FIFTEEN YEARS ON: CENTRAL ISSUES RELATING TO THE TRANSFORMATION OF THE SOUTH AFRICAN JUDICIARY

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ABSTRACT

At its 52nd National Conference held in Polokwane from 16-20 December 2007, the African National Congress adopted a strongly-worded resolution calling for the transformation of the judiciary to be expedited. The judiciary has also recently attracted controversy due to the ongoing legal travails of ANC President, Jacob Zuma, and allegations regarding improper conduct on the part of Hlophe JP. This is therefore an opportune juncture to step back and consider the transformation of the judiciary over the past fifteen years of South Africa’s constitutional democracy. The article commences with a brief discussion of the role of the judiciary under apartheid. In light of this, the following issues are discussed as components of judicial transformation: the process whereby judges are appointed; the need to change the attitudes of the judiciary; the need to foster greater judicial accountability; and the need for a more efficient judiciary. The conclusion reached is that post-apartheid South Africa has generally made impressive strides towards transforming its judiciary while respecting judicial independence and the separation of powers. However, recent legislative activity, resolutions and statements of the ANC and its alliance partners have not always heeded this approach. Judicial transformation must continue to be pursued but in a manner that is not counter-productive to the constitutional project as a whole.

I PP, JZ AND THE JP

Amongst the new elite there is talk of an epochal moment in South African politics with the acronym PP – Post Polokwane. At its 52nd National Conference, held in Polokwane from 16 to 20 December 2007, the African National Congress (ANC) amongst other promises of change and renewal adopted a strongly worded resolution simply entitled ‘The Transformation of the Judiciary’. The resolution states that implementation of various decisions of the ANC regarding the judiciary is ‘long overdue’, consultation with relevant role-players has already been undertaken ‘over a very lengthy period’, and that the resolution must accordingly be ‘urgently implemented by the end of the present term of government’. As for the contents of the resolution, it specifies a raft of measures, including, in its most controversial aspects, the conversion of the Constitutional Court into the highest court of appeal in constitutional and non-constitutional matters; the amalgamation of the lower

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and higher courts into a ‘single, integrated, accessible and affordable court system’; and the vesting of ‘ultimate responsibility’ for the administration of courts in the ‘Minister responsible for the administration of justice’. The resolution – and the lengthy legislative saga that preceded it, which is detailed below – led certain commentators to raise concerns about the ANC’s alleged hegemonic desire to ‘control and direct all centres of power’.

The Polokwane Conference was, of course, widely noted for another reason, which was the ascension of Jacob Zuma – or JZ to his supporters – to the presidency of the ANC and his emergence as President in waiting. As almost all South Africans are surely aware, Zuma has been charged with corruption. When and if Zuma has his day in court, the judiciary might well determine whether he is able to become President or remain in office. Zuma enjoys enormous popular support and the resulting tension has given rise to unprecedented attacks upon the judiciary by leading members of the ANC and its alliance partners. Thus ANC Secretary-General Gwede Mantashe has expressed concern about the ‘apparent mobilisation of the judiciary’ and is also alleged to have characterised the judges of the Constitutional Court as elements of ‘counter-revolutionary’ forces. A further extraordinary development has been a claim by the Constitutional Court that Judge President Hlophe of the Cape Bench sought to influence two of judges of the Court to find in Zuma’s favour in a case relating to the admissibility of evidence obtained in police raids on Zuma’s offices and those of his lawyers. Frequently, these attacks and claims are linked to the theme of transformation, the insinuation being that a suitably transformed judiciary would be sympathetic to Zuma’s cause, or that a suitably ‘transformed’ judiciary would be more welcoming or accepting of Hlophe JP.

All of this combines to create the impression that the South African judiciary is at a pivotal moment. Furthermore, the stakes could not be higher. An independent and impartial judiciary is essential to the task of implementing and upholding the Constitution, which in turn is central to the national project of post-apartheid South Africa. Against this background, it seems an opportune juncture to step back and critically consider the transformation of the judiciary over the past 15 years of South Africa’s constitutional democracy. Key questions are: what is meant by this concept, how much progress has been

4 Mantashe has denied that he characterised the Constitutional Court as counter-revolutionary although the Mail & Guardian claims to have a recording of the interview in which the statement was made. See ‘ANC Shrugs off Mantashe’s Stance on Judiciary’ Mail & Guardian Online (11 July 2008) <http://www.mg.co.za/article/2008-07-11-anc-shrugs-off-mantashe-s-stance-on-judiciary>. For a very useful overview of the attacks upon the judiciary, see the resources collected at ‘Judiciary under Siege? You be the Judge …’ on the Legalbrief Today website: <http://www.legalbrief.co.za/index.php?page=JudiciaryUnderSiege>.
made in achieving the transformation of the judiciary, and what strategies should now be adopted?

In this article, we attempt to provide a ‘bird’s eye’ view of the central issues involved in the debate about the transformation of the judiciary. The following approach is adopted. First, the term ‘transformation’ implies a change from a state for affairs that existed previously. For this reason, we commence with a brief discussion of the role of the judiciary under apartheid and attempt to draw certain conclusions about the apartheid judiciary’s institutional character. In light of this, the article discusses what is meant by the term transformation. It is argued that transformation should not be understood as carrying a single meaning. Instead, various themes can be identified. These are: the process whereby judges are appointed; the need to diversify the judiciary; the need to change the attitudes of the judiciary; and the need to foster greater judicial accountability. More recently, as the Polokwane resolution illustrates, judicial transformation has become associated with calls for a more efficient judiciary that is responsive to the needs of ordinary South Africans and which facilitates greater access to justice.

This article discusses each of these issues in turn. The conclusion reached is that South Africa has generally made impressive strides towards transforming the judiciary in its first 15 years of constitutional democracy. Moreover, this has been achieved while respecting the independence of the judiciary and the separation of powers – principles that are themselves objectives of judicial transformation, as discussed in greater detail below. Ideally, this approach should be replicated in South Africa’s next 15 years of constitutional democracy. Unfortunately, recent legislative activity in this area, and resolutions, statements and utterances of the ruling ANC and its alliance partners have not always heeded this principle. For this reason, we attempt to identify strategies whereby judicial transformation can continue to be pursued while avoiding unnecessary controversies and outcomes that might ultimately prove counterproductive to the constitutional project as a whole.

II  THE JUDICIARY UNDER APARTHEID

One way of considering South Africa’s present constitutional arrangements – the judiciary included – is by perceiving them as a reaction to its past. In the often recalled words of Mahomed DP, ‘the Constitution … retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable’. In that light, an adequate conceptualisation of judicial transformation might best be achieved by considering the institutional character of the apartheid judiciary. However, this is a ‘well

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6 As indicated, the Polokwane resolution calls for a ‘single, integrated, accessible and affordable court system’. See ‘The Transformation of the Judiciary’ (note 1 above).

7 Shabalala v Attorney-General of the Transvaal 1996 (1) SA 725 (CC) para 26. Or, as Davis J notes: ‘The transformation of our legal concepts must, at least in part, be shaped by memory of that which lay at the very heart of our apartheid past’. See Geldenhuys v Minister of Safety and Security 2002 (4) SA 719 (C) 728-729.
trodden' area of publication and our discussion is therefore brief and to the point.

The process whereby judges were appointed under apartheid is well known. In terms of s 10 of the Supreme Court Act, the State President appointed judges. According to Mpata JA, there is, however, a widely held view that the State President was merely a rubberstamp and that the Minister of Justice was in effect the person who made the appointments. In the latter years of apartheid, this was usually on the recommendation of the Chief Justice or Judge President of the relevant division. Candidates were also drawn from the ranks of senior counsel and were invariably white and male. Indeed, in 1990, when the process of political change commenced, the judiciary was exclusively white and, with one exception, male. On 27 April 1994, the date of South Africa's first democratic election, the situation was much the same: the judiciary remained predominantly white and male, with the exception of three black males and one white female.

The process of identifying potential candidates and their selection was also shrouded in secrecy. It seems clear, however, that political factors played a role in determining who secured appointment and who was promoted. In addition to the process whereby judges were appointed, it is also uncontroversial that judges operated under a dispensation very different to that which exists now. The South African Constitution was modelled on the Westminster tradition of parliamentary sovereignty, which meant that judges enjoyed no power to strike down legislation that infringed human rights.

Judges were, however, able to interpret legislation and might have been able to mitigate its effects. Notwithstanding this, in pioneering work John Dugard argued that South African judges tended to regard themselves as merely 'declaring' the law and denied that they enjoyed a creative function. Moreover, apart from generally failing to interpret legislation in favour of

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8 For book length treatments, see C Forsyth In Danger of their Talents A Study of the Appellate Division of the Supreme Court of South Africa from 1950 (1985); D Dyzenhaus Hard Cases in Wicked Legal Systems South African Law in the Perspective of Legal Philosophy (1991); S Ellman In a Time of Trouble Law and Liberty in South Africa's State of Emergency (1992).
9 59 of 1959.
human rights, judges also rarely commented on the unjust nature of apartheid law. Hugh Corder draws the conclusion that:

The overall picture [of judicial attitudes] which emerges is one of a group of men who saw their dominant roles as the protectors of a stability ... The judges expressed it in terms of a positivistic acceptance of legislative sovereignty, despite a patently racist political structure, and a desire to preserve the existing order of legal relations, notwithstanding its basis in manifest social inequalities ..."  

At the conclusion of apartheid, the South African judiciary was therefore almost exclusively white and male; its composition had been influenced, to some extent at least, by political factors; it had been schooled in a tradition of parliamentary sovereignty with a concomitant emphasis upon literalism in the interpretation of statutes; and it had generally supported the status quo in an unjust system.  

Nevertheless, for reasons of continuity, the judiciary survived the political transition almost wholly intact. While the legislative and executive branches of government were replaced, the only innovation in respect of the judiciary was the creation of a Constitutional Court, which would serve as the highest court of appeal for constitutional matters, together with a new appointment body, the Judicial Service Commission (JSC).  

Furthermore, it was this same judiciary that was tasked with enforcing, and developing the meaning of, a Constitution that constituted a radical departure from the apartheid legal order. Most obviously, the Constitution entrenches a system of democratic government in which Parliament is no longer sovereign. Courts are, instead, empowered to invalidate legislation that is inconsistent with the Constitution. The Constitution also expressly rejects a literal approach to statutory interpretation and instead requires that legislation be interpreted in light of the values of the Constitution. Finally, as has been widely noted, the South African Constitution is ‘transformative’ in nature. Geoff Budlender explains that

[o]ur Constitution differs from many others in a fundamental respect. Most Constitutions reflect the outcome of a change which has already taken place, and lay down the framework

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19 The authors are grateful to GJ Marcus SC for this point.  
20 Section 39(2) provides that ‘[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’.  
for the new society. A key theme of our Constitution is the change which is yet to come – the transformation which is yet to come.\textsuperscript{22}

Again, this sits uneasily with the apartheid judiciary’s institutional character, which tended to regard itself as a protector of the status quo.

Against this background, it was, as Budlender also remarks, something of a leap of faith to place such extensive power in the hands of the judiciary – faith that, he thinks, has generally been vindicated.\textsuperscript{23} It is also against this background that the imperative to transform the judiciary must be understood.

### III The Transformation of the Judiciary: What does it mean?

Judicial transformation in South African can be chiefly understood as a response to the negative characteristics of the apartheid judiciary outlined above. For this reason, judicial transformation should not be understood as carrying a single meaning. Instead, various themes can be identified, each of which must be discussed.

First, judicial transformation must incorporate changes in the manner in which judges are appointed. Appointments should not be secretive and should not be influenced by party political considerations. Secondly, for reasons discussed in greater detail below, it is necessary to change the demographics of the judiciary. As an institution, it cannot remain predominantly white and male. Thirdly, the underlying attitudes of the judiciary must change – it must, argues Budlender, ‘embrace and enforce the principles of a fundamentally new legal order’.\textsuperscript{24} Fourthly, it is necessary for the judiciary to be accountable, although the difficult questions are, of course, accountable to whom and in what manner? Finally, judicial transformation has, as indicated, also come to be regarded as embracing concerns about efficiency and access to justice. Each of these aspects of judicial transformation is explored below.

#### (a) The process whereby judges are appointed

The process whereby judges were appointed under apartheid has already been outlined. The interim\textsuperscript{25} and final Constitutions established a new set of procedures, intended to overcome the difficulties that were inherent in that approach. Under the final Constitution, the President appoints judges after consulting, or on the advice of, the JSC depending upon the nature of the appointment.\textsuperscript{26}

It is the JSC that constitutes the most radical break from the pre-constitutional procedure for the appointment of judges. The composition of the JSC is complex but includes inter alia senior members of the judiciary, the Minister

\textsuperscript{22} ‘Transforming the Judiciary: The Politics of the Judiciary in a Democratic South Africa’ (2005) 4 \textit{SALJ} 715, emphasis in the original.
\textsuperscript{23} Ibid 724.
\textsuperscript{24} Ibid 716.
\textsuperscript{25} Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution).
\textsuperscript{26} In certain cases, the leaders of parties in the National Assembly must also be consulted. See s 174 of the Constitution.
responsible for the administration of justice, legal practitioners and members of Parliament.\(^27\) As for the procedure followed by the JSC, the Constitution provides that the JSC ‘may determine its own procedure, but decisions of the Commission must be supported by a majority of its members’.\(^28\) In broad outline, the JSC calls for nominations whenever a vacancy occurs; candidates are then interviewed, after which the JSC makes recommendations to the President. Interviews are conducted in public, which allows for greater public debate and scrutiny. However, once the interview is concluded, the deliberations of the JSC are confidential. This has led to criticism on the basis that the JSC’s reasons for preferring one candidate are not always clear. In the view of Mpati JA, however, little would be achieved – for either the disgruntled candidate or the appointment system – if the JSC were to disclose its deliberations. The public would, in his view, do better to focus on the criteria that the JSC employs.\(^29\)

As noted, a key rationale for the creation of the JSC was to establish a more open and independent appointments process. Although aspects of the JSC’s work have been criticised – a point to which we return below – in this it appears to have been generally successful. The procedures followed by the JSC are a clear improvement upon the opaque processes of the apartheid era. Moreover, the fact that the ANC has intermittently expressed dissatisfaction with the pace of the judiciary’s demographic transformation can be interpreted as a measure of the JSC’s independence.\(^30\)

(b) Diversity

The promotion of a diverse judiciary is a constitutional imperative. Section 174(2) of the Constitution provides that ‘[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed’. Perhaps because the matter is put beyond doubt by the Constitution, the rationale for this policy is not always closely considered. However, the justification for pursuing a diverse judiciary is clearly relevant to the principles that should guide this policy. These are therefore the issues that are considered in this section, as well as how effective and satisfactory the JSC’s pursuit of a diverse judiciary has been.

The term ‘affirmative action’ – also termed ‘positive action’ in jurisdictions such as the United Kingdom – encompasses a range of policies. These may usefully be thought of in terms of a spectrum, with relatively modest policies situated at one end and more far-reaching measures at the other. Affirmative action may, for instance, refer simply to steps taken by an institution to eradicate discriminatory practices, such as hiring by word of mouth, which tend to

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\(^{27}\) Section 178(1).

\(^{28}\) Section 178(6).


favour groups who are currently represented rather than groups that are not. Alternatively, affirmative action may take the form of outreach programmes, which are specifically designed to attract and if necessary qualify candidates from the underrepresented group. Finally, in its most controversial manifestation, affirmative action may consist in giving preference to members of disfavoured groups, or redefining merit so that criteria such as race and gender are made relevant qualifications.\(^{31}\)

Affirmative action can also be profitably understood in terms of two main strands of justification. On the one hand, affirmative action is frequently associated with the promotion of equality, the argument being that such policies engender a more egalitarian society. In South Africa, this is the justification that is most commonly invoked, no doubt in part because affirmative action is authorised under s 9, the Constitution’s equality guarantee, where it is expressly linked to the achievement of equality.\(^{32}\) Thus in *Minister of Finance v Van Heerden*, the Constitutional Court’s leading case on affirmative action, Moseneke J held that ‘[r]estitutionary measures, sometimes referred to as “affirmative action”, may be taken to promote the achievement of equality’.\(^{33}\) However, affirmative action can also be justified on the basis of utilitarian rationales. For instance, it might be argued that the mere fact of diversity brings certain advantages to an institution that are independent of any egalitarian benefits. Thus in the United States, in the seminal case of *Regents of the University of California v Bakke*, Powell J held that affirmative action is permissible in university admissions because of the educational benefits of a diverse learning environment. In his words:

> An otherwise qualified medical student with a particular background – whether it be ethnic, geographic, culturally advantaged or disadvantaged – may bring to a professional school of medicine, experiences, outlooks and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.\(^{34}\)

Although in South Africa the equality rationale for affirmative action is generally preferred, it is submitted that in and of itself it does not constitute a particularly compelling justification for a diverse bench. Indeed, the fact that affirmative action within the judiciary and affirmative action generally are authorised under separate provisions of the Constitution – s 174(2) and s 9(2) respectively – would seem to suggest that different considerations are at stake. Our view is therefore that affirmative action within the judiciary is more profitably understood in terms of the diversity rationale expounded in *Bakke*. In that case, it was held that affirmative action is permitted because it exposes students to views that they would not otherwise encounter, thereby adding value to their university experience. In a similar vein, it is possible to argue

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32 Subsection (2) provides: ‘Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken’.
33 2004 (6) SA 121 (CC) para 28.
that a diverse bench will result in a plurality of perspectives being brought to the process of adjudication, thereby enhancing the quality of judicial decision-making. Kentridge, for instance, drawing on his experience as an acting judge of the Constitutional Court, states that the Court’s diversity ‘illuminated our conferences especially when competing interests, individual, government and social, had to be weighed. I have no doubt that this diversity gave the court as a whole a maturity of judgment it would not otherwise have had’.\(^{35}\) That said, various objections might be advanced against this rationale. One might question whether a judge’s background and experience should be relevant to the process of adjudication. Surely this results in partiality and subjectivity? Would it not be better to emphasise technical competence regardless of race, gender and so on?

In truth, this is an issue that we have canvassed already. As noted, one of the myths that was propagated about the judiciary under apartheid was that personal experience never plays a role in judicial decision-making. The role of the judge is, instead, merely to declare the law. As Dugard sought to demonstrate, this account of adjudication is misconceived. The judge’s interpretation of law and fact will inevitably be coloured by his or her background and experience. Indeed, the Constitutional Court has subsequently acknowledged this and stated that ‘[i]t is appropriate for Judges to bring their own life experience to the adjudication process’.\(^{36}\) If so, then this constitutes a powerful rationale for judicial diversity. As Cory J remarks in the Canadian case of \(R v S (RD)\): ‘The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging’\(^{37}\).

However, a far more pertinent objection can be advanced, which is that the diversity rationale presupposes a link between a person’s status – their race or gender – and the views that they hold. Put differently, this justification seems to assume an essentialist notion of identity, in terms of which a person’s status determines their opinions. Indeed, this is implicit in the use of the term ‘representative’ to describe the type of bench that proponents of judicial transformation seek. The word suggests – implausibly to some – that judges drawn from a range of backgrounds will somehow ‘represent’ the concerns and interests of their particular constituencies. For Anne Phillips, an advocate of greater representation of women and minorities in legislative assemblies, this is a matter of particular concern.\(^{38}\) Nevertheless, she regards the exercise as worthwhile. First, there is the importance of symbolic representation. In her words,

\[\text{[w]hen those charged with making the political decisions are predominantly drawn from one of the two sexes or one of what may be numerous ethnic groups, this puts the others in the}\]

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35 Kentridge (note 29 above) 61.
36 President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147 (CC) para 42.
category of political minors. They remain like children, to be cared for by those who know best.39

For Phillips, the legitimacy of legislative – and, by extension, judicial – decision-making is enhanced by greater diversity, even if the decisions themselves are not altered. Budlender makes this point as follows:

A judge or magistrate who presides in a case does so on our behalf. In the 21st century, in a democratic South Africa, there is something utterly incongruous about this being done overwhelmingly by white men.40

Secondly, while rejecting the view that members of particular groups share a unified set of views and interests, Phillips suggests that such individuals tend to occupy a distinct position in society. Women, for example, ‘are typically concentrated in lower paid jobs and they carry the primary responsibility for the unpaid work of caring for others’.41 Greater representation of women offers no guarantee that the needs and interests arising from these experiences will find expression – such a guarantee could only be sought in some notion of essentialism – but it does make it more likely; it is an ‘enabling condition’42 that ‘operates in a framework of probabilities rather than certainties’.43

In South Africa the diversity rationale is especially compelling, at least in respect of race. Because apartheid segregated South Africans for so long, the colour of one’s skin still says a great deal about one’s background, life experience, values and outlook. However, as Budlender remarks,

[that is the position of the current generation. As we move towards a more clearly class-based society, there will be a growing class of people who are black, but have no lived experience of deprivation or of being discriminated against, and who have only limited contact with people who do have that lived experience.44

This process is, one might add, likely to be exacerbated by the well-known tendency of affirmative action to benefit the best-off members of disadvantaged groups. In other words, the type of person most likely to be considered for judicial appointment is less likely to be someone from an underprivileged background. Clearly, this factor should be borne in mind by the JSC.

If that establishes the case for pursuing a more diverse bench, how successful have such measures been? Given that, as mentioned, in 1990 the bench was exclusively white and, with one exception, male, progress has arguably been impressive, at least in terms of race. According to the most recent statistics, of the 201 judges in the higher courts, white males remain in the majority, numbering 89. There are, however, 59 black, 9 mixed-race and 11 Indian male judges. In addition, there are 33 female judges: 11 white, 10 black and 6

39 Ibid 39.
40 Budlender (note 22 above) 716.
41 Phillips (note 38 above) 66.
42 Ibid 83.
43 Ibid 82. For doubts about this argument, based on empirical evidence relating to the appointment of women judges in the US, see K Malleson ‘Justifying Gender Equality on the Bench’ (2003) 11 Feminist Legal Studies 1, 20.
44 Budlender (note 22 above) 716-717.
Indian. Such progress has been partly achieved by widening the pool from which candidates are drawn. Previously, judges were appointed solely from the ranks of senior counsel. Now candidates for the judiciary can be drawn from academia, the magistracy and attorneys’ profession. The abandonment of the previous approach – which is not conducive to the achievement of a diverse bench even in the absence of a system such as apartheid – is a good example of an affirmative action measure situated at the ‘modest’ end of spectrum which seeks to achieve better representation of disadvantaged groups by eradicating discriminatory practices.

Notwithstanding these achievements, in 2002, Chaskalson CJ, as he then was, noted that further progress in diversifying the judiciary was likely to be slow: ‘We have already drawn deeply into the pool of existing candidates from these sections of the profession. We need to increase the size of the pool. It takes time for people to have the necessary experience and be in a position where they can accept a place on the bench’. Chaskalson CJ noted further that there might be a need for ‘positive action’ to ensure that the demographic transformation of the judiciary continues at a satisfactory pace. Positive, or affirmative, action is, of course, already taken for granted in South African judicial appointments. What Chaskalson CJ appears to have had in mind are outreach programmes – situated at the centre of the spectrum of affirmative action measures – that seek to attract and if necessary qualify members of the disadvantaged group.

Chaskalson CJ’s comment appears to be borne out by the experience of other jurisdictions. Not all judicial appointments commissions have been equally successful in promoting a diverse bench. However, one conspicuously successful example is the Judicial Appointments Advisory Committee that was established in Ontario, Canada in 1989. At that time, women made up a very small minority of the bench. However, between 1989 and 1995 the proportion of women judges appointed rose to 40 per cent. An important factor in increasing the number of women judges was the approach of the commissioners and the Attorney General, which resulted in a concerted effort to recruit women to the bench. In 1990, for example, the Committee undertook an outreach programme whereby it contacted associations representing women lawyers and asked them to encourage outstanding lawyers within their associations to apply for judicial appointment.

In this regard, it is notable that the current Chief Justice, Pius Langa, with the support of the government (both financial and moral), has in 2007 launched a new initiative aimed at dealing with the severe under-representation of women
in the High Court.\textsuperscript{49} Nineteen women were selected from over 300 applicants to participate in a novel programme, specially designed to expose them to various fields of judicial work. The participants, selected from the magistracy and private legal practice, had to have ten years experience or more. They underwent a three-month theoretical course and will undergo a further six-month practical judicial course at various High Courts. Candidates will be marked on their work. If they pass the course requirements, they will be part of the pool available for the appointment of acting judges, from which, in practice, High Court judges are chosen. Much of the success of this project will depend upon the government and the Chief Justice encouraging and persuading the Judge Presidents of the various provincial high courts to use this pool of candidates as acting judges, so that they can put into practice what they have learnt on the course in order to make them strong contenders for eventual judicial appointment.

A final consideration relates to the principles that should guide the application of the most far-reaching form of affirmative action, that is, where one candidate is preferred to another on the basis of his or her race or gender. As noted, the Constitutional Court’s leading judgment on affirmative action is \textit{Van Heerden}. In that decision, Moseneke J was principally concerned with affirmative action as a means of promoting equality under s 9(2) rather than as a means of promoting diversity under s 17(2). It is therefore doubtful that \textit{Van Heerden} has direct application to the appointment of judges.

Despite this, it is submitted that we can draw upon \textit{Van Heerden} in considering the principles that should apply to the pursuit of diversity within the judiciary. In \textit{Van Heerden}, Moseneke J indicated that affirmative action measures under s 9(2) should satisfy three criteria:

The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; the third requirement is whether the measure promotes the achievement of equality.\textsuperscript{50}

For our purposes, \textit{Van Heerden} is instructive insofar as Moseneke J envisages a proportionality test. In law, proportionality requires that the measures adopted must be necessary and appropriate to achieve the objective that is pursued, and the impact of the measures must be proportionate to the objective. Moseneke’s commitment to a proportionality standard is revealed by his comments on the second and third yardstick. Thus, commenting on the second yardstick, Moseneke J states that the key question is whether the measures are capable of meeting their objective, which translates into an examination of the relationship between means and ends. In a similar vein, in respect of the third yardstick, Moseneke J states that ‘a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from


\textsuperscript{50} \textit{Van Heerden} (note 33 above) para 37.
its benefits that our long-term constitutional goal would be threatened— a statement that is likewise suggestive of proportionality.

In applying the proportionality principle to the appointment of judges, one approach might be to juxtapose the values of diversity and efficiency and argue that the pursuit of the former must be balanced against the latter. There is some authority for this in labour law. However, this is arguably a false dichotomy. The rationale for pursuing a diverse judiciary is that this will bring greater legitimacy and a plurality of perspectives to the bench, thereby enhancing respect for the judiciary and the quality of decision-making. A diverse judiciary is therefore not necessarily a less efficient judiciary; it is ideally, on balance, a more efficient judiciary. As Van der Westhuizen J held in Stoman v Minister of Safety and Security:

As far as efficiency is concerned, I am respectfully of the view that the requirement of representivity is often linked to the ideal of efficiency … In other words, the ideal of representivity … cannot necessarily be separated from the ideal of efficiency.

It is submitted that a better approach would be for the JSC to consider the purpose for which diversity is pursued, and whether the measures adopted are necessary and appropriate in order to achieve that purpose. The constitutionally authorised goal is a judiciary that is ‘broadly’ representative of the racial and gender composition of South Africa. The objective is not a judiciary that represents the races and genders in direct proportion to their share of the national population. Furthermore, diversity should be pursued, not for its own sake, but for the reasons outlined above. The JSC should seek to appoint black and female candidates who bring legitimacy and competence to the bench, thereby enhancing the quality of decision-making and public confidence in the judiciary.

In short, race and gender should not trump all other considerations. Diversity should be pursued proportionately, in a manner that furthers, rather than hinders, the constitutional goals that have been elaborated in this section. The JSC purports to be taking this approach in any event. According to its 2004 Annual Report, the Commission pays particular attention to [diversity] when it considers applications for judicial appointment. It also takes into account the requirement that candidates who are appointed be committed to the values of the Constitution and have the necessary skills to be appointed for office as a member of the higher judiciary.

51 Ibid para 44.
52 See PSA v Minister of Justice (1997) 18 ILJ 241 (T) in which the Court held that an efficient administration must be promoted and cannot be compromised by the aim of a broadly representative administration. See further Coetzer v Minister of Safety and Security (2003) 24 ILJ 163 (LC) where the judge interpreted the constitutional duty of the police force to be ‘effective’ to mean that it could not refuse to make appointments of white males to the bomb disposal unit simply because this would affect equity statistics.
53 2002 (3) SA 468 (T) 482 C-F.
54 Section 174(2).
Despite this, Gordon and Bruce write that many people believe that the JSC has focused more on race and gender than on legal competence when making judicial appointments. As evidence of the JSC’s attitude, some people point to cases in which experienced and highly qualified white male candidates have been overlooked in favour of less qualified and experienced black or women candidates.\footnote{56}

An example in this regard is Geoff Budlender, who co-founded the Legal Resources Centre and is known throughout the South African legal fraternity, and beyond, as a leading human rights advocate, but who has been passed over for judicial appointment on three occasions.\footnote{57} Budlender himself has commented that

\[\text{[w]e do need to take great care that the appointment process does not generate either the reality or the perception that white males, however well qualified, need not apply … If that happens, the judiciary will be very seriously weakened, at a high cost to all of us.}\footnote{58}

\section*{(c) Judicial attitudes}

As mentioned, few members of the judiciary spoke out against legislative injustice under apartheid, either in their judgments or other forums. Furthermore, there was a tendency to adopt a literal approach to interpretation that eroded the creative role of the judge. In general, Corder argues, apartheid judges acted as defenders of the status quo, despite its manifestly unjust nature. As such, in South Africa’s current dispensation, there is a need for judicial transformation to embrace changes in judicial attitudes. Judges must embrace and enforce the principles of a fundamentally new legal order.\footnote{59} Furthermore, the transformative nature of South Africa’s Constitution means that judges can no longer cast themselves as defenders of the status quo. The judiciary must instead facilitate the creation of the new society that the Constitution envisages.

All of this might seem uncontroversial. The difficulty is how to give effect to a change in judicial attitudes. Here a key principle is that transforma-

\begin{footnotes}
56 Gordon & Bruce (note 18 above) 47.
57 See C Rickard ‘The Bench is Closed to Pale Males, Struggle Credentials or Not’, \textit{Sunday Times} (18 July 2004). We are aware that some suggest that Budlender was overlooked because of his involvement in supporting and representing the Treatment Action Campaign in its legal disputes against the Minister of Health over the provision of antiretrovirals to HIV/AIDS sufferers. Without available proof, we choose not to speculate. But to the extent that the suggestion is true, it highlights that race, gender and politics play a role in the selection of judicial officers.
58 Budlender (note 22 above) 723.
59 Ibid 715. The same is obviously true of magistrates. That certain members of the magistracy have not embraced the values of the Constitution is clear from recent reports of xenophobia in relation to Zimbabwean nationals who were denied bail by a magistrate. The bail hearing was heard on a Friday afternoon, and she reminded lawyers for the detainees that she wanted to go home to spend time with her family. Initially she declined permission for the lawyers of the accused to consult with their clients, and eventually sent all the detainees back to the cells for the weekend after mocking their speech and language and then refusing them bail. When the Legal Resources Centre took the matter to the High Court on urgent review, the judge who heard the matter referred the magistrate’s conduct to the Magistrates’ Commission for investigation. See C’Rickard ‘Xenophobes in Judiciary Need Transforming’ \textit{Weekender} (23 February 2008).
\end{footnotes}
tion cannot be pursued in a manner that compromises, or even appears to compromise,60 the independence of the judiciary or the separation of powers. The Constitution guarantees this. It states that ‘[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice’.61 Furthermore, ‘[n]o person or organ of state may interfere with the functioning of the courts’.62 Changes in judicial attitudes may therefore not be effected through, for instance, executive interference in the work of judges. That would undermine a cornerstone of South Africa’s democracy.

How then might transformation be achieved? It is submitted that one highly successful strategy was the creation of the Constitutional Court which binds all courts in South Africa on constitutional issues. The judges appointed to the Court have generally not served under the apartheid judiciary (and those that did were recognised for the consistent track-record as liberal and independent judges) and have the type of credentials that the South African judiciary requires. The Court has in large part produced a highly progressive body of case law that has won national and international acclaim.63 Given its position in the hierarchy of courts, its jurisprudence has filtered down to the lower courts and its instructive approach to constitutional interpretation and insistence regarding the permeating effect of the Constitution in relation to all areas of law have been reminders to other judges of the transformation imperative.

Another means whereby transformation in the attitudes of judges might be achieved is through judicial education. Virtually all judges agree that ‘one of the most effective ways of achieving transformation of the judiciary is through training’.64 Former Chief Justice Mahomed, for example, explained the need for ‘sensitisation’:

Proper judicial insights in many areas would involve training sensitive to the perspectives and the complaints of special groups, unfairly marginalised in the past, such as women,

60 As was remarked in the English case of R v Sussex Justices ex parte McCarthy [1924] 1 KB 256, '[i]t is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done' (258).
61 Section 165(2).
62 Section 165(3).
63 The Court’s record has not been consistently progressive, but that is explicable (even if not forgivable) given its precarious role within a young democracy. For criticism of some of its less progressive decisions, particularly in the field of socio-economic rights, see J Dugard & T Roux ‘The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995-2005’ in R Gargarella, P Domingo & T Roux (eds) Courts and Social Transformation in New Democracies An Institutional Voice for the Poor? (2006); and Dugard (note 21 above). For an insightful explanation of why the Court has not always felt it possible to be progressive, see T Roux ‘Principle and Pragmatism on the Constitutional Court of South Africa’ in C Jenkins, M du Plessis & K Govender Law, Nationbuilding and Transformation in South Africa (forthcoming). In that piece Prof Roux explains how in politically controversial cases the Court has used its considerable forensic and rhetorical skills to avoid direct confrontation with the political branches in order to shore up its institutional legitimacy.
64 H Corder ‘Battle is on for Control of the Courts’ Sunday Independent (5 June 2005).
blacks, homosexuals and even illiterate and disabled persons, all disadvantaged by assumptions which might need review and discussion.\textsuperscript{65}

Judicial education has been the subject of recent legislative activity. In 2005, the government proposed, in the National Justice Training College Draft Bill, which formed part of a package of five bills on the administration of justice, that judges should be trained at a state-managed institution: the Justice College based at the University of South Africa in Pretoria. At present the College is managed by a Chief Directorate within the Department of Justice and is mandated to provide practical legal training to court officials in the employment of the Department. The National Justice Training College Draft Bill sought to keep the College administration under the control of the Department of Justice as well as introducing a separate faculty to ‘provide proper and appropriate education and training for judicial officers’.

These proposals were met with justified protest.\textsuperscript{66} More specifically, it was argued that judicial education should not occur at a government-administered institution. Langa J, prior to becoming Chief Justice, argued that, in such circumstances, the judiciary would not be regarded as independent. Although the draft Bill stated that curriculum matters would be the responsibility of the proposed Faculty Board, it was noted that the Board would nevertheless fall under the Department of Justice and would therefore be subject to the authority of the executive. These objections are persuasive. As emphasised, judicial transformation should not occur in a manner that compromises, or appears to compromise, the independence of the judiciary and the separation of powers.

The government was receptive to these complaints and the proposed legislation has been withdrawn for reconsideration.\textsuperscript{67} At the time of writing the new South African Judicial Education Institute Bill\textsuperscript{68} differs substantially from the legislation that was previously proposed and provides for the training of judges through the newly created Judicial Education Institute under the direction of a Council, chaired by the Chief Justice. The Chief Justice, with the concurrence of the Minister, will issue guidelines regarding the functioning of the Institute. The 21 members of the Council will include the Chief Justice, the Deputy Chief Justice and six other judges (including one retired judge) and three magistrates. The other nine representatives will comprise teachers of law and representatives of attorneys and advocates, the Minister of Justice (or appointee) and a representative of the JSC. Accordingly, the authority of the Minister over the Institute will be diluted and the predominance of judges on the Council will ensure the requisite independence from the executive. This is an excellent illustration of how transformative goals such as chang-

\textsuperscript{65} I Mahomed ‘Welcoming Address at the First Orientation Course for New Judges’ (1998) 115 SALJ 1.


\textsuperscript{67} ‘Waiting for a New Policy on the Judiciary’ Business Day (26 October 2006).

ing the attitudes of the judiciary can be pursued without compromising other key facets of judicial transformation, such as judicial independence and the separation of powers.

(d) Accountability and ethics

It seems uncontroversial that the judiciary should be accountable and ethical. The reasons, says Edwin Cameron, are ‘obvious’. Judges are an arm of state; wield enormous power; and, because of their position, frequently assume the role of public oracles. However, ‘[p]ower, public prominence and influence without accountability amount to despotism’.69 The difficult questions are, however, accountable to whom and in what manner?

In a recent article, David Dyzenhaus draws a provocative contrast between transformation and *gleichschaltung*, the word used in Germany after 1933 to describe the process of bringing into gear or synchrony all organs of state so as to ensure an efficient machine for the unchecked implementation of the regime’s policy.70 Dyzenhaus’s point is to caution against conflation of these concepts. Quite clearly, properly understood, judicial transformation does not amount to *gleichschaltung*. Indeed, a key outcome of transformation is an independent judiciary that regards its primary task as the implementation of the Constitution as opposed to the policies of the government of the day.

Nevertheless, this distinction should be borne in mind, especially when considering the following statement of the ANC’s National Executive Committee issued on 8 January 2005:

The reality can no longer be avoided that many within our judiciary do not see themselves as part of the masses, accountable to them, and inspired by their hopes, dreams and value systems. If this persists for too long, it will invariably result in popular antagonism towards the judiciary and our courts, with serious negative consequences for our democratic system as a whole.71

One trusts that the authors of this statement did not have in mind some sort of direct electoral accountability, as is the case with the legislature. Even in a state without a justiciable Constitution, the ordinarily understood role of the judiciary is to show above all else fidelity to the law. As Lord Steyn explains, the duty of the (English) judiciary is to reach ‘through reasoned debate the best attainable judgments in accordance with justice and law’.72 In South Africa, judges are similarly accountable to the law and above all the Constitution.73

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73 This is made clear by amongst other things the judicial oath which provides that all judges must: ‘… be faithful to the Republic of South Africa… uphold and protect the Constitution and the human rights entrenched in it, and… administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law’. See s 6(1) of Schedule 2 of the Constitution.
uphold the provisions of the Constitution. In order to properly satisfy that duty, judges in mature constitutional democracies are set aside as independent arbiters of human rights and are by their oath of office expected to avoid any form of ‘accountability to the masses’ by their impartiality.

This independence of spirit is in fact a settled human rights principle that ‘is addressed to the judiciary itself’. The principle is encapsulated in Article 14 of the International Covenant on Civil and Political Rights which requires not only that judges should be competent and independent, but also that they should be impartial in the discharge of their duties. Justice Kirby of the Australian judiciary reflects that Article 14 helps to remind judges that they have no rights, as an elected legislator may, to pursue an agenda that they conceive to be in the interests of society. They are adjudicators. They must approach the resolution of the parties’ dispute without partiality towards either side. Nor must they be obedient to external interest.

This notion of independence has been firmly espoused by South Africa’s Constitutional Court which has stated that judicial independence ‘is a constitutional principle and norm that goes beyond and lies outside the Bill of Rights’ and thus is not subject to limitation.

For these reasons it must be the case that the ANC statement cannot seriously be construed as a call for a compliant judiciary loath to upset or interfere with the government’s policies. That would not be transformation but gleichschaltung. Perhaps then the ANC’s statement might better be understood as a call for the judiciary to be more aligned with the goals of the government, even if not subservient thereto. Former Chief Justice Chaskalson attempted at the time to provide such a generous interpretation and read it as a call for judges to uphold and give effect to the values of the Constitution. In his view, the statement was a call consistent with the widely felt need for judicial trans-

74 1995 (3) SA 391 (CC) para 87.
76 Ibid.
77 Van Rooyen v The State 2002 (5) SA 246 (CC) para 35. In that case the Court addressed the issue of institutional independence and, through reliance on s 165 of the Constitution, explained that the Constitution ‘not only recognises that courts are independent and impartial, but also provides important institutional protection for courts’ (para 18). Previously, in De Lange v Smuts 1998 (3) SA 785 (CC) the Court stressed that independence is ‘foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law’ (para 59).
78 For a view suggesting that the ANC statement was just that, see N Fritz & D Unterhalter ‘ANC Confuses Compliance with Constitutional Fidelity’ Business Day (14 January 2005). Consider also the response of the ANC National Working Committee (NWC) to Deputy Chief Justice Moseke’s comments at his 60th birthday party that ‘I have another 10 to 12 years on the bench and I want to use my energy to help create an equal society. It’s not what the ANC wants or what the delegates [to the Polokwane conference] want; it is about what is good for our people’. The NWC initially stated that the remarks showed ‘disdain for the delegates to the ANC National Conference, and highlights the difficulty that many within the judiciary appear to have in shedding their historical leanings and political orientation’. The ANC later stated that after meeting Moseke and discussing his speech it accepted that ‘no ill was intended’. However, the knee-jerk response of at least certain members of the NWC likewise seemed to imply a form of judicial ‘accountability to the masses’, with these understood as embodied by the delegates at the Polokwane conference and, by extension, the ANC itself. See ‘ANC does About-turn over Moseke Comments’ Mail & Guardian Online (17 January 2008) <http://www.mg.co.za/article/2008-01-17-anc-does-about-turn-over-moseke-comments>.
formation, and a more rights-committed and socially-conscious approach to the judicial task.\textsuperscript{79} Such an interpretation might also be sought in Budlender’s view that a transformed judiciary should be responsive to the ‘goals’ of a democratically elected government. However, he distinguishes between what the nation seeks to do in the dispensation created by the Constitution and what the ruling party seeks to do from time to time. The judiciary should be sympathetic to the former but should not distort or ignore the law in order to accommodate the latter. That, he says, is not a transformed judiciary; it is a ‘depressingly familiar judiciary’.\textsuperscript{80} Put differently, judicial transformation should not result in executive-mindedness – one subject of Cameron’s classic critique of LC Steyn’s tenure as Chief Justice\textsuperscript{81} – being reinvented in a new guise.

That said, what structures should be in place to ensure judicial accountability? South Africa has had recent examples of questionable judicial conduct that illustrate the need for a code of judicial ethics and a procedure for disciplinary action. The most high profile examples relate to the beleaguered Judge President Hlophe of the Cape Bench. In respect of the first matter, questions were raised about Hlophe JP’s failure to disclose a retainer from the Oasis Group, which did not stand in the way in granting the Group leave to sue a fellow judge in the same division (Judge Desai) for defamation. The JSC considered the debacle but was unable to agree that Hlophe JP’s conduct was such that it warranted further inquiry.\textsuperscript{82} This is surprising not least because in a subsequent case Judge President Tshabalala of the KwaZulu-Natal Bench was asked by the JSC to hand back shares valued at almost R7 million that he had received from Tokyo Sexwale. According to the JSC, it was considered ‘inappropriate’ for Tshabalala to take the shares because of the risk that a perception of partiality could arise.\textsuperscript{83} The inconsistent approach by the JSC to these two complaints has been the subject of much critical comment.\textsuperscript{84}

More recently, Hlophe JP has been in the headlines again, this time on the basis of an extraordinary claim by all 11 judges of the Constitutional Court that he approached two of them – Nkabinde J and Jafta J – in an attempt to improperly influence the Court’s decision in a case concerning the admissibility of evidence in criminal proceedings relating to Jacob Zuma. Hlophe is alleged to have told the judges that he would be the next Chief Justice, that he had a ‘mandate’, and that they should consider their futures and rule in favour

\textsuperscript{79} ‘Chief Justice Reaffirms Judiciary’s Commitment to Transformation’ \textit{De Rebus} January 2005.

\textsuperscript{80} Budlender (note 22 above) 720.

\textsuperscript{81} Note 13 above.


\textsuperscript{84} Ibid.
of Zuma.\textsuperscript{85} After discussing the matter with their colleagues, the Court issued a press statement indicating that it would be lodging a complaint with the JSC. Hlophe JP has since brought an application in an attempt to prevent the JSC from hearing the complaint, pointing to alleged procedural irregularities. At the time of writing the application was being heard by a full(er than usual)\textsuperscript{86} bench of the Johannesburg High Court. It goes without saying that events such as these do little to enhance the esteem in which the judiciary is held and further underscore the need for clear disciplinary procedures and a code of ethics in this area.

In our discussion of the demographic transformation of the judiciary, we noted that race and gender should not trump all other considerations in the appointment of judicial officers. Instead, judicial appointments should be rationally connected to the objectives of transformation and that these should not be understood in narrow racial terms. The same applies, of course, to debates and decisions about whether judges accused of misconduct should remain on the bench and how complaints against them should be made and heard. In the events outlined, it is striking that support for Hlophe JP has been strongly racialised, emanating particularly from organisations such as the Black Lawyers Association\textsuperscript{87} and Advocates for Transformation.\textsuperscript{88} Indeed, support for Hlophe JP is sometimes presented as a component of transformation. In South Africa, this is perhaps unsurprising and it is no doubt also true that racism is prevalent in the white legal fraternity. However, it does suggest a fundamental misunderstanding that transformation is not about the appointment of black and female candidates per se but rather about the appointment of black and female candidates who enhance the legitimacy and competence of the bench.

However, returning to the theme of judicial accountability, this has, like judicial education, been the subject of recent legislative activity. In 2004, the government introduced the Judicial Service Amendment Bill, which proposed a Judicial Code of Conduct as well as a Register of Financial Interests. The Bill also provided for a Judicial Conduct and Ethics Committee, which would comprise the Chief Justice, the Deputy Chief Justice, the President of the Supreme Court of Appeal, two people not ordinarily involved in the administration of justice who would be appointed by the President, three judges including one woman and two members of the JSC belonging to the legal profession or

\textsuperscript{85} ‘Hlophe Approached Two Judges’ \textit{IOL} (8 June 2008). <http://www.int.iol.co.za/index.php?set_id=1&click_id=13&art_id=nw20080608145326896C183154>. Hlophe’s alleged conviction that he would be the next Chief Justice, coupled to his alleged claim to a ‘mandate’, is perhaps the most disturbing part of this saga given that should Zuma become the next president he would then, in terms of s 174(3) of the Constitution, be in a position to appoint the next Chief Justice once Langa CJ retires. Should the Constitutional Court’s version of events be verified, a suspicion must surely arise that Hlophe JP had been in contact with Zuma or people close to him.

\textsuperscript{86} The bench is comprised of five judges – signifying above all the gravity of the case.


academia. The fact that the proposed Committee would include people who were not judges once again raised concerns about executive interference in the workings of the judiciary.

The Judicial Services Commission Act Amendment Bill and the Judicial Conduct Tribunal Bill were more controversial. These provided for the establishment of a formal complaints and disciplinary mechanism for judicial officers, largely through a subcommittee of the JSC. The subcommittee would hear complaints against judges and would investigate non-impeachable complaints itself. Impeachable complaints would, however, be referred to the JSC with the request that a tribunal be convened. The subcommittee would comprise the Deputy Chief Justice and three judges, one of whom would be a woman, designated by the Chief Justice in consultation with the Minister. The tribunal, on the other hand, would comprise two judges and one non-judicial person, appointed by the Chief Justice in consultation with the Minister.

The Bills sought to deflect criticism that they interfered with the independence of the judiciary by providing that disciplinary bodies would not be able to entertain complaints that ‘relate solely to the merits of the judgment, or are frivolous or hypothetical’. Despite this, the Bills were met with strong opposition from members of the judiciary, who favoured the creation of a Judicial Council of five judges to assess complaints regarding their own members. In this regard, it was argued that the possible inclusion of members of the executive or legislature on the subcommittee or tribunal would constitute an unacceptable breach of the separation of powers.

In response to this outcry, the Minister of Justice and Constitutional Development, Brigitte Mabandla, agreed to reconsider the Bills. In mid-December 2005 the Minister gazetted for public comment the Constitution Fourteenth Amendment Bill, which proposed altering various aspects of court administration but reintroduced the ‘justice bills’ with little change. This resulted in further opposition and discontent in the judiciary, with Justice Harms stating in his submissions to Parliament concerning the Bills that ‘[i]t is wrong in principle and constitutionally offensive to subject the judiciary to the functional or ethical control of a non-judicial body, especially one in which executive appointees predominate’. Accordingly, in July 2006 President Mbeki announced that the Superior Courts Bill and the Constitution Fourteenth Amendment Bill would be processed only after the buy-in of judges into a new policy on transformation of the judiciary.

The Judicial Conduct Tribunals Bill and the Judicial Services Commission Act Amendment Bill have now been combined in the Judicial Service

89 Quoted in ‘Debating the Transformation of the Judiciary’ (note 66 above) 8.
91 Justice Harms ‘Judicial Ethics, Complaint Procedures against Judges and Related Issues: Submissions to the Portfolio Committee on Justice’ (May 2006).
Commission Amendment Bill. Again, aspects of the Bill are likely to prove contentious. Section 12(1), for instance, provides that the Chief Justice, acting in consultation with the Minister, must compile a Code of Judicial Conduct. However, in s 12(3) the Bill provides further that the Code must be tabled in Parliament, where the National Assembly may approve the Code or make amendments thereto. A further point of concern is s 8(1), which provides for the establishment of a Judicial Conduct Committee, consisting of the Chief Justice, Deputy Chief Justice and four judges, at least two of whom must be women. This is certainly an advance on the previous legislation, given that the proposed committee consists solely of judges. However, s 8(1)(c) provides that the four judges must be appointed in ‘consultation with the Minister’, thus retaining a role for the executive.

In both instances, the question that arises is why legislative and executive involvement in judicial complaints procedures is considered necessary at all. As Gordon and Bruce note,

> given that judges are trusted to interpret the Constitution, review legislation and executive actions, and decide cases that impact on the litigants’ lives, it seems reasonable to argue that judges also have the competence and personal integrity necessary to control a complaints process."

The determination of the executive to involve itself and the legislature in the judicial complaints process seems indicative of a lingering mistrust of the judiciary, coupled with a desire to exert some form of control over areas where the judiciary should enjoy as much autonomy as possible.

The process of establishing a judicial complaints procedure, although far from resolved, has, it should be apparent, been both arcane and contentious. It is therefore striking that much of this controversy has been unnecessary. In the late 1990s, a committee of senior judges chaired by Justice Harms began investigating accountability and ethics. After consulting numerous judges and a myriad of outside sources, the committee developed a code of ethics and a draft Bill establishing a disciplinary body. In 2000, all of the heads of the superior courts and the JSC approved the documents, and the committee submitted the code and draft Bill to the Department of Justice. To protect the independence of the judiciary and prevent the appearance that other organs of government were using the complaints procedure as a way to pressure judges, the committee determined that judges should control any complaints procedure with as little outside influence as possible. Had this Bill been adopted, or at least considered as a starting-point for draft legislation in this area, it is likely that these issues would now be settled and much of the controversy outlined above would have been avoided. The example of the South African Judicial Education Institute Bill, discussed in the previous section, illustrates that it is entirely possible to achieve transformative objectives while also not

94 Gordon & Bruce (note 18 above) 41.
95 Ibid.
compromising judicial independence and the separation of powers – principles that are, as repeatedly emphasised, themselves aspects of transformation.

(e) Efficiency and access to justice

Quite apart from the concerns canvassed in the previous sections, judicial transformation has also become associated with calls for a more efficient judiciary that is responsive to the needs of ordinary South Africans and which therefore facilitates greater access to justice. This is especially evident in a recent resolution of the ANC adopted at its National Conference in Polokwane, which calls inter alia for a ‘single, integrated, accessible and affordable court system’. 96

Clearly, efficiency and access to justice are laudable goals. Furthermore, aspects of the resolution – such as the call for interpretation services so as to enable every person to use the official language of his or her choice in court proceedings of first instance – have much to recommend them. However, other features of the resolution are more problematic. Our comments are limited to those aspects of the resolution that are likely to prove most contentious.

Firstly, the resolution states that a

single, integrated, accessible and affordable court system must be established, including the integration of the Judicial Service Commission (JSC) and the Magistrates Commission (MC) into a single appointment mechanism and the establishment of a single grievance procedure for judicial officers. 97

Elsewhere the resolution emphasises the need for a ‘single, integrated, streamlined court system’ 98 as well as ‘an integrated system of court governance, within a single judiciary, with the Chief Justice as the head of the judiciary’. 99

It is true that most South Africans’ experience of the judiciary is in the Magistrates’ Courts. Discussion of judicial transformation should therefore not focus unduly upon the higher courts. Nevertheless, proposals to amalgamate the higher courts and the Magistrates’ Courts should be approached very cautiously. This is because although all courts benefit from the constitutional guarantee of judicial independence, 100 the Magistrates’ Courts enjoy less independence than the higher courts. This is partly because the Magistrates’ Courts perform different functions to the higher courts. Section 170 of the Constitution provides that ‘a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President’. For this reason, the Constitution guarantees the higher courts the inherent power to protect and regulate their own process, but not the lower courts. 101 The Constitutional Court has recognised this distinction, stating that although the lower courts are independent, this ‘does not mean that the lower

96 ‘Transformation of the Judiciary’ (note 1 above).
97 Ibid 30.
98 Ibid 31.
99 Ibid.
100 Section 165(2).
101 Section 173.
courts have, or are entitled to have their independence protected in the same way as the higher courts’. In short, the concern is that amalgamation of the higher and lower courts may result in a loss of independence on the part of the former. If this aspect of the Polokwane resolution is pursued, it is essential that this outcome should be avoided.

Secondly, the resolution states that the Constitutional Court should be the highest court for all matters, with the Supreme Court of Appeal as an intermediate court of appeal, subject to the proviso that this should not lead to undue delays in the hearings of appeals. This would constitute a departure from the present system where the Constitutional Court is the highest court of appeal for constitutional matters only.

The resolution does not state reasons for this proposal. However, Carole Lewis, herself a judge of the Supreme Court of Appeal, argues that the most notable defect in the present system arises from the distinction that was sought to be drawn between constitutional and other issues. In the context of a body of law that must necessarily be constitutionally coherent, that distinction is, and always was, an illusion.

For this and other reasons Lewis therefore supports the creation of an apex court. However, she cautions that this cannot simply involve according the Constitutional Court jurisdiction over ‘non-constitutional’ matters. An initial consideration is that the name of the Constitutional Court would have to change. A further factor is that the judges of the Constitutional Court have been selected for their expertise in constitutional law. The composition of the proposed apex court should therefore not mirror that of the Constitutional Court but would have to include judges, like those currently presiding in the Supreme Court of Appeal, who have expertise in other areas of law. In this regard, it is also relevant that the Supreme Court of Appeal currently hears over 200 cases a year whereas the Constitutional Court hears an average of only 20 cases. The Constitutional Court would therefore have to be re-configured to cope with an increased workload. In short, while the present system is defective, and an apex court might be desirable, the nature and structure of the Constitutional Court would have to be altered to make this reform effective.

Thirdly, the resolution purports to draw a distinction between ‘the development and implementation of norms and standards for the exercise of judicial functions’, on the one hand, and the ‘administration of courts, including any allocation of resources, financial management and policy matters relating to the administration of the courts’, on the other. The resolution states that while the former are the responsibility of the Chief Justice, the latter are the responsibility of the Minister of Justice and Constitutional Development.

This aspect of the resolution is justified on the basis that it will be conducive to greater judicial efficiency. Yet the distinction drawn is problematic. George Bizos explains that because many ‘functions that may be described as admin-

102 Van Rooyen (note 77 above) para 22.
104 ‘Transformation of the Judiciary’ (note 1 above) 31.
istrative bear directly on the exercise of judicial functions, a clean severance of the two is not possible. It is also questionable whether the executive is better placed to administer judicial resources than the judiciary itself. After all, judges have intimate knowledge of courtroom practices and procedures and of the measures necessary to run an efficient trial. As former Minister of Justice and Constitutional Development, Penuell Maduna stated in 2003, ‘[a]t the end of the day, each judicial officer should be in control of his or her own court and see to it that the court functions effectively and efficiently’. Most fundamentally, placing such power in the hands of the executive opens the door to abuse. It is not difficult to envisage scenarios in which the executive manipulates or withholds resources so as to put pressure on judges. Indeed, even the knowledge that the judiciary is dependent on the executive for its resources could impair the ability of the courts to effectively watch over the other branches of government.

Similar concerns are likely to be raised by paragraph 13 of the Polokwane resolution, which states that

[there must be a single rule-making mechanism for all courts, which is inclusive of all role players, to process rules through the Rules Board, which is a specialist advisory body consisting mainly of legal practitioners, with the rules being approved by the Minister and Parliament, and in the process of adopting rules to allow for public participation.

The question that arises is why the involvement of the legislative and executive branches of government in this process is considered necessary. It is also noteworthy that this aspect of the resolution would require a constitutional amendment, given that the Constitution presently provides in s 165(2) that ‘[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice’; and in s 173 that ‘the Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process …’.

It is of fundamental importance to recognise that resistance to proposals such as these does not necessarily stem from suspicion that the present government is acting in bad faith. It is entirely possible to vigorously reject proposals that, for instance, the executive control the allocation of judicial resources while also believing that the government is motivated purely by a desire to promote judicial efficiency. This is because constitutional safeguards exist, not only in respect of the present government, but also in respect of all future governments. No matter how benign the intentions, the door that allows for potential abuse of power should not be opened. Chaskalson J makes this point as follows:

It’s the early incursions into checks and balances which historically have been shown to open the way for later incursions to be made. Nobody knows what the future holds for us,

107 Gordon & Bruce (note 18 above) 37.
but once you accept that you can eat into protections which are there, and that you can erode fundamental principles of the Constitution, sometime, somebody else can take it further. So any attempt to do so, no matter how small, is open to objection.¹⁰⁸

IV Conclusion

South Africa is a young democracy and the issue of judicial transformation is likely to remain a challenging and at times controversial issue. These challenges and controversies should be considered with the realisation that in all democracies in which the judiciary is empowered to review and set aside government conduct, policies and laws, the judiciary invariably shares an at times tense relationship with the other branches of government. It should also be remembered that South Africa’s transformation of the judicial branch has – in terms of increased diversity – been impressive; that transformation of judicial attitudes has on the whole been positive; and for the most part the South African courts, with the Constitutional Court at their apex, have shown themselves transformed from a judiciary that did not effectively curb abuses of power by the other branches of government to a judiciary that treasures its institutional independence within the separation of powers and uses its powers of judicial review to test governmental conduct and legislation against the supreme law of the Constitution.

The hallmark of a true constitutional democracy is the independence of its courts. At the same time, there is a continuing need in South Africa for a widening of the diversity of judges, and for judges – independent though they may be – to continually strive to align themselves with and be dedicated and sensitised to the overall transformative goals of equality, poverty-alleviation, a deepening of democracy and the enhancement of dignity. What needs to be accepted is that any attempts at transformation of the judiciary must be done carefully, sensitively, and with constant respect for and appreciation of the judiciary’s separation and independence from the other branches of government. Over-hasty, ill-considered or insufficiently-negotiated attempts to transform the judiciary may prove counter-productive to the constitutional project as a whole. This is because steps taken to improve diversity on the bench or to educate judges or to discipline them may unwittingly trench on judicial independence, which is itself one of the central necessities for the type of transformation the Constitution has committed South Africa to. As Gordon and Bruce write,

improving court efficiency and management, creating a complaints mechanism and a code of conduct, providing judicial education and rationalising the court system … are crucial to creating an effective judiciary and promoting judicial transformation.¹⁰⁹

¹⁰⁹ Gordon & Bruce (note 18 above) 56-57.
However, ‘achieving these objectives should not excuse and does not require intrusions into judicial independence’.\textsuperscript{110}

Against that background, and having provided an overview of the central issues involved in the debate about judicial transformation, it appears that this topic will remain centrally important as South Africa enters the next 15 years of its constitutional dispensation. There is serious and responsible work that needs to be done towards transforming the judiciary in South Africa. And there are serious and responsible people willing and able to do that work within South Africa. It would be a shame if recent political events around Zuma and Hlophe JP’s seemingly never-ending travails should be allowed to detract from or undermine that project. After all, while transformation of the judiciary is a constitutional goal, it is a journey that the Constitution requires for the good of all society. It is thus shameful that the language of transformation has been invoked in the unprecedented attacks upon the judiciary by leading members of the ANC and its alliance partners. The suggestions that a suitably ‘transformed’ judiciary would be sympathetic to Zuma’s cause, or that a suitably ‘transformed’ judiciary would be more welcoming or accepting of Judge President Hlophe, are insinuations that smack of naked politicking. These attacks on the judiciary have reminded South Africans just how precarious the constitutional project is as a whole. Within that overall project, the attacks have also reminded us – but for the wrong reasons – of how important judicial transformation is as a component of South Africa’s constitutional future. The transformative project that the Constitution has committed us to is one that requires steady, persistent and urgent effort in the greater interest of all South Africans. It is obviously a project which South Africa cannot afford to have perversely hijacked by the political and judicial ambitions of two men and their supporters. At the same time, it is because of the same two men and their supporters that we are reminded of just how important it is that the project succeeds.

\textsuperscript{110} Ibid 57.