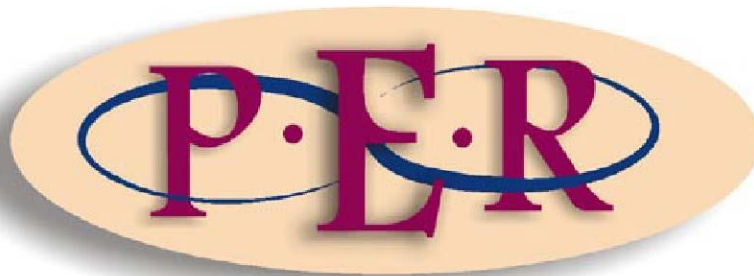


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eISSN 1727-3781



2015 VOLUME 18 No 4

<http://dx.doi.org/10.4314/pej.v18i4.03>

THE INDEPENDENCE OF SOUTH AFRICAN JUDGES: A CONSTITUTIONAL AND LEGISLATIVE PERSPECTIVE

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1 Introduction

The principle of judicial independence is fundamental to democracy. As a result, it features quite prominently in many international legal instruments.¹ It is also protected and guaranteed by the South African *Constitution*² and pertinent statutes. Addressing the Cape Law Society a few weeks before his death, the former Chief Justice of the Republic of South Africa, Arthur Chaskalson, had this to say:

Judicial independence is a requirement demanded by the Constitution, not in the personal interests of the judiciary, but in the public interest, for without that protection judges may not be, or be seen by the public to be, able to perform their duties without fear or favour.³

Conceptually, judicial independence has been defined in various ways.⁴ Admittedly, the principle is very extensive and complex and this creates enormous definitional difficulties.⁵ However, the common thread that runs through the various definitions is that judicial independence exists at two levels: firstly, at an individual level – the ability of a judge to impartially and independently apply his or her mind to a matter without

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¹ See, for example, s 10 of the *Universal Declaration of Human Rights* (1948); s 14 of the *International Convention on Civil and Political Rights* (1966); a 6(1) of the *European Convention on Human Rights* (1950); a 25(1) of the *American Convention on Human Rights* (1969); and a 26 of the *African Charter on Human and Peoples Rights* (1981).

² The *Constitution of the Republic of South Africa*, 1996.

³ See De Vos 2014 <http://constitutionallyspeaking.co.za/category/criticism-of-courts/>.

⁴ See for example Landes and Posner 1975 *J Law Econ* 875-901; Shetreet "Judicial Independence" 590-681

⁵ Shetreet "Judicial Independence" 591.

undue influence; and secondly, at an institutional level – the ability of the judiciary to control the administration and appointment of court staff.

Considering whether judicial protection is sufficient in the South African context is the task of this article. In making that determination, we begin from the premise that judicial independence entails the ability of a judge to make a decision without undue influence and interference from internal and external forces.⁶ Moreover, the judge must have security of tenure and financial security in order to guard against bribery and related interference and corrupt conduct.⁷ Furthermore, the judiciary must manage its own administrative functions and activities. In essence, a judiciary that does not have individual or personal and institutional or functional independence falls short of the core requirements of judicial independence.

Although judicial independence exists at a personal/individual and functional/institutional level, from a conceptual perspective this article deals with the personal or individual independence of judicial officers. This is against the backdrop of an extensive literature that deals with judicial independence generally.⁸ The question addressed is whether the existing legislative mechanisms in South Africa sufficiently protect the impartiality of the bench and insulate judges from improper influence in their adjudicatory tasks, consistently with section 165(4) of the *Constitution*. This section prescribes that organs of state – through legislative and other measures – must assist and protect the courts in order to ensure their independence, impartiality, dignity, accessibility and effectiveness. This is of course supported by and in the context of sections 165(2) and 165(3), which also pertain to judicial authority and state that the courts are independent and subject only 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 functioning of the courts. These sections are especially relevant considering the criticism of the judiciary by government, which is discussed later in the paper.

⁶ In terms of s 165(3) of the *Constitution*.

⁷ The terms of office and remuneration of judges are provided for under s 176 of the *Constitution*.

⁸ See, for example, Devenish 2003 *THRHR*; Budlender 2005 *SAJHR*; IBA *Beyond Polokwane*; Mnyongani 2011 *Speculum Juris*; Malan 2014 *PER*.

The debate about the personal independence of judges is especially relevant, given recent and current assertions that judicial independence has been compromised on several occasions. Indeed the debate is no longer academic – it has moved prominently into the public and political domains. In addressing the important question of independence, in this paper an analysis is made of the impartiality of judges, their appointment, security of tenure, complaints and disciplinary proceedings, the removal of judges, and their remuneration. Some challenges to judicial independence in South Africa – largely relating to impartiality and bias – are identified and discussed, and some conclusions are presented.

2 Impartiality

Impartiality is generally understood to refer to the state of mind/attitude of a judge or tribunal relative to the issue and parties in a particular case.⁹ Central to the concept of impartiality is the absence of bias, whether actual or perceived. The opposite of impartiality, therefore, is bias. The question that arises then is how bias is determined. In *S v Collier*,¹⁰ where the accused insisted on being tried by a black magistrate and the presiding white magistrate refused to recuse himself, it was held on appeal that:

Equally, the apparent prejudice argument must not be taken too far; it must relate directly to the issue at hand in such a manner that it could prevent the decision-maker from reaching a fair decision ... the mere fact that a decision-maker is a member of the SPCA does not necessarily disqualify him from adjudicating upon a matter involving alleged cruelty to animals. By the same token, the mere fact that the presiding officer is white does not necessarily disqualify him from adjudicating upon a matter involving a non-white accused. The converse is equally true ...¹¹

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

Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to

⁹ *Valente v The Queen* 1985 2 SCR 673 674.

¹⁰ *S v Collier* 1995 2 SACR 648 (C).

¹¹ *S v Collier* 1995 2 SACR 648 (C) 650 E-H.

suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.¹²

In developing the test for bias, the Constitutional Court held in *President of the Republic of South Africa v South African Rugby Football Union*¹³ that:

... the correct approach to recusal is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to the persuasion by the evidence and submissions of counsel. Central to the assessment of reasonable apprehension is that the reasonableness of the apprehension must be assessed in light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience.¹⁴

Thus, from the above considerations, the test to determine bias can be summarised as follows: a) there must be a reasonable apprehension, b) the reasonable apprehension ought to be held by an objective and well informed person, c) the apprehension must be that the judge will not be impartial in adjudicating the matter, and d) this apprehension must be made in the light of the oath of office taken by the judges.¹⁵ The presumption is that a judge is impartial in his/her adjudicative responsibility – hence, the person who alleges the bias must prove it in terms of established jurisprudence. The objective test is exacting on the person who wishes to prove it. Actual bias, or the suspicion thereof, impugns negatively on the administration of justice and may affect public confidence in the justice system. Thus, litigants should not be allowed to question it unnecessarily.

3 Judicial appointments

Historically, judges were drawn from the senior ranks of the bar. The procedure was that the Judge President of the court concerned assessed the needs of the division, identified a candidate with appropriate qualities, and made a recommendation to the

¹² *Re JRL; Ex parte CJL* 1986 161 CLR 342 (30 July 1986) 352.

¹³ *President of the Republic of South Africa v South African Rugby Football Union* 1999 7 BCLR 725 (CC).

¹⁴ *President of the Republic of South Africa v South African Rugby Football Union* 1999 7 BCLR 725 (CC) para 48.

¹⁵ *President of the Republic of South Africa v South African Rugby Football Union* 1999 7 BCLR 725 (CC) para 48.

Minister of Justice – and if the Minister agreed the recommendation was forwarded to the President for endorsement.¹⁶ However, this position has changed significantly. The process followed in the appointment of judges is now prescribed by the *Constitution*.

The body tasked with the responsibility of facilitating the appointment of judges is the Judicial Service Commission (JSC). The JSC is established in terms of section 178 of the *Constitution* and the *Judicial Service Commission Act*.¹⁷ The JSC comprises: the Chief Justice, the President of the Supreme Court of Appeal (SCA), one judge president designated by the judge presidents, the Minister of Justice or an alternative designated by the minister, two practising advocates nominated from within the advocates' profession and appointed by the president, two practising attorneys nominated from within the attorneys' profession and appointed by the president, one teacher of law designated by teachers of law at South African universities, six members of the National Assembly chosen by it (of whom at least three are members of opposition parties represented in the National Assembly), four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of six provinces, and four persons designated by the president as the head of the national executive. This is settled following consultation with the leaders of all the parties in the National Assembly.¹⁸ In addition, when considering issues of a specific High Court, the Commission is joined by the Judge President of that court and the Premier of the Province concerned.¹⁹

The role of the JSC in appointing judges has not been without controversy. In *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape Province*,²⁰ the Premier of Western Cape Province challenged the validity of the JSC proceedings, based on three issues. Firstly, when the JSC convened and took the relevant decision, she was not present because she had not been notified, which meant that she could not comply with her obligation to attend as required by section 178(1)(k) of the

¹⁶ Van De Vijver *Judicial Institution* 122.

¹⁷ *Judicial Services Commission Act* 9 of 1994.

¹⁸ Section 178(1)(a)-(j) *Judicial Services Commission Act* 9 of 1994.

¹⁹ Section 178(1)(k) *Judicial Services Commission Act* 9 of 1994.

²⁰ *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape Province* 2011 3 SA 538 (SCA).

Constitution. Secondly, only ten members of the JSC participated, when on the JSC's own interpretation of section 178(1)(k), the JSC should have been composed of 13 members. And, thirdly, the decisions of the JSC were not supported by a majority of the members, as required by section 178(6) of the *Constitution*. It was held that the evidence in respect of the complaint did not justify a finding that the judge president was guilty of gross misconduct, and that the matter was accordingly finalised. It was further held that the evidence in support of the counter-complaint did not support a finding that the Constitutional Court justices were guilty of gross misconduct, and that the matter was accordingly finalised. The court also found that none of the judges against whom complaints had been lodged was guilty of gross misconduct. With regard to section 178(1)(k) of the *Constitution*, the court made it clear that the Premier of the province is part of the JSC, when complaints about high court judges of the province concerned are considered. Thus, the Premier of the Western Cape ought to have been invited when the JSC convened over the complaint about the Western Cape Judge President. As far as section 178(6) is concerned, it was held that decisions must be supported by a majority of the members of the JSC, which, in terms of section 178(6) – means a majority of members entitled to be present, and not just a majority of the members present.²¹ This therefore meant that the JSC was not properly constituted when it took such decisions, and this consequently nullified prior decisions made. The court was left with no other option but to set aside the decisions of the JSC.

With regard to the JSC, provision is made for the Chief Justice and the President of the SCA to be represented by their deputies, if necessary. Provision is also made for alternate nominations for the representative of the Judge President, the advocates' and attorneys' professions, and the teachers of law. The JSC is therefore a body of 23 permanent members, and in some instances 25 persons. While the body is diverse in that it consists of members of a wide spectrum from within the legal profession, it is, however, also heavily composed of political nominees. Critics have raised this as a concern, although there is nothing unconstitutional about it. It is submitted that a

²¹ *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape Province* 2011 3 SA 538 (SCA).

distinction should be made between being nominated to implement an independent task and being appointed to act in accord with the dictates of the executive.²² It is also important to note that democratic processes dictate that the:

... executive participates in the appointment of judges as they represent the electorate who have a vested interest in the appointment of judges ... The drafters of the Constitution sought to ensure that persons from diverse political, social and cultural backgrounds, representing varying interest groups, would participate in the deliberations of the JSC.²³

Furthermore, it should be noted that "checks and balances" allow for the intrusion of one arm of government into another, to ensure that there isn't an over concentration of power. Thus, the composition of the JSC envisages cooperation in the appointment of judges between all three arms of government, including other stakeholders such as the legal profession and academia.

The appointment of judges is vested in the State President, as the head of the national executive. Under sections 174(3) and 174(4) of the *Constitution*, the president appoints the Chief Justice, the Deputy Chief Justice and other judges of the Constitutional Court. This is after consultation with the JSC, which interviews the nominees for these positions, and the leaders of parties represented in the National Assembly. Similarly, he consults the JSC before appointing the President and Deputy President of the SCA.²⁴ In terms of section 174(4), the president appoints (from a list prepared by the JSC) the judges of the Constitutional Court, after consultation with the Chief Justice and the leaders of the parties represented in the National Assembly. The list must have three names more than the number of vacancies to be filled. The president must advise the JSC if any nominees are unacceptable – and must give reasons. The JSC then supplements the list with further nominees, and the president must make the remaining appointments from the list so supplemented.²⁵ Section 174(5) provides that – at all times – the Constitutional Court must have at least four members who were serving as judges at the time of their elevation to the court, and

²² *S v Van Rooyen* 2002 5 SA 246 (CC).

²³ *JSC v Cape Bar Council* 2012 ZASCA 115.

²⁴ See s 174(3) of the *Constitution*.

²⁵ Section 174(4) of the *Constitution*.

under section 175(6), the appointments of all judges must be made on the advice of the JSC.

Section 174(1) of the *Constitution* states that any appropriately qualified woman or man – who is a fit and proper person – can be appointed as a judicial officer. This is qualified by section 174(2), which stipulates that the judiciary should broadly reflect the racial and gender composition of South Africa. Although the courts have yet to pronounce on the meaning of this section, it has been suggested that it was included in the *Constitution* to correct imbalances in the composition of the judiciary.²⁶ In expressing the importance of diversity in the judiciary, the JSC has stated that, without it, the court would be unlikely to be able to do justice to all the citizens of the country – and that it would not be competent to do justice if it could not relate fully to the experience of all who seek its protection.²⁷ As a result of section 174(2), the racial and gender composition of the judiciary has been radically changed. For example, according to the Department of Justice and Constitutional Development, by 2011 there were 136 black people and 61 women out of 225 judges – while in 1994 there were only three black people and nine women serving as judges.²⁸

On the face of it, section 174(2) appears to be achieving its purpose in ensuring that the judiciary broadly reflects the gender and racial composition of South Africa. However, despite the seemingly benevolent intentions of the provision and the progress that has been made, section 174(2) has been the subject of intense criticism and debate. For example, the JSC has been criticised over its failure to appoint enough women candidates.²⁹ Some of these debates have also been occasioned by the JSC's failure to appointment certain experienced white candidates,³⁰ while preferring to appoint less experienced black candidates. These omissions have raised concerns that the JSC is emphasising race too much and that whether candidates are fit, proper and

²⁶ AfriMAP and Open Society Foundation for South Africa 2005 <http://www.afriMAP.org/english/images/report/sa-eng-part-2-chapter-4.pdf>.

²⁷ AfriMAP and Open Society Foundation for South Africa 2005 <http://www.afriMAP.org/english/images/report/sa-eng-part-2-chapter-4.pdf>.

²⁸ Nel 2012 <http://www.justice.gov.za/docs/articles/20120304-dm-transformation.html>.

²⁹ Hassim 2012 <http://mg.co.za/article/2012-11-30-00-jsc-a-few-good-women-needed>.

³⁰ Geoff Budlender SC in 2004, and Jeremy Gauntlett SC in 2012.

appropriately qualified is considered too little.³¹ The question that still remains is whether section 174(2) seeks an appropriate demographic representation of the judiciary, or whether it is only a guide in the appointment process. In an attempt to elucidate on how this section ought to be interpreted, the former constitutional court judge, Justice Kriegler, has submitted that:

The constitutional mandate instructs the Judicial Service Commission in section 174(1) to appoint people that are appropriately qualified. That's a precondition. That's a mandatory requirement. And then subsection (2), as a rider to that, says: and in doing that, have regard to the racial and gender balance on the Bench. And it's for obvious reasons that the Constitution, while mentioning the transformational criterion in subsection (2), demands in subsection (1) as the primary and essential requirement that appointees be appropriately qualified. Now these two essential factors, the one absolute and the other discretionary, have been turned on their heads.³²

It is clear from this statement that Justice Kriegler's favoured interpretation is that section 174(2) is merely a guide, and not a prerequisite for appointment. Justice Kriegler's interpretation is narrow. Black people and women are previously disadvantaged; it stands to reason that section 174(2) cannot be read in isolation of section 9(2) of the *Constitution* and the *Employment Equity Act*,³³ which seek to address the imbalances of the past through affirmative action measures. Therefore section 174(2) embraces the principle of substantive equality, which can be described as equality of outcome, as it requires a consideration of the actual social and economic conditions of groups and individuals in order to determine if the *Constitution's* commitment to equality is being upheld. The Constitutional Court has described the notion of substantive equality to mean:

This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.³⁴

³¹ Steward 2012 <http://www.politicsweb.co.za/news-and-analysis/jeremy-gauntlett-race-and-judicial-appointments>.

³² Kriegler "Can Judicial Independence Survive Transformation?".

³³ *Employment Equity Act* 55 of 1998.

³⁴ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) 27.

Accordingly, section 174(2) ought to be viewed as a measure seeking "remedial or restitutionary equality"³⁵ within the judiciary, and enjoins the JSC in the appointment process of judges. It is therefore submitted that from this perspective, section 174(1) ought to be read together with section 174(2). While section 174(1) of the *Constitution* requires that candidates for appointment are appropriately qualified and fit and proper, section 174(2) seeks to ensure that previously disadvantaged persons are given the opportunity if they are adequately qualified and are fit and proper. Moreover, it is submitted that the existence of a judiciary that is broadly reflective of the gender and racial composition of society bodes well for public confidence in it.

In the case of *Judicial Service Commission v Cape Bar Council*,³⁶ the court had to deal with two substantive issues. The first was whether the JSC was properly constituted (the president of the SCA and his deputy were absent) when it interviewed candidates for vacancies in the Western Cape High Court and, if not, whether that resulted in the invalidity of the decisions taken at the meeting. The second issue was whether, in the circumstances, the decision of the JSC not to recommend any of the candidates to fill the two remaining vacancies was irrational and therefore unconstitutional. Regarding the first issue, in reaching its conclusion the court was bound by its previous pronouncement in *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape Province*,³⁷ where it had held that the JSC cannot take valid decisions in matters that relate to a court in a particular province without the presence of the premier. The court considered that the position could be no different with matters relating to the absence of the President of the SCA or his deputy.³⁸ It therefore held that the absence of the President of the SCA, or, alternatively, his deputy rendered the decisions taken on the day regarding six unsuccessful candidates invalid, as the JSC had not been properly constituted.³⁹ Regarding the second issue, the court was of the view that, firstly, since the JSC is under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend candidates for

³⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) 60.

³⁶ *JSC v Cape Bar Council* 2012 ZASCA 115.

³⁷ *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape Province* 2011 3 SA 538 (SCA).

³⁸ *JSC v Cape Bar Council* 2012 ZASCA 115 para 30.

³⁹ *JSC v Cape Bar Council* 2012 ZASCA 115 para 36.

judicial appointment, it follows that – as a matter of general principle – it is obliged to give reasons for its decision not to do so. The court further held that:

... where the undisputed facts gave rise to a *prima facie* inference that the decision not to recommend any of the suitable candidates was irrational, the failure by the JSC to adhere to its general duty to give reasons inevitably leads to confirmation of that *prima facie* inference.⁴⁰

There are two very important pronouncements made by the court in this case, which related to the operation of the JSC. The first is that the JSC ought to be properly constituted when it makes decisions, and that the composition of the JSC shall be determined by the purpose for which it has convened. Secondly, the JSC ought to act rationally and lawfully. Rationality encompasses giving reasons to an unsuccessful candidate. This is because the:

... JSC is under a constitutional obligation not to act in an irrational and arbitrary manner; the importance of reasons is that they assist to rationalise the exercise of power and decision making and provide the aggrieved party an opportunity to rebut the defence of the decision maker.⁴¹

The manner in which judges are appointed is crucial to the independence of the judiciary.⁴² Ideally, by stipulating clear procedures to be followed in their appointment the *Constitution* ensures that appointments are made in a transparent manner and for the correct reasons. The process also seeks to ensure that judges who are appointed are people of ability, and who are fit and proper.⁴³ Moreover, the appointment processes also ensure that the constitutional imperatives of transformation are taken into account.⁴⁴ The *Constitution*, through the JSC, therefore ensures that judges aren't appointed arbitrarily for inappropriate reasons. This is particularly important in a constitutional democracy such as South Africa, as judges are the guardians of the *Constitution*.⁴⁵ However, questions have been raised about the president's extensive powers of appointing judges. Deputy Chief Justice Dikgang Moseneke is one of those who have questioned such powers:

⁴⁰ *JSC v Cape Bar Council* 2012 ZASCA 115 para 51.

⁴¹ *JSC v Cape Bar Council* 2012 ZASCA 115 para 44.

⁴² The appointment of judges is provided for under s 174 of the *Constitution*.

⁴³ Section 174(1) of the *Constitution*.

⁴⁴ Section 174(2) of the *Constitution*.

⁴⁵ The concept of judges' being guardians of the *Constitution* is discussed in detail in Casper 1980 *S Cal L Rev* 773.

... a careful examination of the powers of the national executive chapter in the constitution displays a remarkable concentration of the president's powers of appointment.⁴⁶

According to Moseneke, the way power is currently allocated is not always optimal in terms of advancing the democratic project.⁴⁷ He pointed out that the president also appoints the Chief Justice, the Deputy Chief Justice, all judges and heads of institutions such as the National Prosecuting Authority, the Public Protector, the Auditor General, members of the Commission for Gender Equality and Human Rights Commission, the heads of the police, military and intelligence services, the Governor of the Reserve Bank, the Commissioner of the South African Revenue Services and the heads of similar institutions. Furthermore, the powers of appointment are often coupled with powers of removal – although subject to some prescribed process.⁴⁸ He concludes by suggesting that the dispersal of public power in South Africa should be revisited.

4 Security of tenure

Another important feature of judicial independence is the security of tenure. The *Constitution* provides that a judge of the Constitutional Court is appointed for a non-renewable term of 12 years or until the age of 70 – whichever comes first.⁴⁹ Judges of other courts hold office until discharged from active service in terms of an Act of Parliament.⁵⁰ *The Judges Remuneration and Conditions of Employment Act*⁵¹ governs this position. Section 3 of the Act is similar to section 176(1) of the *Constitution* in providing that a judge of the Constitutional Court is to be discharged from active service either on reaching the age of 70 or after completing a 12-year term of office on the Constitutional Court – whichever occurs first.⁵² Furthermore, the Act also provides that the president may discharge a judge from active service on the

⁴⁶ Tabane 2014 <http://www.news24.com/Archives/City-Press/Moseneke-calls-for-review-of-presidential-powers-20150429>.

⁴⁷ Tabane 2014 <http://www.news24.com/Archives/City-Press/Moseneke-calls-for-review-of-presidential-powers-20150429>.

⁴⁸ Tabane 2014 <http://www.news24.com/Archives/City-Press/Moseneke-calls-for-review-of-presidential-powers-20150429>.

⁴⁹ Section 176(1) of the *Constitution*.

⁵⁰ Section 176(2) of the *Constitution*.

⁵¹ *Judges Remuneration and Conditions of Employment Act* 47 of 2001.

⁵² Section 3(1)(a) of the *Judges Remuneration and Conditions of Employment Act* 47 of 2001.

Constitutional Court for incapacity due to ill health, or at the judge's own request for a reason the president deems sufficient.⁵³

There are, however, further qualifications relating to the tenure of judges in the Constitutional Court. If at the end of the 12-year term the judge has not completed a total of 15 years' active service, his term is extended until this service has been completed.⁵⁴ If – at the age of 70 years – the judge has not completed 15 years of active service, then the term on the Constitutional Court is extended until either the 15-year mark has been reached, or the judge is 75 years of age – whichever occurs first.⁵⁵ Section 3(2)(a) of the afore-mentioned Act also provides for a discharge from active service on reaching the age of 70, or on the completion of 10 years of active service – whichever comes first. A judge who has reached the age of 65 years and has completed 15 years' active service and who wishes not to continue may notify the minister accordingly and be discharged by the president.⁵⁶

In the case of *Justice Alliance of South Africa v President of South Africa*⁵⁷ the Constitutional Court had to determine whether section 8(a) of the *Judges Remuneration and Conditions of Employment Act* was consistent with section 176(1) of the *Constitution*. This required the Court to consider whether section 8(a) of the Act delegates the power to extend tenure to the president; if so, whether delegation is permitted by section 176(1) of the *Constitution*; and, if so, whether the delegation was validly done and whether section 176(1) authorises a differentiation of the terms of office of judges of the Constitutional Court.⁵⁸

In addressing the first issue, which related to delegation, the court held that section 8(a) (of the Act) grants the President an executive discretion on whether to extend the term of office of the Chief Justice who is approaching the end of his/her term.⁵⁹ Furthermore, the court held that section 176(1) of the *Constitution* states that the

⁵³ Section 3(1)(b) and (c). of the *Judges Remuneration and Conditions of Employment Act* 47 of 2001.

⁵⁴ Section 4(1) of the *Judges Remuneration and Conditions of Employment Act* 47 of 2001.

⁵⁵ Section 4(1) of the *Judges Remuneration and Conditions of Employment Act* 47 of 2001.

⁵⁶ Section 3(2)(b) of the *Judges Remuneration and Conditions of Employment Act* 47 of 2001.

⁵⁷ *Justice Alliance of South Africa v President of South Africa* 2011 5 SA 388 (CC).

⁵⁸ *Justice Alliance of South Africa v President of South Africa* 2011 5 SA 388 (CC) para 41.

⁵⁹ *Justice Alliance of South Africa v President of South Africa* 2011 5 SA 388 (CC) para 52.

term must be extended by an Act of Parliament, and thus the extension by the President does not qualify as required by the *Constitution* – as it lacks the specific features of an Act of Parliament.⁶⁰ The court considered that had it been contemplated that the power in section 176(1) be delegable, the intention to do so would have been made clear by the drafters of the *Constitution*. The court also held that what is also problematic about section 8(a) is that it usurps the legislative power granted only to Parliament – which therefore constitutes an unlawful delegation.⁶¹ Moreover, another important consideration in assessing the constitutional compliance of delegation, the court held, "is the constitutional imperative of judicial independence".⁶² The court further considered that the open-ended discretion in section 8(a) could raise a reasonable apprehension or perception that the independence of the Chief Justice – and by corollary the judiciary – could be undermined by interference from the executive.⁶³ The court therefore concluded that the provisions of section 8(a) amount to an impermissible delegation and are invalid as they are inconsistent with the provisions of section 176(1) of the *Constitution*.

Regarding the issue of whether or not section 176(1) authorises a differentiation of terms of office of judges of the Constitutional Court, it was held that non-renewability is the bedrock of security of tenure, and a protective mechanism against judicial favour in passing judgment. Amongst other things, the importance of non-renewability is that it fosters public confidence in the judiciary as a whole – as judges can function without fear that their terms will not be renewed or inducement to seek to secure renewal.⁶⁴ The court also held that singling out the Chief Justice amongst the members of the Constitutional Court is incompatible with section 176(1), as this section does not allow singling out any one Constitutional Court judge on the basis of his/her individual identity or position within the Court.⁶⁵ The court further stated that the incumbency of the office of Chief Justice or Deputy Chief Justice makes no difference – and confers

⁶⁰ *Justice Alliance of South Africa v President of South Africa* 2011 5 SA 388 (CC) para 58.

⁶¹ *Justice Alliance of South Africa v President of South Africa* 2011 5 SA 388 (CC) para 62.

⁶² *Justice Alliance of South Africa v President of South Africa* 2011 5 SA 388 (CC) para 66.

⁶³ *Justice Alliance of South Africa v President of South Africa* 2011 5 SA 388 (CC) para 68.

⁶⁴ *Justice Alliance of South Africa v President of South Africa* 2011 5 SA 388 (CC) para 73.

⁶⁵ *Justice Alliance of South Africa v President of South Africa* 2011 5 SA 388 (CC) para 85.

no special entitlement to extension⁶⁶ – as creating a special category for the extension of the term of office of the Chief Justice or the Deputy Chief Justice would single out one judge. Therefore the court considered that "incumbency of an office is irrelevant to the delineation of the members of the Constitutional Court in section 176(1)". The court thus concluded that "section 8(a) is invalid on the basis of the differentiation it effects".⁶⁷

This judgment highlights the relevance of non-renewability of tenure to judicial independence. The position taken by the Court is that the terms of office of constitutional court judges should be fixed in order to provide stability and consistency in the functioning of the court, and to prevent any perception of bias or a lack of independence in the judiciary. In essence, the decision underscores the security of tenure as being an important element of judicial independence, and demonstrates the vigilance of South African courts – particularly the Constitutional Court – in enforcing such security and protecting judicial independence.

5 Complaints, disciplinary proceedings and the removal of judges

Complaints and disciplinary proceedings against judges and procedures for their removal from office are intrinsically interrelated and sensitive issues. Their sensitivity stems from the general view that any complaints, disciplinary action and removal of judges ought to be dealt with in terms of a clear legislative framework. What gives rise to this view is the desire to insulate any such proceedings from abuse or manipulation – political or otherwise. It is therefore important to ensure that clear, objective standards are established. In the South African context, section 180 of the *Constitution* states that national legislation may provide for any matter concerning the administration of justice not dealt with in the *Constitution* – including the procedures for dealing with complaints about judicial officers.

⁶⁶ *Justice Alliance of South Africa v President of South Africa* 2011 5 SA 388 (CC) para 94.

⁶⁷ *Justice Alliance of South Africa v President of South Africa* 2011 5 SA 388 (CC) para 95.

The complaints' procedure against judges is governed by the *Judicial Services Commission Act*.⁶⁸ The preamble of the Act spells out the purpose of the Act as *inter alia* to

... provide procedures for dealing with complaints about judges; to provide for the establishment of a Judicial Conduct Tribunal to inquire into and report allegations of incapacity; gross incompetence or gross misconduct against judges; and to provide for matters connected therewith.

Section 14(1) of the Act provides that any person may lodge a complaint against a judge, and that the grounds for this are incapacity giving rise to a judge's inability to fulfil his duties in accordance with prevailing standards. According to section 14, gross incompetence or gross misconduct, as envisaged in section 177(1)(a) of the *Constitution*, includes but is not limited to:

... any wilful or grossly negligent breach of the Code of Judicial Conduct [and] any wilful or grossly negligent conduct ... that is incompatible with or unbecoming of the holding of judicial office, including any conduct that is prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts.⁶⁹

The Act also recognises the existence of "lesser complaints."⁷⁰ Section 15(2) of the Act stipulates that a complaint that does not fall within the parameters of any of the listed grounds and which is solely related to the merits of a judgement or order or is frivolous or hypothetical may be dismissed.

Section 17(2) of the Act states that an inquiry into serious but non-impeachable complaints should be conducted in an inquisitorial manner and there is no onus on any person to prove or disprove any fact during such an investigation. Section 17(3)(a) requires that the respondent in the matter ought to be invited to respond to the allegations in writing or in any other manner specified, within a specified period. Subsequently, the complainant must have the opportunity to comment on the response of the respondent within a specified period of time.⁷¹ If it is found that there is no reasonable likelihood that a formal hearing on the matter will contribute to

⁶⁸ *Judicial Services Commission Act* 9 of 1994.

⁶⁹ Sections 14(4)(b) and (e) *Judicial Services Commission Act* 9 of 1994.

⁷⁰ Section 15 *Judicial Services Commission Act* 9 of 1994.

⁷¹ Section 17(3)(c) *Judicial Services Commission Act* 9 of 1994.

determining the merits of the complaint, the complaint must be dismissed, or it must be found that the complaint has been established and that the respondent has behaved in a manner unbecoming of a judge, and remedial steps are to be imposed.⁷² Under section 17(4)(c), it may also be recommended to the JSC that the complaint should be investigated by a tribunal. Conversely, if it is found that a formal hearing is required in order to determine the merits of the complaint, this must be done within a reasonable time.⁷³ Upon conclusion of the formal hearing, the complaint must either be dismissed or it must be:

... found that the complainant has established that the respondent has behaved in an unbecoming manner for a judge and impose remedial relief referred to in terms of the Act or recommend to the Committee to recommend to the Commission that the complaint should be investigated by a Tribunal.⁷⁴

Section 17(8)(a)-(g) of the Act contemplates that one step or a combination of remedial steps may be imposed in respect of the respondent, including apologising to the complainant in a specified manner, a reprimand, a written warning, compensation, appropriate counselling, and attendance of a specified training course.

Impeachable complaints about judges are conducted in terms of section 16(1) of the Act, and sections 21 to 34 deal with the establishment of the Judicial Conduct Tribunal, whose objectives are to collect evidence, conduct a formal hearing, make findings of fact, make a determination on the merits of the allegations, and submit a report on its findings to the JSC.⁷⁵ Section 26(2) directs the tribunal to conduct its enquiry in an inquisitorial manner – with no onus on any person to prove or disprove any fact before a Tribunal.⁷⁶ It is also important to note that when considering the merits of allegations against a judge, the Tribunal must make its determinations on a balance of possibilities,⁷⁷ and must keep a record of its proceedings.⁷⁸ Section 2(1) states that the tribunal must be appointed by the Chief Justice whenever requested to do so by the JSC. The composition of the tribunal is governed by section 22(1), to comprise

⁷² Section 17(4)(b) *Judicial Services Commission Act 9 of 1994*.

⁷³ Section 17(5)(a) *Judicial Services Commission Act 9 of 1994*.

⁷⁴ Section 17(5)(c)(iii) *Judicial Services Commission Act 9 of 1994*.

⁷⁵ Section 26(1)(b) *Judicial Services Commission Act 9 of 1994*.

⁷⁶ Section 26(2) *Judicial Services Commission Act 9 of 1994*.

⁷⁷ Section 26(3) *Judicial Services Commission Act 9 of 1994*.

⁷⁸ Section 26(4) *Judicial Services Commission Act 9 of 1994*.

two judges – one of whom must be designated by the Chief Justice as the Tribunal President, and one other person who is not a judicial officer. Furthermore, at least one member of every tribunal must be a woman.⁷⁹

The circumstances and procedure for the removal of a judge from office are unequivocally spelt out under section 177 of the *Constitution*, which provides that a judge may be removed from office only if the JSC finds that the judge suffers from an incapacity, is grossly incompetent, or is guilty of gross misconduct, and if the National Assembly calls for that judge to be removed by a resolution adopted with a supporting vote of at least two thirds of its members.⁸⁰ Thereafter, the president must remove the judge concerned from office.⁸¹ In effect then, the body tasked with making a finding that a judge is guilty of incapacity, gross incompetence or gross negligence, is the Judicial Conduct Tribunal.

It is submitted that the *Judicial Services Commission Act* creates a clear legislative framework that ought to be followed in matters pertaining to complaints, disciplinary procedures, and the removal of judges. As stated above, a judge can be removed from office by the president only after a two-thirds majority resolution adopted by the National Assembly.⁸² In other words, until such a resolution is adopted by the National Assembly a judge may not be removed from office – despite an adverse finding by the tribunal. It is to be noted that the establishment of the tribunal by the Act closes a lacuna, as the task of disciplining judges previously lay with the JSC, without any clear procedures established about how complaints ought to be dealt with. It is submitted that the possible reasons for the onerous two-thirds majority vote in the National Assembly are, firstly, adherence to the principle of security of tenure which is premised on the principle that a judge's tenure is secure and may be removed only in exceptional circumstances. Secondly, this is consistent with the principle of checks and balances which ensure that the power to remove judges does not solely rest with the judiciary.

⁷⁹ Section 22(2) of the *Constitution*.

⁸⁰ Section 177(1)(b) of the *Constitution*.

⁸¹ Section 177(2) of the *Constitution*.

⁸² Section 177(1)(b) of the *Constitution*.

The importance of this is that it removes the over-concentration of power in the judiciary regarding the removal of judges.

6 The remuneration of judges

It is important that judges be well remunerated, because if this does not happen, they may become susceptible to illicit financial inducements from parties who may want to influence them in a particular manner. Thus, ensuring that judges are well remunerated seeks to protect them from corrupt behaviour. A well-paid judge may find it easier to confidently resist corrupt inducements.⁸³ Secondly, in order to attract the best candidates to the judiciary, it is imperative that they be remunerated competitively. Although the salaries, allowances and benefits of judges and acting judges are governed by the *Judges Remuneration and Conditions of Employment Act*,⁸⁴ in terms of the *Constitution*, salaries, allowances and benefits of judges cannot be reduced.⁸⁵ This is to guard against the possibility of any government attempts to influence or put pressure on judges through salary reductions.

Ultimately, the President determines the annual salary of judges, but parliament has the right to debate and reject the terms of the President's proclamation.⁸⁶ It is also interesting to note that, once discharged from active service, a judge is entitled to a life-time salary, which is adjusted in terms of the *Judges Remuneration and Conditions of Employment Act*.⁸⁷ This depends on the judge's manner of discharge and period of service. Moreover, in addition to the lifetime salary, a gratuity is also received on retirement.⁸⁸

7 Challenges

Although it could be said that constitutionally and legislatively speaking, judicial independence seems to be fairly protected in South Africa, some incidents have

⁸³ *De Lange v Smuts* 1998 3 SA 785 (CC) para 70 (wherein it is indicated that a basic degree of financial security is one of three essential conditions of judicial independence).

⁸⁴ *Judges Remuneration and Conditions of Employment Act* 47 of 2001.

⁸⁵ Section 176(3) of the *Constitution*.

⁸⁶ Sections 2(1) and 2(2) of the *Judicial Services Commission Act* 9 of 1994.

⁸⁷ Section 5 *Judges Remuneration and Conditions of Employment Act* 47 of 2001.

⁸⁸ Section 6 *Judges Remuneration and Conditions of Employment Act* 47 of 2001.

appeared to compromise such independence. One example was the appointment, in February 2010, of Advocate Mpshe – a former Acting National Director of Public Prosecutions – as an acting judge in the North West Province. Advocate Mpshe's appointment was met with much consternation because of perceived past political affiliations and possible bias in favour of the government.⁸⁹ Another example was the appointment of Judge Heath as the Head of the SIU.⁹⁰ In dealing with this issue, the Constitutional Court held that Judge Heath's appointment to the position of head of the SIU could result in a public perception that judges were functionally associated with the executive and therefore unable to control the power of that executive with the detachment and independence called for by the *Constitution*. This, in turn, would undermine the separation of powers and the independence of the judiciary. Therefore the appointment of a judge to head the SIU could not be supported and was thus invalid.⁹¹

The above two examples are analogous in terms of representing insidious attempts to erode the separation of powers and the judiciary's independence. If the sanctity of these constitutional principles is to remain, it is imperative that any such attempts are resisted.

The best (or worst) example of a challenge to judicial independence in South Africa is perhaps what we shall refer to as the "Hlophe saga", although the scope of this paper precludes a detailed account of this saga. This has been a vexed and controversial issue which continues to cast a dark shadow over the independence of the judiciary in South Africa. The saga originated from a series of events which began in 2008, with judges of the Constitutional Court claiming that the Cape Judge President John Hlophe tried to improperly influence two of them to rule in favour of Jacob Zuma – who was not yet the President of South Africa – and who was facing corruption charges at the time. Hlophe subsequently instituted a counter complaint against the Constitutional Court judges on the basis that they issued a statement to the media regarding their

⁸⁹ Staff Reporter 2010 <http://mg.co.za/article/2010-02-18-da-reiterates-objection-to-mpshe-appointment>.

⁹⁰ Established in terms of the *Special Investigating Units and Special Tribunals Act* 74 of 1996.

⁹¹ *South African Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) para 46.

complaint without giving him an opportunity to defend himself. The drama that followed resulted in a disciplinary committee of the JSC dismissing the complaint against Judge Hlophe in 2009. The question to be asked is whether such a dismissal amounted to an abdication of the JSC's constitutional responsibility, and whether such an abdication constitutes a threat to judicial independence. The counter-complaint lodged by Hlophe against the judges of the Constitutional Court is, however, deliberately omitted from this discussion, as the SCA has on two occasions held that the JSC acted lawfully in dismissing the complaint.⁹² In September 2014, six years after the complaint was initially raised, the Johannesburg High Court dismissed an application brought by Constitutional judges Bess Nkabinde and Chris Jafta against the JSC. Two months later the Court dismissed the two judges' application for leave to appeal against the September judgment – ostensibly paving the way for the JSC tribunal to go ahead. At the time of writing, there is still no certainty about how the dispute will be resolved.

The view we express, however, is that the failure of the JSC as an institution constitutes a threat to judicial independence. The amount of damage the Hlophe saga may have potentially caused is unknown. Anecdotal evidence seems to suggest that the JSC, as an institution, may have suffered great harm. For example, in 2009 Judge Nugent of the SCA withdrew his application with the JSC as a candidate for a vacancy in the Constitutional Court – citing, as the reason for the withdrawal, his lack of trust in the JSC as a result of the manner in which the body had handled the Hlophe saga. He further suggested that the low number of candidates applying for positions in the Constitutional Court in recent times may be influenced by the lack of confidence in the body to dutifully dispose of its mandate.⁹³ It may therefore be concluded that the abdication of responsibility by the JSC in fact constitutes a threat to judicial independence.

⁹² *Langa CJ v Hlophe* 2009 8 BCLR 823 (SCA); *Freedom Under Law v Acting Chairperson: Judicial Service Commission* 2011 3 SA 549 (SCA).

⁹³ Hawker 2012 <http://www.iol.co.za/news/crime-courts/concourt-candidate-riles-commissioners-1.1315509>.

Another significant threat to judicial independence emanates from periodic statements by politicians about the need to review the judgments of the Constitutional Court with a view to assessing the need to make changes to the *Constitution*.⁹⁴ Concerns have been raised about these statements as they are seen not only as a threat to the independence of the judiciary but also as a threat to the *Constitution* and to democracy.

The issue of judicial independence and impartiality was brought into sharp relief by the late June 2015 visit to South Africa – in order to attend an AU summit – of Sudan's infamous President Omar al-Bashir.⁹⁵ The ICC had previously issued a warrant for al-Bashir's arrest in 2009 for genocide and war crimes in the Darfur region of Sudan. He had not been invited to President Zuma's inauguration because of South Africa's obligations as a signatory to the Rome Treaty – which established the ICC. However, for attendance of the AU summit al-Bashir was promised diplomatic immunity by the South African government, and also that he would not be arrested. However, commentators believe that this was an executive order which cannot trump South Africa's obligations to adhere to the ICC warrant.⁹⁶ The outcry over his attendance was compounded when the government ignored a unanimous North Gauteng high court ruling by three judges that al-Bashir should remain in South Africa (unrestrained, al-Bashir flew back to Sudan).⁹⁷ The government thereafter stated that it had had no choice as arresting al-Bashir would have been tantamount to declaring war on Sudan, that it would have given the ICC a legitimacy which it felt it no longer deserved because of alleged bias against Africa, that it would have jeopardised the peace process in Sudan, and would also have sullied South Africa's reputation and influence on the continent.⁹⁸ On 13th July 2015 the government gave notice of application for leave to appeal the judgment.⁹⁹ However, beyond this detail and the political

⁹⁴ De Vos 2014 <http://constitutionallyspeaking.co.za/category/criticism-of-courts/>.

⁹⁵ For detail on the al-Bashir saga, see Lund 2015 <http://showme.co.za/lifestyle/omar-al-bashir-saga-obligations-abandoned/>.

⁹⁶ Lund 2015 <http://showme.co.za/lifestyle/omar-al-bashir-saga-obligations-abandoned/>.

⁹⁷ *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2015 ZAGPPHC 402.

⁹⁸ Lund 2015 <http://showme.co.za/lifestyle/omar-al-bashir-saga-obligations-abandoned/>.

⁹⁹ GCIS 2015 <http://www.gcis.gov.za/newsroom/media-releases/government-appeal-gauteng-high-court-judgement-president-al-bashir-matter>.

ramifications – which are beyond the scope of this paper – what is more important are the attacks on the judiciary made by various government officials and government alliance partners, all of which seem to relate to or were instigated by the al-Bashir ruling. These attacks have included statements that the judiciary is biased against the state, that the judiciary is driven "to create chaos", is "overreaching" and "contradicting the interest of the state" (according to ANC secretary general Gwede Mantashe), and, importantly, that the judges were influenced to reach certain verdicts (according to Police Minister Nathi Nhleko).¹⁰⁰ These attacks on the judiciary eventually led to an extraordinary judicial heads of court meeting, after which Chief Justice Mogoeng Mogoeng announced that the judiciary would meet President Jacob Zuma to discuss matters, after "repeated and unfounded criticism" of the judiciary, given that the criticism "has the potential to delegitimise the courts".

8 Conclusion

This paper sought to explore whether or not – or the extent to which – judges in South Africa are independent. An analysis of the constitutional and legislative measures which seek to insulate judges from improper influence was undertaken. We draw the following conclusions. Firstly, in terms of South African jurisprudence, the presumption is that a judge is impartial. Should there be any suspicion or allegation of bias, the burden of proof falls on the party alleging the bias to prove it. Secondly, the *Constitution* establishes mechanisms for the appointment of judicial officers and stipulates clear procedures to be followed in this process. The JSC plays an important oversight role in ensuring that judges are appointed in terms of the objective criteria stipulated by the *Constitution*. Thirdly, the legislative framework adopted to ensure the security of tenure of judges provides that a judge's term of office is predetermined and non-renewable. Fourthly, the legislative framework adopted in terms of complaints, disciplinary proceedings and the removal of judges is elaborate. It also establishes a Judicial Conduct Tribunal whose responsibility is to deal with such

¹⁰⁰ John 2015 <http://mg.co.za/article/2015-07-08-chief-justice-hammers-gratuitous-criticism>; SABC and News24 2015 <http://www.sabc.co.za/news/a/6e0aaa804913771db139b970b5a2a8d2/Zuma-and-Mogoeng-meeting-%E2%80%9Cextremely-significant%E2%80%9D-20151207>; Reuters Africa 2015 <http://af.reuters.com/article/topNews/idAFKCN0PJ11A20150709>.

complaints. The legislative framework also distinguishes between impeachable complaints and serious but non-impeachable complaints, and further deals with the removal of judges. Fifthly, the legislative framework relating to the remuneration of judges is agreeable to the general principle that judges ought to be well paid and that their salaries may not be reduced. This is with the view that this would remove the likelihood of improper financial inducements or pressure having an effect on the decisions of judges.

It may therefore be concluded that, generally speaking, the constitutional and legislative framework adopted by South Africa sufficiently insulates judges from improper influence. However, there have been several notable challenges in practice. These relate particularly to judicial appointments and how the JSC has handled certain matters; the ongoing Hlophe saga referred to above is an important example of this. Irresponsible and uninformed political statements by politicians and unwarranted political attacks on the judiciary by government – highlighted by the recent al-Bashir saga discussed above – are also a source of great concern. These challenges could and should be construed as threats to judicial independence, and need to be comprehensively and properly addressed.

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LIST OF ABBREVIATIONS

AU	African Union
GCIS	Government Communication and Information System
IBA	International Bar Association
ICC	International Criminal Court
J Law Econ	Journal of Law and Economics
JSC	Judicial Service Commission

PER	Potchefstroom Elektroniese Regstydskrif / Potchefstroom Electronic Law Journal
S Cal L Rev	Southern California Law Review
SAJHR	South African Journal on Human Rights
IU	Special Investigative Unit
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg