, among other things, the realisation of the citizenry's legal aspirations, transparency, accountability, and responsiveness, the development of truly independent and efficient corruption-busting apparatuses, the defence of press freedom, and the promotion of an investor-friendly environment. For instance, the South African Constitutional Court determined that the corruption-busting authority established by law was insufficiently independent to combat corruption effectively and that the relevant legislation needed to be suitably altered to meet the independence requirement.[178]

Due to the Ministry's control over court administration, there is a regrettable public misconception that the Minister of Justice and Constitutional Development serves as the head of the judiciary. This openly expressed perception, which is made worse by the fact that the Minister must approve all special and lengthy leaves of absence for judges, including the Chief Justice, has the unintended consequence of undermining the authority, dignity, independence, and effectiveness of the courts, which runs counter to the intent of section 165(4) of the Constitution. It underlines the crucial significance of the discussions regarding judicial self-governance that have taken place between the judiciary and the executive over the years. According to item 16(6) of schedule 6, the Minister of Justice and Constitutional Development is responsible for overseeing the rationalisation of courts and is required to take action only after consulting the Judicial Service Commission. The provision appears to essentially assume that the commission's opinions in the judiciary will necessarily include them without making any mention of consulting with the Chief Justice and other judges.[179]

The first black Chief Justice of democratic South Africa made the following observation ‘unlike Parliament or the Executive, the court does not have the power of the purse or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier’.[180]

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[177] Ebrahim, op cit note 97 at 100.

[178] Mogoeng Mogoeng ‘The Rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards’ available at *https://constitutionallyspeaking.co.za/transcript-chief-justice-mogoeng-on-the-rule-of-law-in-south-africa/,* accessed 23 August 2022.

[179] Ebrahim, op cit note 97 at 100.

[180] Ismael Mahomed, ‘The Role of the Judiciary in a Constitutional State: Address at the First Orientation Course for New Judges’ (1998) 115 *SALJ* 111, 112.

In-depth reform and modernisation appeared to be anticipated in the 1996 final Constitution.[181] According to Ebrahim, a transitory provision envisioned a judicial system 'adapted to the requirements of the new Constitution,' which would entail some sort of rationalisation of the court system.[182] Ebrahim adds that in the time after the issuance of the final Constitution, it would have been reasonable to anticipate the emergence of a thoroughly crafted and comprehensive strategy. Instead, there was a protracted period of delay interspersed with haphazard changes that did little to advance the notion of independent judicial administration: 'Successive Ministers of Justice failed to give the constitutional obligation the careful, deliberate and methodical consideration it deserved'.[183]

It is crucial to remember that Justice Ngcobo initially brought up the issue of judicial governance in 2003 and stated:

> At a conceptual level, one cannot talk about the judiciary as a genuinely independent and autonomous branch of government if it is substantially dependent upon the executive branch not only for its funding but also for many features of its day-to-day functions and operations. The practical dimension flows directly from this. While the judicial officers may be free to operate independently and to hand down fair and impartial decisions according to law, their ability to do this may be constrained in various ways, notably by the financial, human and physical resources available to perform their tasks. A key element of this is the extent to which the judiciary has control over its own resources and thus is able to determine its policy and strategic priorities and how funds are to be allocated to pursue those priorities.[184]

Even though the Chief Justice's tasks and responsibilities 'steadily rose,' as the OCJ's 'legacy report' puts it, little progress had been made in building the Chief Justice's capacity and that of those around him or her. Ngcobo made the case for more judicial independence in its governance in a paper he delivered to the heads of court shortly after his appointment in 2009 and shortly before that year's presidential election.[185] As Calland puts it, Ngcobo then started to strengthen the argument for the independence of judicial governance by first commissioning a study on various judicial governance models and then undertaking research to outline the very significant powers and authority that were now vested in the Chief Justice. He wanted to demonstrate how much power and responsibility now rested with the Chief Justice and why, as a result, with his initial study effort, the OCJ's capacity needed to be increased.[186]

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[181] Calland, op cit note 171 at 3.
[182] Ebrahim, op cit note 97 at 100.
[183] Ebrahim, op cit note 97.
[184] Mogoeng WA Mogoeng, 'The implications of the Office of the Chief Justice for constitutional democracy in South Africa' (2013) 24 *Stellenbosch Law Review,* 401.
[185] Calland, op cit note 171 at 5.
[186] Calland, op cit note 171.

However, at first, at least some observers, particularly those in the liberal legal establishment, perceived Ngcobo's strategy as 'imperial' or even 'self-aggrandising'.[187] And Ebrahim adds his own dash of doubt:

> The OCJ was really established in response to a call made from the time that Arthur Chaskalson was Chief Justice. He asked for more support and the OCJ was then established. Ngcobo's vision was different. He believed that the Judicial Branch was headed by a Chief Justice who was to be the 'co-equal' to the President and Speaker. This equality would, therefore, come down to even having the same level of salary, benefits, security detail and even the entitlement to entertainment allowances.[188]

As Calland puts it, 'no-one wanted to talk about magistrates or judicial accountability. All they were interested in is having and controlling their own budget, except that they did not want to be held accountable for this'.[189] A second study, Policy Framework: Independent Court Administration, was based on the committee's research project and presented an overview of three possible models of court administration: an executive-based model, a totally autonomous model, and a judiciary-based model. The option that would 'locate[s] an independent court administration authority outside both the executive and judiciary,' answerable only to the judiciary, emerged as the preferred one.[190] As Calland submits, Malunga narrates the following:

> The Committee and officials worked like clockwork. Once or twice Chief Justice Chaskalson did lose his temper as he was not pleased with the speed at which we were moving. Chief Justice Langa was the dove of the Co-Chairs, always calm and humorous. CJ Ngcobo had also appointed retired Constitutional Court Justice Yvonne Mokgoro as 'Judge in the Office of the Chief Justice'. She had a cursory role in this project but was highly instrumental in setting up the structures of the OCJ. Our [the secretariat's] job was to consolidate the Committee's vision. I was given a lot of leeway by my bosses to be proactive in researching the various models and outcomes that we sought. The mission was clear: to create a model for an independent Office of the Chief Justice that would be in line with international best practice. What we didn't realise is that we were creating something so innovative and powerful that is not found in most advanced democracies.[191]

According to the initial Ngcobo proposal, two independent organisations would be created. A Court Administrative Authority would serve as the institutional framework's executive and administrative arm under the supervision of a separate judicial council and a courts advisory board. Section 165(6) of the Constitution[192], when read in conjunction with the

[187] Calland, op cit note 171 at 5.
[188] Ibid at 4.
[189] Ibid.
[190] Ibid at 7.
[191] Ibid.
[192] Section 165(6) of the Constitution provides:
'The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.'

Superior Courts Act [193], gives the Office of the Chief Justice and Judicial Administration the authority to support the Chief Justice in his or her capacity as head of the Judiciary.[194]

As part of its mandate, the Office of the Chief Justice is also required to 'provide and coordinate legal and administrative support to the chief justice; provide communication and relationship management services; provide intergovernmental and internal coordination services; develop administration policies for courts; support the development of judicial policy, norms and standards; support the judicial function of the Constitutional Court; and support the Judicial Service Commission and South African Judicial Education Institute in the execution of their mandates'.[195]

A desired court management paradigm was discussed by Chief Justice Mogoeng.[196] The model, according to him, should be one in which an advisory board acts as a guide and is led by a judicial council made up of members of the judiciary that is appointed by the heads of court.[197] According to O'Reilly, Chief Justice Mogoeng contends that the Office of the Chief Justice or the new entity established by legislation would eventually have to receive the entire Court Services Unit of the Justice Department, regional offices, rule-making powers, library services, information technology, and facilities components of Justice, along with the associated budget and staff.[198]

According to Chief Justice Mogoeng, there should not be a cabinet member in charge of the judiciary-led court administration structure.[199] In an effort to create a model that would work for South Africa's constitutional democracy, Chief Justice Mogoeng stated that discussions had taken place with other countries such as the United States of America (USA), the Russian Federation, Singapore, Ghana, and Qatar.[200] It is important to note that a successful justice system depends on effective administration of the courts.[201] Without a well-functioning system of court administrators, judges and magistrates cannot complete their duties of hearing

[193] See Act 10 of 2013 supra note 174.
[194] National Treasury 'Vote 22 Office of the Chief Justice and Judicial Administration' available at *https://www.treasury.gov.za/documents/national%20budget/2019/ene/Vote%2022%20Office%20of%20the%20Chief%20Justice%20and%20Judicial%20Administration.pdf*, accessed 02 August 2022.
[195] Ibid.
[196] O'Reilly, 'Chief Justice Mogoeng seeks judicial independence' available at *http://www.saflii.org/za/journals/DEREBUS/2013/92.pdf*, accessed 23 August 2022.
[197] Ibid.
[198] Ibid.
[199] O'Reilly, 'Chief Justice Mogoeng seeks judicial independence' available at *http://www.saflii.org/za/journals/DEREBUS/2013/92.pdf*, accessed 23 August 2022.
[200] O'Reilly, 'Chief Justice Mogoeng seeks judicial independence' available at *http://www.saflii.org/za/journals/DEREBUS/2013/92.pdf*, accessed 23 August 2022.
[201] Commonwealth Secretariat, 'Administration of courts: development of a Model Court Handbook' (2009) 35 *Commonwealth Law Bulletin*, 1.

and adjudicating cases in a timely and effective manner.[202] There were numerous concerns regarding ineffective court administration in many of the states, that Commonwealth Secretariat's visits which made it difficult for the court system to function effectively and promptly. Commonwealth Secretariat recommended that efforts to reform and build more effective judicial systems make professionalising court administration a top focus.[203] Each member of the court personnel ought to be formally trained in court administration. These employees ought to be quite knowledgeable about the court's administrative processes. All staff members should have a court handbook with a copy of relevant procedures for quick access.[204] The Court Handbook should serve as the foundation for staff training, and an exam should be developed around its topics. The personnel should also be quite knowledgeable about the numerous pieces of legislation that control how courts are operated and managed, including criminal and civil process codes and the court rules that uphold them. Additionally, employees should have a fundamental knowledge of the law.[205]

In his 2013 speech, Justice Ngcobo also noted that effective management and administration are essential to the smooth running of the court system, just as they are to the success of any other public or private organisation.[206] In Ngcobo's opinion, the successful administration of justice requires centralised authority over the provision of administrative services.[207] For tasks including management of case – flow, having a thorough understanding of the law and legal processes and managing a courtroom, court administrators need specialised expertise. In this respect, court administrators, registrars, and clerks of court must receive formal training and need to pass the required tests in various jurisdictions, making them qualified to perform this task.[208] In a landmark speech given to a national judges' symposium in July 2013, Justice Ngcobo noted that the judiciary cannot be considered truly independent and autonomous from the executive branch if it depends heavily on it for many aspects of its daily operations.[209] It is for this reason that the judiciary must have authority over the administration of the courts including managing its affairs at all material times.

Powell asserts that the objectives outlined in the first phase of the original three-phase plan appear to have been greatly exceeded by the OCJ in terms of administration.[210] The Chief

[202] Commonwealth Secretariat, op cit note 201.
[203] Ibid.
[204] Ibid at 2.
[205] Ibid.
[206] Ebrahim, op cit note 97 at 104.
[207] Ibid.
[208] Commonwealth Secretariat, op cit note 201 at 1.
[209] Ebrahim, op cit note 97 at 103.
[210] Powell, op cit note 4 at 11.

Justice is at the top of the administration system for the judiciary established under the Superior Courts Act.[211] Following this, the OCJ received a wide range of tasks and employees in the 2015–2016 fiscal year.[212]

A part of the Superior Courts Act titled "Judicial management of judicial activities" gives the Chief Justice the authority to direct, supervise, and keep an eye on court operations.[213] The Chief Justice is given authority over a variety of "judicial functions," including scheduling court appearances, assigning judges to these appearances, assigning cases and performing other judicial tasks, as well as managing case flow and deciding cases that have already been heard by judicial officers.[214] According to Powell, a further transfer of superior court administration from the Department of Justice (DOJ) to the OCJ in March 2015 was made in accordance with the Public Service Act 103 of 1994, as stated in the OCJ Annual Report for 2015/2016.[215] This move involves a large number of functions and people. The latter include judicial support services, case flow management, court operations, language services, the execution of "quasi-judicial" agencies, service level contracts, editing documents and translations, ensuring equal access to all official languages, braille and sign language, procurement, data collection, the forensic unit, public education and communication, and management of a number of units now transferred to the OCJ, such as human resources, finance, and securitisation.[216]

Court reporters are among the staff members who perform these duties and are now under the OCJ's jurisdiction rather than the DOJ.[217] Registrars, managers, legal researchers, court translators, support staff for the dining service, judges, OCJ management, secretaries, IT coordinators, administrative officers and clerks, statisticians, vetting investigators, and forensic auditors are among the positions that have been transferred to the organisation.[218] The OCJ has full control over a significantly larger range of administrative matters than those that were described as "important to the judicial function" in the debate above.[219] Powell contends that Ngcobo J limited this category to case-flow management, records, statistics, and information management, all of which are fundamentally related to the judicial function.[220] He did not view the executive's control of administrative tasks such as space and equipment management,

[211] Powell, op cit note 4.
[212] Ibid.
[213] See sections 8(6) of Act 10 of 2013 supra note 174.
[214] Ibid.
[215] Powell, op cit note 4 at 11.
[216] Powell, op cit note 4.
[217] Powell, op cit note 4.
[218] Ibid.
[219] Ibid.
[220] Ibid.

budgetary and financial management, and other administrative duties as being 'incompatible with judicial independence'.[221]

A notice that was published in February 2014 was one of the ways the Chief Justice exercised the authority granted to him by the Act.[222] The notice outlines a distinct hierarchy of authority and control for the judiciary and lays out a number of "norms and criteria" for how it should function.[223] To put it simply, the Heads of Court for each division in which these courts are located are in charge of them. According to the hierarchy's structure of accountability, the lower levels must answer to the upper levels. The appropriate Judge President must receive an accounting from the heads of the Regional and Administrative Magistrates' Regions for their management of these regions. The Chief Justice will demand an explanation from the SCA President and the Judge President of each division regarding how they handled the judicial duties assigned to them. However, there are no rules dictating how these duties are to be carried out or how those tasked with overseeing the performance of judicial officer are to do so.[224] Powell contends that, in the 'Norms and Standards' section, there are subsections for 'objectives,' 'fundamental values,' 'administration of judicial functions,' 'monitoring and execution,' and actual 'norms and standards'. They give a great deal of information regarding how courts should operate. Once more, the emphasis is on what the judges should be doing, and little attention is paid to any rights or expectations that the judges themselves may have of the organisation and its management.[225] In *Lethoko and Another v Minister of Defence and Another*[226] the court stated that: "[t]he Chief Justice has issued a number of directives aimed at the efficient functioning of the courts and the speedy finalisation of cases of which the "Norms and standards for the performance of judicial functions" GN 147 in GG 37390 of 28 February 2014.'[227] Again, the court emphasised 'the objectives of the directives' and asserted that:

> These norms and standards seek to achieve the enhancement of access to quality justice for all; to affirm the dignity of all users of the court system and to ensure the effective, efficient and expeditious adjudication and resolution of all disputes through the courts, where applicable. These objectives can only be attained through the commitment and co-operation of all Judicial Officers in keeping with their oath or solemn affirmation to uphold and protect the Constitution

[221] Powell, op cit note 4.
[222] Ibid.
[223] Ibid at 11.
[224] Ibid.
[225] Ibid at 12.
[226] *Lethoko and Another v Minister of Defence and Another* (*Lethoko*) 2021 (2) SACR 661 (FB).
[227] Ibid para 4.

> and the human rights entrenched in it and to deliver justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law.[228]

In this respect Powell states:

> Under the heading, 'Norms', the Notice emphasises the duties of each judge to act efficiently, effectively, expeditiously, courteously and respectfully towards the public, and collegially towards their colleagues. The Heads of Court are encouraged to 'take all necessary initiatives to ensure a thriving normative and standardised culture of leadership' and to engender an 'open and transparent policy of communication both internally and externally' The section on 'Standards' includes provisions on the numbers of hours the trial courts should sit per day and time limits for the delivery of judgments.[229]

Last but not least, the "Norms and Standards" paragraph establishes a Judicial Case Flow Management Report that will be coordinated by National and Provincial "Efficiency Enhancement" Committees (the NEECs and PEECs), the former of which will be led by the Heads of Court and will answer directly to the Chief Justice. The OCJ's current focus on enhancing court effectiveness is centred on this effort.[230] Powell further emphasised that the three 2015 objectives, namely capacitating the OCJ (which focuses on enhancing the office's human resources), assisting the Chief Justice in his role as head of the judiciary, and providing "effective and efficient administration and technical support to the Superior Courts", remain the driving forces behind its work.[231] In this respect, it is important to make sure that judges carry out their duties and provide the public with essential services.[232] It is important to note that, the funding for a case-flow management programme and modernisation of the court system to facilitate electronic filing has supported this project.[233]

(a) Budget

In July 2003, Chief Justice Arthur Chaskalson demanded that the judiciary play a real role in how its budgets were written or tabled and have control over how it is spent and run. This would remedy the challenging working conditions that judges face, such as a lack of basic amenities. Additionally, it would aid in bringing in fresh bench prospects.[234]

The Superior Court Bill, 2010, which Parliament will soon consider, adopts a model that places the Chief Justice in charge of "the administration of judicial functions," while maintaining the current arrangement under which the Director-General of the Department of

[228] *Lethoko* supra note 226.
[229] Powell, op cit note 4 at 12.
[230] Ibid.
[231] Ibid.
[232] Ibid.
[233] Ibid.
[234] Judges call for administrative autonomy for the judiciary, *https://www-mylexisnexis-co-za.ezproxy.uct.ac.za/#.*

Justice is responsible for the financial management of the judiciary.[235] The relationship between the Chief Justice and the Minister is not clearly defined; it is entirely up to the executive branch to decide whether to consult the chief justice for guidance.[236] The court administration budget cannot be created or run independently of the government by the courts. The Chief Justice lacks the financial and operational authority necessary to operate independently from governmental orders.[237]

Similar to Canada, a separate entity should be established, as per *Reference re Public Sector Pay Reduction Act*[238], to mediate between the government and the judiciary over judicial compensation. In my view this will guarantee a safe space for the judiciary to work and exercises its power without being dependent on the Minister or whoever is responsible for the budget. Moreover, it is sufficient for the purposes of the argument that this independent body's members each possess adequate independence from the other branches of government.[239] I submit that South Africa must establish or follow a similar approach to Canada for dealing with budgetary issues. According to later Canadian case law, the government must provide justification for deviating from this body's recommendations.[240] According to Powell the Langa/Chaskalson report's suggested finance arrangement called for a separate committee of parliament to which the OCJ would have been directly accountable and to which it would have submitted financial proposals. If so, this committee would have handled budget and financial demands in a manner similar to how the Auditor-General's finances are handled.[241]

The Independent Commission for the Remuneration of Public Office Bearers and the OCJ itself both assist the President in deciding the salaries of judges. When deciding on judges' salaries, allowances, and benefits, the President takes proposals from the Independent Commission for the Remuneration of Public Office Bearers into account.[242] The recommendations, however, are not legally binding on the President. Insofar as the Commission consults the Chief Justice during its proceedings and deliberations, the OCJ has a

[235] Cachalia, op cit note 30.
[236] Ibid.
[237] Ibid.
[238] *Attorney-General of Canada et al, Intervenors* (1997) 150 DLR (4th) 577 (SCC).
[239] Powell, op cit note 4.
[240] Ibid.
[241] Ibid.
[242] The Independent Commission for 'the Remuneration of Public Office Bearers was established in terms of Constitution s 219 and the Independent Commission for the Remuneration of Public Office Bearers Act 92 of 1997.'

say in salary decisions.[243] According to section 54 of the Superior Courts Act[244], the Minister must take into account requests for resources needed for the Superior Courts' administration and operations, as determined by the Chief Justice in collaboration with the Heads of Court.[245] The Minister is required to take these requests "into consideration in the way established for the budgeting processes in the departments of state." Since 2015, Parliament has received the OCJ budget request as a separate vote.[246] Increasing justice access (broadening) requires more resources. The Treasury in Vote 22 report stated that:

> 'The National Development Plan asserts that high legal costs present a significant barrier to justice, especially for the poor, which can lead to a failure of the justice system. To increase access to the system, the department expects the high court in Mpumalanga to be fully operational in 2019/20. Funding for the court is expected to increase from R28.1 million in 2019/20 to R33.4 million in 2021/22, in the Superior Court Services programme. Similarly, allocations for the operations of the Polokwane high court, which opened in 2016/17, are expected to increase by 13.6 per cent, from R27.2 million in 2019/20 to R30.9 million in 2021/22.'[247]

These figures demonstrate the critical need for funding for the Judiciary and the Office of the Chief Justice. The Chief Justice and a competent board should be given the resources required to contribute to the development of competent courts that would aid in carrying out the duties of the judiciary. Furthermore, It is also crucial to remember that the judiciary will suffer if the state does not provide enough financing, as we do not anticipate the judiciary and the chief justice's office to find other sources of additional income.

(b) Protection of Judges

The Constitution provides that "[n]ational security must reflect the resolve of South Africans as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life."[248] It does so against a historical setting in which the quest for a distorted idea of national security was weaponised and intended to undermine the dignity of the vast majority of South Africans.[249] For this reason 'the protection of judges' must

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[243] *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others* 2013 (7) BCLR 762 (CC) para 61.
[244] See Act 10 of 2013 supra note 174.
[245] Ibid.
[246] National Treasury 'Vote 22 Office of the Chief Justice and Judicial Administration' available at *https://www.treasury.gov.za/documents/national%20budget/2019/ene/Vote%2022%20Office%20of%20the%20Chief%20Justice%20and%20Judicial%20Administration.pdf*, accessed 02 August 2022.
[247] National Treasury 'Vote 22 Office of the Chief Justice and Judicial Administration' available at *https://www.treasury.gov.za/documents/national%20budget/2019/ene/Vote%2022%20Office%20of%20the%20Chief%20Justice%20and%20Judicial%20Administration.pdf*, accessed 02 August 2022.
[248] See section 198(a) of the Constitution.
[249] *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* (AmaBhungane) 2021 (4) BCLR 349 (CC) para 6.

be observed since it is one of the most important pillars of judicial independence across the globe. Notably, this is because judges must be assured of their safety and security in order to exercise their duties without any fear or favour or prejudice. In *Van Rooyen,* the Constitutional Court emphasised the importance of security of judges and held that "the essence of the security afforded by the essential conditions of judicial independence must be provided or guaranteed, although this need not be done by any particular legislative or constitutional formula."[250]

The failure of the state to keep judges safe poses a danger in compromising the judiciary since those who preside may falter because of fear and thus prejudice the processes. In my view, all judges must be afforded the necessary security which will keep them safe at all material times including looking after their families. In this regard, the benefits that the state affords to the Ministers and all those who are the important figures of the government should also be afforded to the offices of the judiciary. Parliament should table a bill which will grant the above privileges to judges. As the judiciary is the last arm of the state, it is imperative for the government to do everything necessary to assure its stakeholders of safety and security.

(c) Security of tenure

Security of tenure is a key component in judicial independence.[251] The Westminster constitutional model requires that the judiciary remains independent as one of its distinguishing characteristics because of the significant role that courts play.[252] Thus, it mandates that courts operate independently of the legislative and the executive branches. To maintain judicial independence, judges must not be subjected to any improper influence from the executive or from Parliament while performing their duties.[253] De Vos argues that "the independence of judges depends, in part, on a guarantee that judges will not be dismissed or face the threat of dismissal from office for making a decision adverse to the interest of the government of the day or of powerful business or other societal interests aligned with the government."[254]

For this reason the constitution explicitly guarantees judges security of tenure:[255] The security of tenure, which mandates that judges be appointed for life, is the first method that judicial independence is ensured. Second, unless they are proved to have broken the law or committed other serious wrongdoing, judges cannot be expelled from their positions of

[250] *Van Rooyen* supra note 9 para 16.
[251] Siyo and Mubangizi, op cit note 27 at 13.
[252] De Vos, op cit note 65 at 86.
[253] Ibid at 86.
[254] Ibid at 400.
[255] See section 176(3) of the Constitution supra note 76.

authority. Third, while they are still in office, judges' pay is guaranteed and cannot be decreased.[256] Section 176 of the Constitution categorically stipulates that Constitutional Court judges hold office for a non-renewable term of 12 years or until they attain the age of 70, whichever occurs first except where an Act of Parliament extends the term of office of a Constitutional Court judge.[257] This is a significant provision in the constitution because judges' security of tenure should be taken into consideration at all material times, failure of which might place the judiciary in jeopardy.

Serving as a judge on another court counts as active service. However, a judge of the Constitutional Court must retire at the age of 75 years regardless of how long they have served in this capacity. As a result, a judge on the Constitutional Court having served in an active capacity for three years or more on a High Court or on the SCA will normally hold office for a fixed term of 12 years.[258] As De Vos puts it, "this is unless the judge turns 75 before completing the 12-year term, in which case the judge will retire when reaching the age of 75 years."[259] However, a judge appointed to the Constitutional Court, who had not previously held judicial office elsewhere, will typically serve a fixed term of 15 years on that court, provided that, once more, he or she does not turn 75 before the conclusion of this time frame.[260]

In 2001, the Constitution was amended to implement the clause which states that a judge of the Constitutional Court may have his or her term of office extended by an Act of Parliament.[261] The provisions of section 176 were then supposed to be put into effect by the provisions of the *Judges Remuneration and Conditions of Employment Act*.[262] These clauses came under heavy fire for weakening the security of tenure safeguards and having the potential to affect the independence of the court. A Chief Justice or President of the SCA may be asked to "continue to perform active service for a period determined by the President" at the end of their term of office under the Remuneration and Conditions of Employment Act, but only if the extension does not extend past the date on which the Chief Justice or President of the SCA turns 75 years.[263] Therefore, Section 8 gave the President the authority to prolong the terms of the Chief Justice and the President of the SCA for any length of time and as many times as desired.[264] De Vos contends that 'the clause was purportedly passed in accordance with the

[256] De Vos, op cit note 65 at 88.
[257] See section 176 of the Constitution supra note 76.
[258] De Vos, op cit note 65 at 400.
[259] Ibid.
[260] Ibid.
[261] De Vos, op cit note 65 at 400.
[262] F Du Bois, 'Tenure on the Constitutional Court' (2002) 119 *South African Law Journal*, 1–17.
[263] See section 8(a) of the Judge's Remuneration and Conditions Employment Act 47 of 2001.
[264] De Vos, op cit note 65 at 402.

Constitution's modified section 176(1), which, as we've seen, gives Parliament the power to extend a judge of the Constitutional Court's time in office'.[265]

To put it another way, because of its increased power, parliament is able to significantly change any statute or piece of legislation that it deems necessary or appropriate for furthering the rule of law and society at large. In the case of *Justice Alliance of South Africa v President of South Africa*[266] the Constitutional Court was asked to decide whether section 8(a) of the *Judges Remuneration and Conditions of Employment Act*[267] was in accordance with section 176(1) of the Constitution.[268] Siyo writes 'that this required the Court to consider whether section 8(a) of the Act delegated the president's authority to extend tenure; if so, whether section 176(1) of the Constitution permitted delegation; and, if so, whether the delegation was validly carried out and whether section 176(1) authorises a differentiation of the terms of office of judges of the Constitutional Court'.[269] Section 8(a) of the *Judges Remuneration and Conditions of Employment Act* was found unlawful by the court. Independence of the judiciary, rule of law, and separation of powers are all fundamental concepts of constitutional law that were affirmed and expanded upon in the verdict. The President was given the authority to ask a Chief Justice to remain in active service and if the Chief Justice agreed, to determine the length of the extension according to section 8(a), which the Court deemed to be unconstitutional.[270] If the Chief Justice agreed to the request and the President so decided, the term of office could be extended. The President had complete discretion over the length of the extension, and his decision-making was unrestricted in that he did not have to seek anyone's input before extending the Chief Justice's term.[271]

The court determined that the President has the executive discretion to decide whether to prolong the term of a Chief Justice whose term is about to expire under the first issue, which concerned delegation, as stated in section 8(a) (of the Act).[272] The fact that Parliament had not attempted to provide any, much less sufficient, guidelines for the President's exercise of discretion, rendered section 8(a) more problematic. Due to the provision's usurpation of the legislative authority reserved for Parliament under section 176 of the Constitution, the President was improperly granted legislative authority.[273] Parliament can often not assign its

[265] De Vos, op cit note 65 at 402.
[266] *Justice Alliance of South Africa* supra note 34.
[267] Act 47 of 2001 supra note 263.
[268] See section 176(1) of the Constitution supra note 76.
[269] Siyo and Mubangizi, op cit note 27 at 15.
[270] *Justice Alliance of South Africa* supra note 34 para 50.
[271] De Vos, op cit note 65 at 402.
[272] *Justice Alliance of South Africa* supra note 34 para 52.
[273] Ibid para 51.

primary legislative duties to the president under a constitutional democracy that upholds the theory of separation of powers. Although the Constitution's section 176(1) allows for an exception to the requirement that a Constitutional Court judge's term be set, only Parliament has the right to grant such an exception. The Court made note of the fact that section 176(1) not only grants Parliament legislative authority, but also highlights the importance of Parliament in maintaining separation of powers and preserving judicial independence.[274]

It is important to note that, in *Justice Alliance of South Africa v President of South Africa* the court held that:

> The extension by the President does not qualify as an Act of Parliament as required. It does not bear the specific features of an Act of Parliament, such as originating from a Bill that was assented to and signed by the President. The extension is made through an executive decision of the President. Section 176(1) explicitly refers to an Act of Parliament extending the term. That is a strong indication that the legislative power may not be delegated by the Legislature.[275]

The court further found that because an Act of Parliament is required to prolong a term under section 176(1) of the Constitution and if the President's extension lacks these characteristics it does not meet the requirement.[276] According to the Act, "the president may release a judge from active service on the Constitutional Court for incapacity owing to ill health, or at the judge's own request for a reason the president deems adequate."[277] At this point, the court reasoned that the intention of the Constitution's drafters would have been made obvious if it had been intended for the power in section 176(1) to be delegable. The court also determined that section 8(a) is problematic because it usurps the legislative authority that is exclusively entrusted to Parliament, which is why it is an illegal delegation.[278] De Vos submits:

> accordingly, section 8(a) violates the principle of judicial independence. This kind of open-ended discretion may raise a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the Executive. The truth may be different, but it matters not. What matters is that the judiciary must be seen to be free from external interference.[279]

The court additionally decided that the open-ended discretion in section 8(a) could give rise to a legitimate concern or perception that executive meddling could weaken the independence of the Chief Justice and consequently the judiciary.[280] The court came to the

[274] *Justice Alliance of South Africa* supra note 34 para 57.
[275] Ibid para 58.
[276] Siyo and Mubangizi, op cit note 27 at 15.
[277] Ibid at 13.
[278] *Justice Alliance of South Africa* supra note 34 para 62.
[279] De Vos, op cit note 65 at 403.
[280] *Justice Alliance of South Africa* supra note 34 para 68.

conclusion that because section 8(a) is incompatible with section 176(1) of the Constitution, it amounts to unlawful delegation and is invalid.

The Court emphasised the significance of a defined term of office for judges in order to defend and preserve the independence[281] and impartiality of the judiciary, by stating that:

> It is well established on both foreign and local authority that a non-renewable term of office is a prime feature of independence. Indeed, non-renewability is the bedrock of security of tenure and a dyke against judicial favour in passing judgment. Section 176(1) gives strong warrant to this principle in providing that a Constitutional Court judge holds office for a non-renewable term. Non-renewability fosters public confidence in the institution of the judiciary as a whole, since its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal.[282]

The provision clearly states that Parliament cannot single out any individual Constitutional Court judge by name. All of the parties before us agreed on this point. It is also clear that no individual may be singled out for an irrelevant individual characteristic or feature. This was a typical cause. As a result, the term "a Constitutional Court judge" in section 176(1) does not allow for the exclusion of any particular Constitutional Court judge based on his or her individual identity or position within the Court. [283] As a result, Parliament was not permitted to introduce laws that would extend the tenure of solely the Chief Justice, in spite of section 176(1).[284] The Constitutional Court went one step further and declared that it would be illegal for the legislature to target the Chief Justice's position particularly for a term extension and claimed that:

The Constitutional Court went one step further and declared that it would be illegal for the legislature to target the Chief Justice's position particularly for a term extension and stated:

> In approaching this question it must be borne in mind that the extension of a term of office, particularly one conferred by the Executive or by Parliament, may be seen as a benefit. The judge or judges upon whom the benefit is conferred may be seen as favoured by it. While it is true, as counsel for the President emphasised, that the possibility of far-fetched perceptions should not dominate the interpretive process, it is not unreasonable for the public to assume that extension may operate as a favour that may influence those judges seeking it. The power of extension in section 176(1) must therefore, on general principle, be construed so far as possible to minimise the risk that its conferral could be seen as impairing the precious-won institutional attribute of impartiality and the public confidence that goes with it.[285]

Despite section 176(1), Parliament was, however, not permitted to enact legislation that would extend the tenure of the Chief Justice. The court went on to say that holding the office of Chief Justice or Deputy Chief Justice while in office makes no difference and does not bestow a

[281] De Vos, op cit note 65 at 404.
[282] *Justice Alliance of South Africa* supra note 34 para 73.
[283] Ibid para 85.
[284] Ibid.
[285] Ibid para 75.

particular claim to extension because doing so would single out one judge.[286] Since the Constitutional Court's members are defined in section 176(1), the court concluded that 'incumbency of an office is meaningless'. In light of the differentiation it causes, the court came to the conclusion that section 8(a) is invalid.[287] This ruling emphasises the importance of tenure that is not renewable. To promote stability and consistency in the operation of the court and to avoid any perception of bias or lack of independence in the judiciary, the Court has adopted the position that the terms of office of constitutional court judges should be fixed. The ruling essentially emphasises the importance of tenure security and shows how vigilant South African courts, notably the Constitutional Court, are about upholding tenure security and preserving judicial independence.[288]

Despite the fact that the Chief Justice and Deputy Chief Justice's positions are expressly established by the Constitution, this does not permit a single-term extension for the Chief Justice. This is true since, after being appointed, the Chief Justice and Deputy Chief Justice join the other nine judges who make up the Court's membership.[289] Having unanimously determined that section 8(a) is unconstitutional and incompatible with the Constitution, the court stated that:

> 'Once appointed, however, the Chief Justice and Deputy Chief Justice take their place alongside nine other judges in constituting the membership of this Court. The Constitution provides that a matter before this Court "must be heard by at least eight judges". Here the Constitution makes no differentiation between the Chief Justice, the Deputy Chief Justice and the other judges of this Court in how the quorum is constituted. The Chief Justice and Deputy Chief Justice add to the tally of eight without contributing more than their individual weight. Their high office and the extra-judicial duties they may be called upon to perform add nothing to the tally. Nor does their office count when this Court determines the cases and the matters before it. Their views count and their voices are heard equally with the respect and authority accorded every member of this Court.'[290]

Parliament was therefore prohibited from mentioning any particular judge on the Constitutional Court by name under section 176(1) of the Constitution. It is obvious that no person may be singled out because of a non-relevant personal trait or quality. As a result, section 176(1)'s definition of "a Constitutional Court judge" forbids identifying a specific Constitutional Court judge based on the judge's personal characteristics or position within the

[286] *Justice Alliance of South Africa* supra note 34 para 94.
[287] Ibid para 95.
[288] Siyo and Mubangizi, op cit note 27 at 17.
[289] De Vos, op cit note 65 at 404.
[290] *Justice Alliance of South Africa* supra note 34 paras 97-80.

Court. This means that Parliament is not allowed to single out a Chief Justice when using its authority to prolong the judge's term on the Constitutional Court.[291]

According to De Vos, the Court made a distinction between section 8(a) and section 4 of the Judges' Remuneration and Conditions of Employment Act, which is significant.[292] It noted the difference between section 8 of the amendment and section 4 of the Act since section 4:

> The Act does not allow any member of the category of Constitutional Court judge to be singled out, whether on the basis of individual characteristic, idiosyncratic feature or the incumbency of office. Age is an indifferent criterion that may be applied in extending the term of office of a Constitutional Court judge. Age is an attribute that everyone attains. Previous judicial service is another criterion that may be indifferently applied to all the judges of this Court. The Act provides that a Constitutional Court judge whose 12-year term of office expires before he or she has completed 15 years' 'active service' as a judge must, subject to attaining the age of 75, serve for 15 years in this Court.[293]

Judges who are not on the Constitutional Court are known as ordinary judges, and they keep their positions until they are relieved of their duties in accordance with a parliamentary act.[294] This topic is governed by section 3(2) of *the Judges Remuneration and Conditions of Employment Act.*[295] De Vos writes that, according to this clause, other judges will often remain in office until the day they turn 70 if they have served for at least 10 years in an active capacity on the date of their retirement.[296] The term of office will terminate after they have served for 10 years, even if they have not yet reached a milestone of 10 years of continuous service. However, section 4(4) of the Act grants judges further latitude and permits a judge to continue to undertake active service until the date on which he or she completes a period of 15 years' active service or attains the age of 75 years, whichever occurs first," the law states.[297]

The following chapter discusses the potential roles that the CJ and the OCJ could play in the selection of judges, their contribution to achieving this independence, and any potential roadblocks.

V ROLE OF THE OCJ IN THE APPOINTMENT OF JUDGES

The process of appointing judges has changed dramatically following the coming into operation of the current constitutional dispensation. For instance, as already mentioned above, the Constitution sanctions the common practice of appointing acting judges. The JSC relies

[291] De Vos, op cit note 65 at 404.
[292] Ibid.
[293] *Justice Alliance of South Africa* supra note 34 para 91.
[294] See section 176(2) of the Constitution supra note 76.
[295] Act 47 of 2001 supra note 263.
[296] De Vos, op cit note 65 at 404.
[297] Ibid.

heavily on this mechanism as a form of probation to assess the suitability of a person for permanent appointment to the bench.[298] The new constitutional system necessitated the creation of a transformed and transformative judiciary since transformation is part and parcel of the reconstruction of society.[299]

The transformation of the judiciary is a contested issue and broadly understood includes factors such as the life experiences and mindsets of prospective judicial officers. Transformation of the judiciary includes, amongst other definitions, the re-organisation and re-engineering of the structures and branches of the judiciary and a change in the way judges do their work.[300] With this re-engineering came the need for a change in the demographic composition of the judiciary; a type of transformation that has been a hotly contested topic over the years.[301]

A vexing question is how much influence the Chief Justice has over the appointment of judges in South Africa. This chapter addresses the issue briefly, citing relevant cases and legislative provisions. The chapter also discusses the significance and impact of the nomination process on the appointment of judges. Before delving into the critical role of the Chief Justice, a general overview of judicial appointment is provided.

(a) Appointment of judicial officers: a general overview

The appointment of judicial officers is a key feature of the Constitution, and it is intended to boost the credibility of those who sit on the bench.[302] Any suitably qualified person who is fit and proper may be appointed as a judicial officer. Furthermore, anyone appointed to the Constitutional Court must be a South African citizen.[303]

The President also appoints the other judges of the Constitutional Court after consulting the Chief Justice of the Constitutional Court and the leaders of the political parties in the National Assembly.[304]

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[298] M Olivier, 'The appointment of acting judges in South Africa and Lesotho' 2006 *Obiter* 554.
[299] C Oxtoby and T Masengu, 'Who nominates judges? Some issues underlying judicial appointments in South Africa' (2017) 28 *544 Stell LR*, 540.
[300] Oxtoby C and Masengu, op cit note 299.
[301] Ibid.
[302] GE Devenish *The South African Constitution* (2005) 337.
[303] Section 174(1) of the Constitution provides that '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.'
[304] Section 174(4)(a) of the Constitution provides:
'The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance

(b) JSC

The JSC plays an important role in the appointment of persons to the bench. As a starting point, it is critical to note that the Chief Justice's role is very limited in case law or legislation. However, the highest law of the land, the Constitution, contains provisions that specifically address the appointment and role of the Chief Justice in South Africa. As a result, before delving into the specific role of the Chief Justice in appointing judges, a general overview of the process of appointing Chief Justices is required. The JSC is a key player in this process.[305]

The JSC has a minimum of 23 members and can have up to 25 when candidates for provincial high courts are interviewed. Three judges, the Minister of Justice, four lawyers, one law professor, and ten members of parliament are among the members (both upper and lower houses are represented),[306] and four persons designated by the President (who inevitably tend to be practising lawyers). The JSC is empowered to advise the national government on issues relating to the judiciary or the administration of justice in addition to playing a key role in judicial discipline and the removal of judges from office.[307]

The JSC is involved in the appointment of all judges to South Africa's superior courts, with appointments to the Magistrates' Commission handled separately. However, as briefly mentioned in the introduction, not all superior court judges are appointed in the same manner. After consulting with the JSC and leaders of political parties represented in the National Assembly, the President appoints the Chief Justice and Deputy Chief Justice. After consulting the JSC, the President appoints the President and Deputy President of the Supreme Court of Appeal. In practice, the President effectively nominates these appointees by advising that he

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with the following procedure: (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made and submit the list to the President.'

[305] Oxtoby and Masengu, op cit note 299.

[306] Section 178(1)(h) and (i) of the Constitution provides:

'(h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;

(i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces.'

[307] Section 177 of the Constitution provides:

'(1) A judge may be removed from office only if—

(a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

(b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.

(3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).'

intends to appoint them and soliciting input from the prescribed organisations.[308] As previously stated, the commission's recommendations must take into account the Constitution's explicit requirement that the judiciary broadly reflect South Africa's racial and gender composition.[309] Furthermore, such individuals must be fit and proper to be appointed as judicial officers.[310] This means that the commission's recommendations are not solely based on merit.[311] As alluded to above, The JSC's primary function is to advise the President on the appointment of judges to the High Courts, Supreme Court of Appeal, and Constitutional Court.[312]

The President (with the Cabinet) appoints the Chief Justice and Deputy Chief Justice after consulting the Commission. Other superior court judges are appointed by the President on the advice of the Commission, which means that the President is bound to accept the Commission's decision and appoint the people it recommends as judges, effectively removing executive control over the appointment of superior court judges. Although the above process for the selection and appointment of judges, as envisaged in the Constitution, is a significant departure from the previous regime in which judges were appointed by the executive, [313] there are a number of flaws in the process. The general public is welcome to attend but not participate in these interviews. The information on which the Commission bases its questioning of candidates is not made public. Finally, the decision to appoint a judge is made by a vote of a body dominated by political appointees who are not required to justify their decisions.[314]

The JSC plays an important role in the selection and removal of judges, as the Constitutional Court recognised in the *First Certification case*.[315] It should act and be seen to act transparently, accountably, and rationally in carrying out significant constitutional obligations.[316] In conclusion, it has been argued that the size and structure of the JSC remains problematic and in need of reform, as acknowledged to some extent by the government in its National Development Plan 2030.[317] It has also been argued that, in comparison to other

[308] Oxtoby and Masengu, op cit note 299 at 545.
[309] See section 174(2) of the Constitution.
[310] See section 174(1) of the Constitution supra note 307.
[311] Devenish, op cit note 302 at 337.
[311] See section 174(1) of the Constitution supra note 307.
[312] I Currie et al *New constitutional & administrative law* (2001) 303.
[313] *First Certification* supra note 36 at para 124 , the Constitutional Court mentioned that the Commission 'provides a broadly based selection panel for appointments to the judiciary and provides a check and balance to the power of the executive to make such appointments.'
[314] Currie, op cit note 312 at 304.
[315] *First Certification* supra note 36 para 120.
[316] Hoexter C and Olivier M *Judiciary in South Africa* (2014) at 198.
[317] Ibid.

judicial appointment commissions, the JSC is an unjustifiably large and unwieldy organisation in which politicians and political participants are over-represented.[318]

(c) Role of the Chief Justice

The Chief Justice is responsible for many ceremonial and substantive functions and responsibilities; the OCJ's research amply demonstrates the overwhelming nature of the Chief Justice's constitutional and legislative mandates.[319] The Chief Justice may, however, be assisted in the exercise of his/her judicial leadership functions by any judge designated by him/her, as provided for in section 8(7) of the Superior Courts Act. The Chief Justice has always been the de facto head of the judiciary, and an amendment to the Constitution has recently made him/her the de jure head of the judiciary.[320] The Constitution Seventeenth Amendment Act places the Chief Justice in charge of 'establishing and monitoring norms and standards for the exercise of all courts' judicial functions'. The Act also established the Constitutional Court as the highest court in South Africa with jurisdiction over all constitutional issues and any other matter for which it may grant leave to appeal.[321]

As indicated above, in both case law and legislation, there is very little that defines the role of the Chief Justice in the appointment of judges. The powers of a Chief Justice are in fact quite limited. The main role of a Chief Justice is leadership. Like in other jurisdictions, the Chief Justice is expected to be the spokesperson and representative of the judiciary in its dealings with the executive government and the community.[322] As both the chief of the Court

[318] Hoexter and Olivier, op cit note 316.
[319] This research was carried out in support of an unpublished *Office of the Chief Justice Strategic and Annual Performance Plan for Fiscal Years 2011-2014 (March 2022).*
[320] The Constitution Seventeenth Amendment Act, section 165 of the Constitution which provides:
'(1) The judicial authority of the Republic is vested in the courts.
(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.'
[321] Section 167(3) of the Constitution provides:
'(3) The Constitutional Court—
(a) is the highest court of the Republic; and
(b) may decide—
(i) constitutional matters; and
(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court, and
(c) makes the final decision whether a matter is within its jurisdiction.'.'
[322] D K Malcom, 'The role of the Chief Justice' (2008) *Cross UL Rev*, 150.

and the State's judiciary, the Chief Justice plays an executive function. But it's not entirely obvious what a Chief Justice can do to deal with a judge who is not doing their jobs as effectively as they should be.

The creation of the OCJ provides a platform for the implementation of initiatives aimed at improving the culture of non-performance that has crept into the judiciary over time. As the head of the judiciary, the Chief Justice is responsible for developing policies, norms and standards.

(d) Chief Justice as the chairperson of the JSC

As previously stated, the Chief Justice chairs the JSC and thus presides over meetings and interviews of candidates for judicial office. The Chief Justice leads the Commission in carrying out its constitutional function of selecting judges, and he or she must ensure that public interviews are conducted in an open and fair manner.[323] Notably, as chairperson of the Judicial Conduct Committee, the Chief Justice is the enforcer of discipline against fellow judges. He or she must be a person of impeccable integrity who sets a good example and understands and values the high standards of judicial conduct expected of judges.[324]

For the reasons stated above, the role of the Chief Justice at the JSC is difficult. Furthermore, it is critical that the Chief Justice, in collaboration with the JSC, questions candidates for the bench to determine whether they have the necessary qualities, abilities, and experience to hold this demanding office. In addition to the candidate's ability as a judge, his or her suitability to lead the judiciary should be considered.[325]

(e) Judicial education

In terms of judicial appointments, the OCJ ensures that those who are permanently appointed are appropriately equipped for their judicial functions, and the OCJ began aspirant judges' training programmes, orientation of newly appointed judges and magistrates, and continuing judicial education of judges and magistrates on January 16, 2012. South African Judicial Education Institute (SAJEI) has since organised a number of workshops and educational programmes aimed at empowering judicial officers across the board to carry out their duties more effectively.[326]

[323] Hoexter and Olivier, op cit note 316 at 143.
[324] Ibid at 143.
[325] Ibid at 144.
[326] Mogoeng, op cit note 184 at 401.

(f) Norms and standards

The OCJ is said to have begun the process of developing norms and standards and are working out how implementation can be properly monitored in anticipation of the Superior Courts Act and the Constitution Seventeenth Amendment Act going into effect. The OCJ was concerned about the disturbing frequency of delays, backlogs, absenteeism, and poor performance by some Judicial Officers. These decades-long issues can only be effectively addressed through the proposed norms and standards, which aim to address realistic case completion periods as well as performance monitoring and evaluation.[327]

Even in its current form, the OCJ has assisted the judiciary in developing capacity to examine best practices in jurisdictions in comparable democracies in order to work on the following: its own norms and standards, performance monitoring and evaluation mechanisms, an effective case management system, determining judicial policy and strategic objectives, performance-enhancing judicial education programmes, and a self-governance system commensurate with judicial independence. With the implementation of the new legislation, it will circulate drafts to colleagues for feedback in order to avoid delays in putting these measures into effect and to better serve our democracy.[328]

(g) Modernisation

Court modernization or automation is a significant factor in improving the efficacy and efficiency of courts. The OCJ has identified the need for the judiciary to have a server that is separate from that of the Justice Department through its Heads of Court IT Committee, with the proper assistance of the OCJ IT Directorate, in order to eliminate the possibility of unintended and premature access to its draft judgments and to lessen the burden on the already overburdened justice server.[329] On-site and off-site electronic record keeping and filing make it easier to manage cases effectively and hasten their conclusion. They also make it so that the disappearance of records of proceedings, which frequently causes severe injustice to parties involved and occasionally even the general public, is a thing of the past. These are a few of the initiatives that the judiciary has chosen and is pursuing with the OCJ's assistance.[330]

[327] Mogoeng, op cit note 184 at 400.
[328] Ibid at 400.
[329] Ibid at 402.
[330] Ibid.

The OCJ has started the process of building the judiciary's competence to collect and analyse its own court performance information.[331] In order to swiftly take the necessary corrective action, the OCJ is able to quickly identify the court performance issues that require intervention. Only the Justice Department and the NPA currently have this capability, and they are aware of how the courts are operating. Because of this, several judges have expressed grave worries about the effects on judicial independence of this kind of monitoring and evaluation of court performance by "outsiders." The OCJ has also begun a case file audit operation in all higher courts to find dead files or old cases that should have been resolved long ago and to prioritize them for resolution. Once more, the OCJ has contributed some capacity to assist in resolving this situation.[332]

It seems unlikely that the current hybrid form of judicial selection—which involves the Chief Justice, the JSC, the President, and other parties who have been consulted—will be altered, and even less likely that it will be entirely scrapped. Although it is theoretically possible to amend Section 174 of the Constitution, the current system of selection and appointment has become so entrenched, and the Chief Justice's limited role in the process has become so well established, that any change to it may be viewed with suspicion by civil society, especially if there is any reversion to apartheid-era practices that are incompatible with the democratic ethos and constitutional values of transparency.[333]

VI CONCLUSION AND RECOMMENDATIONS

It is evident that the independence of the judiciary has been severely tested since the dawn of democracy – necessitating that consolidated efforts be taken to protect and salvage what remains of the institutional integrity of the judiciary. However, it must be noted that, when the judiciary itself is biased due to ideological convictions, partisan ties, or animosity toward the new democracy and the judiciary's function within it, the advantages of judicial independence are lost.[334] In many countries like in South Africa, with constitutions that protect the rule of law, separation of powers, judicial independence, equality before the law, and other fundamental rights, as well as the legal responsibility of public officials, the judicial system is

[331] Mogoeng, op cit note 184 at 401.
[332] Ibid at 402.
[333] Hoexter and Olivier, op cit note 316 at 152.
[334] B C Smith, Conclusion: the dilemma of judicial independence' available at *https://www.taylorfrancis.com/chapters/mono/10.4324/9781315544847-11/conclusion-dilemma-judicial-independence-smith*, accessed 22 August 2022.

subject to various degrees of political meddling.[335] The independence of the judiciary must therefore be protected at all material times.

Especially, judicial independence is not only crucial for preserving the impartiality of judges and the rule of law but also for safeguarding the institutional integrity of the judiciary by ensuring that it remains independent from both inside and outside interference. The idea of judicial independence has many facets. Depending on the historical, political, legal, and social context in which the courts functions, various institutional, legal, and operational arrangements that are in abstract designed to maintain judicial independence may function differently.[336] As a result, there is no one-size-fits-all optimal solution for achieving judicial independence. In more simple words, judicial independence is the outcome of a variety of conditions, measures, checks, and balances, which can vary from one nation to another. Each nation needs to establish its own balance.

The research has revealed a daunting picture and gaps relating to the independence of the judiciary. Judicial independence remains threatened and is likely to diminish through passage of time so long as efforts are not taken to safeguard the judiciary from any form of interference. This will not only require government be actively willing but political will is also essential for achieving this goal. Drawing from other foreign jurisdictions such as the USA, it is therefore recommended that the judiciary be endowed with financial autonomy to avoid interference by government and politicians and to avoid being underfunded. Financial independence will bestow on the judiciary the necessary power or autonomy to determine its processes without complete reliance on government funding.

In order for the court to carry out its tasks independently, morally, and effectively, there must be enough resources to guarantee judicial independence from State institutions and private parties.[337] For this reason, the Chief Justice must have the authority to set the judiciary's budget rather than delegating this duty to the Minister, responsible for Justice and Constitutional Development. Each country has a responsibility to ensure that the judiciary has the resources necessary to carry out its duties. Further, the transparency of courts is a key issue that has grown in prominence over the past several years. Access to justice, legal culture, and public confidence in the judicial system can all be improved by providing comprehensive and

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[335] B C Smith, Conclusion: the dilemma of judicial independence' available at *https://www.taylorfrancis.com/chapters/mono/10.4324/9781315544847-11/conclusion-dilemma-judicial-independence-smith*, accessed 22 August 2022.

[336] United Nations Office on Drug and Crime 'The main factors aimed at securing judicial independence' available at *https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/1--the-main-factors-aimed-at-securing-judicial-independence.html*, accessed 16 November 2022.

[337] Ibid.

understandable information on court procedures. Transparent procedures can actually increase individuals' understanding of the judicial system's available legal remedies, the parties' fundamental procedural rights (such the ability to appeal a decision), and the various participants' roles in the process (lawyers, judges, prosecutors, etc.).[338] Finally, transparency lessens potential for corruption while simultaneously improving the fairness and effectiveness of the legal system.[339]

[338] United Nations Office on Drug and Crime 'The main factors aimed at securing judicial independence' available at *https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/1--the-main-factors-aimed-at-securing-judicial-independence.html*, accessed 16 November 2022.
[339] Ibid.

BIBLIOGRAPHY

Books

Bingham Thomas *Business of Judging: Selected Essays and Speeches* (2000)

Currie I et al *New constitutional & administrative law* (2001)

De Vos Pierre *South African Constitutional law in context* (2014)

Devenish GE *South African Constitution* (2005)

Hoexter C and Olivier M *Judiciary in South Africa* (2014)

Chapters in Books

Ebrahim Hassen, 'Governance and administration of the judicial system' in Cora Hoexter and Morné Olivier *The Judiciary in South Africa* (2014)

Journal articles

Albertyn C, 'Current Development "Judicial independence and the Constitutional Fourteenth Amendment Bill' (2006) 22 *South African Journal on Human Rights,* 126 – 143

Calland Richard, 'Sandile Ngcobo: A short study in judicial leadership'(2017) 32 *Southern African Public Law*, 10

Cachalia A, 'Administrative independence as a guarantee of judicial independence: Experiences from South Africa' (2011) *Advocate*, 22

Commonwealth Secretariat, 'Administration of courts: development of a Model Court Handbook' (2009) 35 *Commonwealth Law Bulletin*, 315-328

Del Sole et al, 'An independent judiciary: The role of Chief Justice Cappy' (2009) 47 Duquesne Law Review, 547-554

Du Bois F, 'Tenure on the Constitutional Court' (2002) 119 *South African Law Journal*, 1–17

Dube Felix, 'Separation of powers and the institutional supremacy of the Constitutional Court over Parliament and the executive' (2020) 36 *South African Journal on Human Rights*, 293–318

Hogg P W, 'The Role of a Chief Justice in Canada' (1993) 19 *Queen's Law Journal*, 248-260

Klug Heinz, 'Institutional integrity and the promise of constitutionalism: Justice Moseneke and the Separation of powers' (2017) 1 *Acta Juridica,* 333

Olivier M, 'The appointment of acting judges in South Africa and Lesotho' 2006 *Obiter*, 554

Oxtoby C and Masengu T, 'Who nominates judges? Some issues underlying judicial appointments in South Africa' 544 *Stell LR*, 540

Magabe M T and Kola O O, 'Separation of powers, checks and balances and judicial exercise of self-restraint: an analysis of case law' (2021) 42 *Obiter*, 547

Mahomed Ismael, 'The role of the judiciary in a constitutional State: Address at the first orientation course for new judges' (1998) 115 *SALJ*, 111-112

Mogoeng WA Mogoeng, 'The implications of the Office of the Chief Justice for constitutional democracy in South Africa' (2013) 24 *Stellenbosch Law Review,* 401

Moseneke Dikgang, 'Striking the balance between the will of the people and the supremacy of the Constitution' (2012) 129 *South African law Journal*,

Moseneke Dikgang, 'Was it all in vain?' (2018) 69 *New Agenda: South African Journal of Social and Economic Policy*,

Powell C H, 'Judicial Independence and the Office of the Chief Justice'(2019) 9 *Constitutional Court Review* , 497–519

Siyo L and Mubangizi J C, 'The Independence of South African Judges: A Constitutional and Legislative Perspective' (2015) 18 *Potchefstroom Electronic Law Journal*, 817

Staszak Sarah, 'The Administrative Role of the Chief Justice: Law, Politics, and Procedure in the Roberts Court Era' (2018) 7 *Laws*, 17

<u>*Case law*</u>

<u>*Domestic*</u>

AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others 2021 (4) BCLR 349 (CC)

Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others 2013 (7) BCLR 762 (CC)

De Lange v Smuts NO and Others 1998 (3) SA 785 (CC)

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC)

Hlophe v Judicial Service Commission and Others 2022 (3) All SA 87 (GJ)

Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others 2011 (10) BCLR 1017 (CC)

Justice Alliance of South Africa v President of South Africa 2011 (5) SA 388 (CC)

Lethoko and Another v Minister of Defence and Another 2021 (2) SACR 661 (FB)

S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening) 2002 (8) BCLR 810 (CC)

South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) BCLR 77 (CC)

Steenkamp NO v Provincial Tender Board of the Eastern Cape 2007 (3) BCLR 300 (CC)

Van der Merwe v Road Accident Fund 2006 (4) SA 230 (CC)

Von Abo v President of the Republic of South Africa 2009 (5) SA 345 (CC)

Foreign

Marbury v. Madison, 5 U.S. 1 Cranch 137 (1803)

R v Genereux 1992 1 SCR 259 SCC

R v Valente 1985 24 DLR (4th) 161 SCC

Queen in Right of Canada v Beauegard 1986 30 DLR (4th) 481 SCC

Legislation

Constitution of the Republic of South Africa, 1996

Independent Commission for the Remuneration of Public Office – Bearers Act 92, 1997

Interim Constitution of the Republic of South Africa, Act 200 of 1993

Judge's Remuneration and Conditions Employment Act 47 of 2001

Public Service Act 103 of 1994

Superior Courts Act 10 of 2013

Supreme Court Act 59 of 1959

Internet

Bodiat Aneesa 'At South Africa's Constitutional Court, a Democracy Brick by Brick' *https://daily.jstor.org/at-south-africas-constitutional-court-a-democracy-brick-by-brick/*, accessed 13 November 2022

Cameron E, 'Judge of the Constitutional Court of South Africa. "Middle temple and SA conference: Judicial Independence' available at *https://silo.tips/download/judicial-independence*, accessed 08 September 2022

Corder Hugh 'South Africa's new chief justice: why the wheels came off the appointment process' available at *https://www.news.uct.ac.za/article/-2022-02-15-south-africas-new-chief-justice-why-the-wheels-came-off-the-appointment-process,* accessed 14 August 2022

Competition Tribunal South Africa 'Competition Appeal Court' available at *https://www.comptrib.co.za/competition-appeal-court*, accessed 14 November 2022

Constitutional Court of South Africa 'History of the court' available at *https://www.concourt.org.za/index.php/about-us/history*, accessed 14 November 2022

Courts and Tribunals Judiciary 'Independence' available at *https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/independence/*, accessed 14 November 2022

De Lange R & Mevis P A M, 'Constitutional Guarantees for the Independence of the Judiciary' available at *https://biblioteca.cejamericas.org/bitstream/handle/2015/4318/Constitutional-*

Guarantees-For-Independence-of-Judiciary-Netherlands.pdf?sequence=1&isAllowed=y, accessed 22 September 2022

Department of Justice and Constitutional Development 'courts of South Africa' available at *https://www.justice.gov.za/about/sa-courts.html*, accessed 14 November 2022

International Court of Justice 'Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities' available at *https://www.icj.org/wp-content/uploads/2014/06/CMRec201012E.pdf*, accessed 11 September 2022

Judges Matter 'Discussion document on the governance of the judiciary in South Africa' available at *https://www.judgesmatter.co.za/wp-content/uploads/2022/08/Governance_Discussion_Document-FINAL.pdf*, accessed 08 September 2022

Mogoeng Mogoeng 'The Rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards' available at *https://constitutionallyspeaking.co.za/transcript-chief-justice-mogoeng-on-the-rule-of-law-in-south-africa/,* accessed 23 August 2022.

National Treasury 'Vote 22 Office of the Chief Justice and Judicial Administration' available at *https://www.treasury.gov.za/documents/national%20budget/2019/ene/Vote%2022%20Office%20of%20the%20Chief%20Justice%20and%20Judicial%20Administration.pdf*, accessed 02 August 2022

O'Reilly Kevin, 'Chief Justice Mogoeng seeks judicial independence' available at *http://www.saflii.org/za/journals/DEREBUS/2013/92.pdf*, accessed 23 August 2022

Parliamentary Monitoring Group 'The structure of government' available at *https://pmg.org.za/page/structure-of-government*, accessed 11 November 2022

Ramjathan-Keogh Kaajal, 'The importance of promoting judicial independence in the Southern Africa region' available at *https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Ramjathan.pdf*, accessed 10 June 2022

Smith B C '*Conclusion: the dilemma of judicial independence'* available at *https://www.taylorfrancis.com/chapters/mono/10.4324/9781315544847-11/conclusion-dilemma-judicial-independence-smith*, accessed 22 August 2022

South African Judiciary 'Annual performance plan' available at *https://www.judiciary.org.za/images/news/2022/Annual_Performance_Plan_2022-23.pdf*, accessed 20 November 2022

South African Judiciary 'Magistrates' Courts' available at *https://www.judiciary.org.za/index.php/about-us/16-magistrates-courts*, accessed 15 November 2022

South African Judiciary 'The South African judicial system' available at *https://www.judiciary.org.za/index.php/the-south-african-judicial-system*, accessed 14 November 2022

South African Judiciary 'The establishment of the office of the Chief Justice 2010 -2013' available at *https://www.judiciary.org.za/images/establishment/Establishment-of-the-OCJ-2010-2013.pdf*, accessed 09 November 2022

Supreme Court of Appeal 'history' available at *https://www.supremecourtofappeal.org.za/index.php/history#:~:text=Jurisdiction%20of%20the%20court&text=Originally%20the%20head%20of%20the,the%20President%20of%20the%20SCA*, accessed 14 November 2022

United Nations Office on Drug and Crime 'The main factors aimed at securing judicial independence' available at *https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/1--the-main-factors-aimed-at-securing-judicial-independence.html*, accessed 16 November 2023

United Nations Office on Drugs and Crime 'Commentary on the Bangalore Principles of Judicial Conduct' available at *https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf*, accessed 05 September 2022