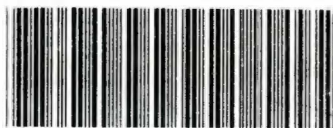


The doctrine of separation of powers in South Africa with specific reference to the independence of the judiciary



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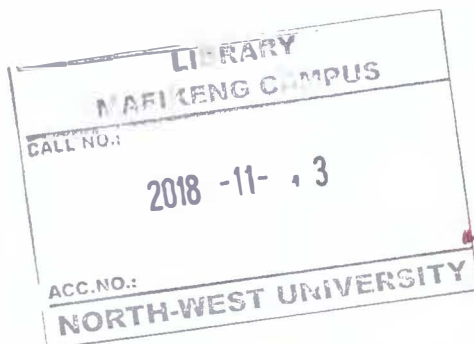
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A mini-dissertation submitted in *partial* fulfilment of the requirements for the degree of *Magister Legum* in the Faculty of Law, North-West University

Supervisor:

Dr J Sedumedi

January 2017



DECLARATION BY CANDIDATE

I, Shadi Maganoe hereby declare that this mini-dissertation submitted to the School of Post-Graduate Studies at the Faculty of Law, North-West University (Mafikeng Campus) for the degree *Magister Legum* is my own work in design and execution. I further declare that it has not been previously submitted at this or any other institution. All materials used herein have been dully acknowledged by means of a complete reference.

Signed at _____ on this the ____ day of _____ 2017.

Shadi Prudence Maganoe

Date

Student No: 23710594

CERTIFICATE OF ACCEPTANCE FOR EXAMINATION

I, Dr Joseph Sedumedi, hereby declare that this mini-dissertation by Shadi Prudence Maganoe for the degree *Master of Laws* in Public law and Legal Philosophy entitled *The Doctrine of Separation of Powers With Specific Refence to the Independence of the Judiciary* be accepted for examination

Signed at _____ on this the ____ day of _____ 2017.

Dr Joseph Sedumedi

Date

DEDICATION

I dedicate this mini-dissertation to the Almighty God, my parents, Mmankau and Senkgane, and to my siblings, Mothofela, Matlhodi and Tumisang Maganoe



ACKNOWLEDGEMENTS

I acknowledge with great sincerity all parties that assisted in the research and compilation of this mini-dissertation. I am particularly grateful to Dr J Sedumedi, my supervisor, for his constructive comments, diligence and dedication rendered to the completion of this mini-dissertation and for the overall supervision of my research. I am grateful to Professor Melvin Mbafo for his constant support and guidance throughout the period of my research, not forgetting the entire Faculty of Law.

To my family, I want to thank you for your relentless effort. Thank you for your support throughout this journey and for helping me realise my goals.

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LIST OF ABBREVIATIONS

ANC	African National Congress
CSVR	Centre for the Study of Violence and Reconciliation
ICCPR	International Covenant on Civil and Political Rights
JSC	Judicial Services Commission
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
UN	United Nations

ABSTRACT

The doctrine of separation of powers was established to prevent absolute concentration of power in a single body. The writings of Locke, Montesquieu, Aristotle and the Magna Carta have contributed to this doctrine and also provided for its pivotal role in every system of government. Separation of powers, also referred to as *trias politica*, requires the separation of state government into three arms, namely, the legislature with law making functions, the executive with the duty to execute the law and the judiciary with the duty to interpret the law and resolve disputes which arise in terms of the law. In order for the separation of powers to apply effectively, all three arms of government must be independent from each other.

The judiciary is the guardian of human rights and freedoms and must at all times be independent and impartial. Those who are vested with the duty of protecting human rights and liberties must remain impartial and independent and must act without fear, favour or prejudice. In South Africa, there have been questions as to whether the independence of the judiciary is at risk of being influenced by external factors such as political factors and the executive arm of government based on events that have taken place in the past years. Political attacks and the amount of power the executive sphere of government has on the judiciary affect the confidence of the public in the judiciary.

A comparative analysis of judicial independence in Canada, the United Kingdom and the United States of America will be conducted in this study. This study examines judicial independence from the view of the doctrine of separation of powers and the current legal standing of this independence in South Africa.

Chapter 1 Introduction

1.1 Background to the study

Judicial independence is an important doctrine which stems from the doctrine of separation of powers.¹ The independence of the judiciary is significant in upholding the rule of law in a free society.² It varies in all jurisdictions across the globe. However, it is defined by the same principle, that judges must reasonably be perceived to be free to make impartial decisions based on the facts of law in order to uphold and protect human rights.³ Bingham has also described judicial independence as an important aspect in a democratic state and stated that:

It is a truth universally acknowledged that the constitution of a modern democracy governed by the rule of law must effectively guarantee judicial independence.⁴

The doctrine of separation of powers is linked to the philosopher John Locke in his work, the *Second Treaties of Civil Government*.⁵ Locke advocated for the separation of government into three functions: the legislature, executive and foreign relations.⁶ However the French philosopher Montesquieu is credited for the principle of division of state power. He developed the separation of powers into three institutions which are still used in South African law today. He divided them into the legislature, executive and the judiciary.⁷ The doctrine of separation of powers was established to prevent the abuse of power and for the advancement of personal freedom.⁸

The courts are considered to be islands of justice and guardians of human rights.⁹ The Constitution of the Republic of South Africa, 1996, is the supreme law¹⁰ of the country and makes provisions for the powers, functions and independence of the judiciary and

¹ Horn and Bösl *The Independence of The Judiciary in Namibia* 12.

² Prefontaine and Lee *The Rule of Law and The Independence of the Judiciary* 1.

³ Prefontaine and Lee *The Rule of Law and The Independence of the Judiciary* 1.

⁴ Bingham *The Business of Judging* 55.

⁵ Locke and Macpherson *The Second Treaties of Government* section 143.

⁶ Locke and Macpherson *The Second Treaties of Government* section 143.

⁷ Currie and de Waal *The New Constitutional and Administrative Law* 91.

⁸ Currie and de Waal *The New Constitutional and Administrative Law* 91.

⁹ Currie and de Waal *The New Constitutional and Administrative Law* 269.

¹⁰ The Constitution of the Republic of South Africa, 1996 hereinafter the Constitution.

judicial review.¹¹ The doctrine of separation of powers refers to specific functions, duties and responsibilities that are allocated to the three spheres of government.¹² These three spheres of government are the legislature, which makes, amends and repeals laws, subject to the provisions of the Constitution from which this power is derived;¹³ the executive, which has the authority to enforce the law,¹⁴ and the judiciary, which interprets and applies the law where there is a dispute.¹⁵

This study examines the judiciary as an independent and separate arm of government. It explores the doctrine of separation of powers and the role it plays on judicial independence and how the Constitution protects the independence and impartiality of the judiciary. The study discusses the overall attitude of the executive sphere of government and political influences in respect of judicial independence.

This study also provides a comparative analysis on judicial independence in Canada, United Kingdom and the United States of America. This study further provides an analysis on the process of judicial appointments, the functions of the Judicial Services Commission and the extent to which these factors affect judicial independence will.

1.2 Problem statement and substantiation

The doctrine of separation of powers is not expressly provided for in the Constitution of the Republic of South Africa. However, it forms part of the South African constitutional design.¹⁶ The doctrine of separation of powers provides for the independence and impartiality of the judiciary in order for it to apply the law without being subject to the executive and the legislature.¹⁷

Section 165 (2) of the Constitution secures the integrity and independence of the judiciary. It provides that the courts are only subject to it as the supreme law.¹⁸ It further provides that the judiciary must apply the rule of law impartially without fear, favour or

¹¹ Section 2 of the Constitution provides that; the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

¹² *Mojapelo 2013 Advocate* 37.

¹³ Chapter 4 of the Constitution.

¹⁴ Chapter 5 of the Constitution.

¹⁵ Chapter 8 of the Constitution.

¹⁶ *Glenister v President of the Republic of South Africa* 2009 1 SA 287 (CC) para 30.

¹⁷ *Mojapelo 2013 Advocate* 37.

¹⁸ Section 165(2) of the Constitution.

prejudice.¹⁹ Section 174 (3) of the Constitution provides for the appointment of judicial officers by the President as head of the national executive.²⁰ This means that the executive has control over the appointment of judicial officers which might undermine the independence and impartiality of the judiciary that the Constitution is aimed at protecting through the doctrine of separation of powers. The process of appointment of judges allows the public to participate in the procedure silently. Interviews with selected candidates are conducted and the public is invited to attend even though they are not allowed to participate actively by contributing their opinions.²¹ At the conclusion of this process, a judge is recommended by a body dominated by political appointees who do not have to provide reasons for their decisions.²²

The independence and impartiality of the courts is, to some extent, questionable due to the procedure of judicial appointments and the amount of power vested in the President as head of the executive. An issue then arises with regards the independence of the judiciary as to whether or not the legal mechanisms which have been put in place to protect the independence of the judiciary are adequate. A question whether or not there are threats to the independence of the judiciary in South Africa is also raised as a result.

1.3 Aims and objectives of the study

The aim of this study is to analyse judicial independence in South Africa and establish whether or not it is at risk of being influenced by the executive arm of government and other factors including political attacks. In order to achieve this task, the study has the following objectives: -

- To analyse the procedure of judicial appointments and establish how it affects the independence of the judiciary.

¹⁹ Section 165(2) of the Constitution.

²⁰ Section 174(3) of the Constitution; the President as head of the national executive, after consulting with the JSC and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the deputy Chief Justice, and after consulting the JSC, appoints the President and Deputy President of the Supreme Court of Appeal.

²¹ Currie and de Waal *The New Constitutional and Administrative Law* 304.

²² Malan 2013 *PER* 1968-1969. The JSC consists of 23 members including the Minister of Justice, 3 members of the National Assembly, 4 from the National Council of Provinces and 4 appointed by the President and in all likelihood aligning the JSC with the majority party in Parliament thus giving the majority party the support of 12 members of the 23 members of the JSC.

- To investigate the influence of the doctrine of separation of powers and the Constitution on the independence of the judiciary;
- To provide a comparative analysis of judicial independence and judicial appointments with other jurisdictions outside the Republic. A comparative study with United States of America, Canada and the United Kingdom is conducted.

1.4 Research Questions

The following research questions are answered in this study:

- Are there current threats to judicial independence in South Africa?
- What is the procedure for judicial appointments and what implications does this have on the independence of the judiciary?
- What are the legal mechanisms in place to protect the independence of the judiciary and are they consistent with section 165 of the Constitution?

1.5 Basic hypothesis

The Constitution has not strictly employed the requirements of the doctrine of separation of powers in terms of the three arms of government. This raises questions as to whether or not there are threats to the independence of the judiciary. The procedure for judicial appointments arguably gives an impression that the independence of the judiciary is at risk of being influenced by external factors, including the executive arm of government.

1.6 Rationale and justification of the study

Judicial independence is important in a democratic state. In protecting the rights and liberties of citizens in the Republic, the judiciary must serve as an independent arm of government. The Constitution protects this independence through application of the doctrine of separation of powers. There are legal mechanisms which have been put in place to protect the independence of the judiciary such as legislation and the establishment of the Judicial Services Commission which deals with the appointment of judicial officers. There is a need to address the issue of judicial independence against the backdrop of the appointments of judicial officers. This is done with reference to the

doctrine of separation of powers in order to provide clarity on the legal position of judicial independence.

1.7 Research methodology

To achieve the aims and objectives of this study, the researcher applies the doctrinal and analytical research method. The doctrinal research method provides a systematic exposition of rules governing a specific area of law.²³ It analyses the relationship between rules and provides an explanation on areas of difficulty in that part of the law. This method could also predict future developments in an area of law which might be investigated. Due to the theoretical nature of this topic, the methodologies used have primarily been through text analysis in the library and electronic research. The researcher makes use of available primary and secondary sources, both local and international. An analysis of legislative and other measures taken to protect the independence and impartiality of the judiciary have been included in the research methodology. Case law and other literature, including textbooks and journal articles have been accessed and used to conduct this study.

This study constitutes an academic discussion and an analysis on the independence and impartiality of the judiciary and the appointment of judicial officers. This research method was adopted to identify the inconsistencies between the existing and proposed legislation for judicial independence with the provisions made in the Constitution. Further, this method was used with the intention of suggesting measures which could be taken in order to strengthen judicial independence. A literature survey of the most important sources in dealing with the history, legislation and precedents has been conducted.

The study is formatted in the prescribed Post-graduate template of the Faculty of Law, North West University, which was last updated in October 2015.²⁴ The house style of the *Potchefstroom Electronic Law Journal*,²⁵ as last updated on 23 August 2016, is used in the citation and referencing of all sources of data applied in the study.

²³ Hutchinson and Duncan 2012 *Deakin Law Review* 85.

²⁴ The template can be accessed at <http://www.nwu.ac.za/it/sc/nwu-templates-postgraduate>.

²⁵ The style is available at <http://www.nwu.ac.za/p-per/style>.

1.8 Literature review

The study materials that were used in this study consist of primary and secondary sources of law. The primary sources used are national and international legal instruments, decided court cases, legislation and contributions from the United Nations. With regard to secondary legal sources, an analysis of academic literature including journal articles, textbooks and papers and reports presented by academics at conferences and seminars, published theses and internet sources were utilised. There have been many writings and contributions by academics and others on judicial independence and the study focus on some of these contributions and not all of them as that was an impossible task to complete. A review on some of the available literature on judicial independence was conducted.

The Federalist papers provide a historical background on the doctrine of separation of powers in a democratic state and the protection of the rights and liberties of citizens of the United States of America. In separating the functions of the three arms of government, the following was provided for in Federalist #78.²⁶ The judiciary was the least harmful institution to the political rights of individuals provided for in the United States Constitution. The executive was responsible for executing and giving effect to the wishes of the community. The legislature prescribed the rules by which the duties and rights of every citizen were regulated. In these three spheres, the judiciary was given less power and influence over the actions of the executive and the legislature. The judiciary had to depend on the aid of the executive in order to have force and give effect to its judgment.

The Federalist Papers Re-examined stated that although the judiciary would be the least powerful of the branches of government, it had the potential to make an impact.²⁷ The Federalist papers did not give the judiciary much recognition in terms of its ability to make changes and gain the confidence of the public through its actions. As an independent sphere of government, the judiciary has transformed since then and has made an immense impact in many democratic states.

²⁶ Lippman *The Federalist Papers Re-examined* 33.

²⁷ Lippman *The Federalist Papers Re-examined* 33.

Judicial independence and impartiality are guaranteed in the Constitution and this arm must be protected at all times. The weakness of mankind is the advancement of their own interests at the expense of others. It is important that judges remain independent both institutionally and individually if they have to protect the independence of the judiciary. If judges fail to remain independent, this poses a risk to the independence of the judiciary. The doctrine of separation of powers prevents this from occurring by requiring that the judiciary be independent from the other two arms of government. Horn and Bösl stated the following:

The inevitability of human error, especially when human interest (which includes the exercise of power as an end in itself) comes into conflict with the claims of others, requires that a judiciary should interpret the law and the assumptions, which underlie it, which is as far as possible independent of the Executive and the Legislature.²⁸

The decision of the Chief Justice Sir Edward Coke in the *Case of Commendams* illustrates the efforts of judges in defending judicial independence. Lord Coke refused to meet with the King prior to making a ruling on the case and the reason behind his decision was that he was sceptical of the legality of the King's request to consult before a ruling had been made. This case shows how judicial independence can easily be encroached upon by external factors if it is not absolutely protected by the Constitution and the other spheres of government.

Currie and de Waal made considerable contributions towards the history and evolution of constitutionalism as a system of law in South Africa. The foundation of the concept of judicial independence is premised on the doctrine of separation of powers. This means that the judiciary must function independently of the legislature and the executive.²⁹ Judicial officers are tasked with the duty of protecting the rights and liberties of citizens and this mandate requires them to always be impartial and independent when acting in their official capacity.

Judicial independence is recognised at an international level and the *United Nations Basic Principles* make provisions for rules which must be applied by the judiciary. One of the rules states that there must not be any unwarranted interference with the judicial

²⁸ Horn and Bösl *The Independence of The Judiciary in Namibia* 17.

²⁹ Currie and de Waal *The New Constitutional and Administrative Law* 299.

process.³⁰ The UN Basic Principles also require every state to apply these rules to guarantee the protection of judicial independence. These mechanisms have been put in place to ensure the protection of judicial independence at an institutional level. There is still a gap which needs to be closed in terms of individual independence of judges that would ensure the full protection of judicial independence.

A lot has been written on judicial independence in South Africa and how the Constitution protects this independence in terms of institutional independence. Individual independence plays an important role in guaranteeing judicial independence as much as institutional independence. Section 165 of the Constitution provides for the protection of judicial independence at an institutional level in South Africa. Provisions for security of tenure and remuneration could assist in ensuring individual independence but these mechanisms are not security enough as the individual independence aspect of judges is still at risk.

The book entitled *Cases and Materials on Constitutional Law* contains the history and evolution of constitutional law and further provides for judicial review and deals with the executive and legislative powers.³¹ It also deals with landmark cases that contributed to the separation of powers and judicial independence. One of the landmark cases is *Marbury v Madison*³² where the Supreme Court announced the principle that a court may pronounce an act of Congress invalid if it is inconsistent with the provisions of the Constitution.

1.9 Scope and limitations of the study

This study discusses the doctrine of separation of powers with specific reference to the independence and impartiality of the judiciary. Its focus is whether the independence of the judiciary is at risk of influence by external factors and what mechanisms could be put in place to strengthen the independence of the judiciary. It further discusses the role and implications of the executive sphere of government in the appointment of judicial officers and how such appointments could affect the independence of the judiciary.

³⁰ Rule 4 of the United Nations *Basic Principles on the Independence of the Judiciary*, hereinafter the UN Basic Principles.

³¹ Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 16.

³² *Marbury v Madison* 5 U.S. 137 (1803).

In order to achieve the aims and objectives set in this study, the analysis is divided into five chapters and these are briefly introduced below.

1.10 Chapter outline

Chapter One: Introduction

This is the introductory chapter. It provides an overview of what the study is about. It provides an introduction, the background of the study; problem statement; aims and objectives; research methodology; a hypothesis of the study and a literature review and scope of the study, including the limitations thereof.

Chapter Two: The Constitutional evolution of the doctrine of separation of powers and judicial independence in South Africa

This chapter deals with the Constitutional evolution of the doctrine of separation of powers with reference to judicial independence in South Africa. It discusses the history and the development of constitutionalism, the doctrine of separation of powers and judicial independence in South Africa. This chapter further discusses the role of the Constitution in securing the doctrine of separation of powers and the independence of the judiciary.

Chapter Three: The independence of the judiciary in South Africa

This chapter of the study provides an analysis of the current legal position with regards the appointment of judicial officers and the independence of the judiciary. It provides an analysis of judicial independence against judicial appointments. It further discusses the role of the executive in these appointments and analyses whether or not judicial independence is at risk of being influenced by the executive sphere of power as a result of the procedures of judicial appointments.

Chapter Four: A comparative analysis: Judicial independence in other jurisdictions

This chapter provides a comparative analysis of judicial independence and the doctrine of separation of powers in other jurisdictions outside the Republic of South Africa. A comparative study with the United States of America, Canada and the United Kingdom

is conducted in this study in order to compare judicial independence and the appointment of judicial officers in these other jurisdictions.

Chapter Five: Findings and recommendations

This chapter presents findings, recommendations and a conclusion.

1.11 Conclusion

Judicial independence is at the heart of a free and democratic society. It guarantees those who are governed that their rights and liberties are protected through access to justice. It is important that the judiciary remains independent and free from any external influences to protect human rights. A lot of literature on the doctrine of separation of powers and judicial independence exists and this study intends to employ relevant literature from this corpus in order to satisfy its aims and objectives as well provide sufficient answers to the research questions defined at the onset of this study.



Chapter 2 The Constitutional Evolution of the Doctrine of Separation of Powers and Judicial Independence in South Africa

2.1 Introduction

History provides that prior to the separation of powers, a common source of governing authority was God and the ruler tended to claim power by divine right.³³ There was no separation of powers and those who had the power to rule and govern others claimed to have acquired it from God. The development of the law and the people realising their human rights led to the establishment of the doctrine of separation of powers. The main objective of the doctrine of separation of powers was to prevent excessive concentration of power in one body through the division of state power. Written constitutions in which power is delegated by the people are a recent development. The United States of America's Constitution was one of the first to be written in this manner where power was distinctly separated.³⁴

This doctrine forms part of and has influenced the constitutional design and development of many states, including South Africa.³⁵ This chapter of the study analyses the history of the doctrine of separation of powers in South Africa, the principle of Constitutionalism and the role of the judiciary. In order for a society to live in harmony, there ought to be a set of rules and regulations that are agreed upon and adhered to uniformly, hence the call for the independence of the judiciary as an organ of state by many societies.³⁶

³³ Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 16.

³⁴ Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 16.

³⁵ Badenhorst *De Rebus* 2015.

³⁶ Horn and Bösl *The Independence of The Judiciary in Namibia* 17.

2.2 Meaning of the doctrine of separation of powers

The doctrine of separation of powers refers to the division of the three main spheres of government: the judiciary, the legislature and the executive. In *Certification of the Constitution of the Republic of South Africa*³⁷ the court held that:

The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the Constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense, it anticipates the necessary or avoidable intrusion of one branch into the terrain of another.

It is pivotal that these three arms of government remain separate and independent with regard to their powers in order to preserve and protect human rights provided for in the Constitution.

It is pivotal that these three arms of government remain separate when exercising their duties and functions in order to maintain the principle of checks and balances and to prevent absolute concentration of power in one sphere of government.

2.2.1 Origin of the doctrine of separation of powers

The doctrine of separation of powers can be traced back to the Greek philosophers and the Magna Carta, Montesquieu and Madison.³⁸ One of the first written constitutions was that of the United States of America and a common source of governing power at that time was God.³⁹ The ruler claimed power by divine right. The principles underlying the United States Constitution are not new and were derived from the contributions of these philosophers.⁴⁰ In articulating that absolute power may endanger the rights of the governed, Plato's *Dialogues* provided that if a person is vested with absolute and irresponsible power, they would never remain firm in their values.⁴¹ Therefore,

³⁷ *Ir. REX: Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC) para 109.

³⁸ Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 16.

³⁹ Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 16.

⁴⁰ Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 16.

⁴¹ Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 16.

governing power must be separated and some facets should be left to the courts of law and others for the legislature to decide on its own.⁴²

The Great Charter of Liberties⁴³ was agreed to by King John of England in Runnymede.⁴⁴ The doctrine of separation of powers in the Magna Charta was simple yet significant.⁴⁵ It consists of 63 chapters written in the form of promises by King John. Chapters 12 to 14 provide for meetings of the common counsel and further provided that there should be no taxation without representation in the form of the legislative branch.⁴⁶ Chapters 39 and 40 made provisions for open courts and set the requirement that the processes of justice adapt to the law of the land.⁴⁷ The chapters on the courts and administrative justice have contributed significantly to the Anglo-American Concepts of Justice and further to the development of judicial independence in modern constitutional democracies.⁴⁸

In his contribution to judicial independence and the separation of powers, Walker also stated that "The King himself can neither make, repeal nor alter any one law."⁴⁹ He further stated that the King, jointly with the Lords and Commons, can neither judge on what the law is as this is the function of the judiciary.⁵⁰ As it was the objective of the doctrine of separation of powers to prevent absolute power which could lead to tyranny, anyone who usurps the governing power, the legislative power and the judicial power unto themselves, would thus be turning themselves into the highest tyrants.⁵¹ Those who are governed by them would lose their liberties and be turned into slaves.⁵² Those who govern supremely on the law which they have made and interpret to their advantage consume boundless power to the detriment of all others under their government.⁵³

42 Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 16.

43 The Great Charter of the Liberties (the Magna Carter).

44 Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 16.

45 Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 17.

46 Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 17.

47 Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 17.

48 Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 17.

49 Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 17.

50 Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 17.

51 Currie and de Waal *The New Constitutional and Administrative Law* 91.

52 Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 18.

53 Crump, Gressman and Reiss *Cases and Materials on Constitutional Law* 18.

The French philosopher Montesquieu, following the works of Aristotle and John Locke, provided for judicial independence in his work of the doctrine of separation of powers. Montesquieu had been established that absolute power corrupts completely and to prevent the abuse of power, this had to be divided for each branch to be held accountable. The reasoning behind his work was based on the preservation of the rights and liberties of humans and to prevent excessive concentration of power in one body. Montesquieu was of the view that absolute concentration of power in one organ of state would pose a threat to individual liberties.

He then concluded that on the role of the judiciary, there would be no liberty if the power of the judge was not separate from that of the legislature and the executive. Where judicial authority was to become part of the legislature, the life and liberty of citizens would be subject to arbitrary power as the judge would then be the legislator. Where the judicial authority formed part of the executive, the judge would then acquire enough power to become the oppressor.

The history of judicial independence can be traced back to England around the seventeenth century.⁵⁴ The decision of Sir Edward Coke⁵⁵ in the famous *Case of Commendams* illustrates the extent that individual judges may reach to protect the principle of judicial independence. During the proceedings of this case, the judges defied the King's request for a stay of proceedings in the matter and based their reason for such refusal on a letter which was written by the Chief Justice, Lord Coke.⁵⁶ The judges stated that they could not uphold the King's request as their oaths of office required them to continue with the trial without undue intervention and influence. Upon confrontation by the King and fearing for their lives, all judges followed the orders of the King irrespective of the sentiments they had previously expressed in the letter to the exclusion of Lord Coke.

Lord Coke asserted to the King that the reason for his decision was because the stay he had requested was a delay of justice and therefore inconsistent with the law and the judges' oath. Upon being asked by the King what they would do if he requested a stay in proceedings again, the judges responded that they would do as the King

⁵⁴ McClellan Liberty, Order and Justice 89.

⁵⁵ Hereinafter referred to as Lord Coke.

⁵⁶ *Commendams Case* 1616.

commanded. The same question was then posed to Lord Coke and he remained unshaken and responded that he would do what would be fit for a judge to do. This resulted in Lord Coke being dismissed from office by the King.

It could be said from the historical overview of the principle of judicial independence that it is a dispute resolution by a third party who does not form part of the dispute. An independent party is designated to settle disputes after considering the facts as well as their relation and relevance to the law.

Locke advocated for the separation of government into three functions: the legislative, executive and foreign relations in his *Second Treatise of Civil Government*.⁵⁷ The reason behind his establishment for the separation of powers was that it was too alluring to vest a great amount of power in one body or person where they may be able to create, execute and pass judgment on the law and thus absolving themselves from the same law both in its making and execution to their private advantage.⁵⁸

The separation of powers is often linked with the French philosopher Montesquieu. Montesquieu developed the separation of powers into three spheres of power which are still used today in South African law; he divided them into the legislative, executive and judicial functions.⁵⁹ The objective of the separation of powers was to prevent absolute power which was at the time possessed by the monarchs.⁶⁰ The reason for the separation of powers was to divide the functions of government by providing each body with specific functions and duties in order to limit absolute power.⁶¹ Montesquieu further to stated the following:

All would be in vain if the same person, or the same body of officials, be it in the nobility or the people, were to exercise these three powers: that of making laws, that of executing the public resolutions, and that of judging crimes or disputes of individuals.⁶²

The basis of the doctrine of separation of powers was to ensure a distinction of the three main spheres of government in functions and in person in order to preserve and

⁵⁷ Locke and Macpherson *The Second Treaties of Government* section 143.

⁵⁸ Locke and Macpherson *The Second Treaties of Government* section 143.

⁵⁹ Currie and de Waal *The New Constitutional and Administrative Law* 91.

⁶⁰ Currie and de Waal *The New Constitutional and Administrative Law* 91.

⁶¹ Currie and de Waal *The New Constitutional and Administrative Law* 91.

⁶² Mojapelo 2013 *Advocate* 38.

protect the liberties of persons and safeguard against cruel and oppressive government or rule.

2.2.2 Separation of powers and the judiciary

The doctrine of separation of powers and the principle of checks and balances are considered to be the defining characteristic features of democracy and both principles are closely linked to judicial independence.⁶³ The notion behind separation of powers as it was first established was to distinguish the three arms of government and that they refrain from interfering with the powers or duties of one another. The principle of checks and balances seeks to promote the doctrine of separation of powers through the balance of power between the three spheres of government.⁶⁴

By separating official power among the three spheres and providing a system on which each organ of state can check the power of the other, the tripartite system of government is aimed at preventing any sphere or person from gaining too much power and control over the government and people.⁶⁵ The judiciary lays the foundation of democracy and is the guardian of human rights entrenched in the Bill of Rights.

The principle of checks and balances provides the judiciary with the tools to ensure balance of power among the three spheres of government. This principle requires the judiciary to be completely separate and independent from the executive and legislature. The judiciary has the duty to inquire into the actions of the executive when exercising its functions and powers vested in it by the Constitution. It does so by applying national constitution, legislation and common law.

2.3 The history of constitutionalism and the judiciary in South Africa

The doctrine of separation of powers is the foundation of every government or state. Throughout history it could be said that where there is governance of people or a state, the principles of the doctrine of separation of powers are present. The doctrine of constitutionalism requires the supremacy of the Constitution and that every action of an

⁶³ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

⁶⁴ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

⁶⁵ The primary principle of a tripartite government is separation of powers which ensures the division of state power and organisation in government.

organ of state should be subject to its law. The doctrine of constitutionalism did not form part of the system of government and the law in South Africa until 1994.

A system of legislative sovereignty prevents judicial review of legislation and limits the powers of the judiciary.⁶⁶ The doctrine of constitutionalism refers to the limitation of state power. It is closely linked to the doctrine of separation of powers and checks and balances. Constitutionalism warrants constitutional supremacy and protection of human rights through the separation of powers strictly by ensuring that none of the three spheres of government encroaches nor usurps the powers of the other through limitation by the rule of law.

2.3.1 *The Union of South Africa*

The Union of South Africa was established through the adoption of a Constitution referred to as the *South Africa Act* in 1909.⁶⁷ This was an Act of the British Parliament which established the Union of South Africa. The Union of South Africa consisted of four British colonies: the Cape of Good Hope, Natal, Orange River Colony and the Transvaal.⁶⁸ The Union of South Africa's Constitution had a Westminster design and legislative authority was given to parliament.⁶⁹ The Union of South Africa had a Westminster system of government in which the legislature was supreme and more powerful than the other two arms of government. The Union's parliament consisted of two houses, a directly elected House of Assembly and a Senate.

The doctrine of separation of powers forms part of the system of government in terms of the *South Africa Act 1909*. The three spheres of government had various duties and powers with Parliament at the apex of the government system. With parliament as the supreme law making body, the executive was subordinate to the legislature while the judiciary had an independent position.⁷⁰ Since 1910, the judiciary of South Africa never truly enjoyed its independence from the executive and the legislature.

Within the Union of South Africa, the executive had the duty to appoint judges. The *South Africa Act 1909* made no provisions for an independent body to administrate the

⁶⁶ *Reference Re Remuneration of Judges* [1998] 1 SCR 3 para 309.

⁶⁷ *South Africa Act of 1909*.

⁶⁸ *South Africa Act of 1909*.

⁶⁹ Currie and de Waal *The New Constitutional and Administrative Law* 43.

⁷⁰ Langa 2006 *SAJHR* 2.

process of those appointments. The Union of South Africa's system of government was similar to that of the United Kingdom which it had inherited from most of its governmental institutions.⁷¹

The Union of South Africa was under the doctrine of parliamentary sovereignty: parliament was the supreme law making body and when a law was passed, no one could question it.⁷² This meant that the judiciary was not in a position to review the legality or constitutionality of an Act of Parliament. The judiciary had no power to review legislation and its function of legal interpretation was limited by the executive to the extent that it was restricted to interpreting legislation in its literal term and to the advantage of the legislature.⁷³

The manner in which the judiciary interpreted legislation during this period was referred to as a "plain fact" approach, meaning that:

Judges hold that the judicial duty when interpreting a statute is always to look to those parts of the public record that make clear what the legislators as a matter of fact intended. In this way, the judges merely determine the law as it is, without permitting their substantive convictions about justice to interfere.⁷⁴

A decision which was made by the court where it displayed the nature of the supremacy of Parliament in *Ndlwana v Hofmeyr*⁷⁵ where the applicant was an African who at the commencement of the *Representation of Natives Act*⁷⁶ was a registered voter and contended that the Act was invalid as it did not comply with provisions of section 35 of the Union Constitution. The court held that:

Parliament composed of its three constituent elements, can adopt any procedure it thinks fit, the procedure express or implied in the South Africa Act is to do as far as the courts of law are concerned, at the mercy of parliament like everything else.⁷⁷

This doctrine was brought about by the British colonisers and dominated English constitutional law for some time. When the Cape and Natal were granted self-government, the doctrine of parliamentary sovereignty became the foundation of the

⁷¹ Langa 2006 SAJHR 2.

⁷² The doctrine of parliamentary sovereignty was made evident in *Harris v Minister of Interior* 1952 2 SA 428 (A).

⁷³ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

⁷⁴ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

⁷⁵ *Ndlwana v Hofmeyr* 1937 AD 229 para 232.

⁷⁶ *Natives Act* of 1936.

⁷⁷ *Ndlwana v Hofmeyr* 1937 AD 229 para 232.

system of their government.⁷⁸ The South African law making powers were limited to the British rule and Parliament. This meant that the South African Parliament was not allowed to make laws which were contrary to the laws of the British parliament which applied to them as well.⁷⁹

2.3.2 *The constitutional crisis*

The National Party government emancipated itself from Britain through the establishment of the Republic of South Africa in 1961.⁸⁰ The aim of declaring South Africa a Republic was to eradicate the dominance and rule of the British Parliament and its restrictions in South African government. It was also to hasten the prosperity and success of the apartheid government. During this period, the legislature passed laws which ensured the strength of Parliament as the supreme arm of government while the executive and judiciary remained subordinate to it.

The Union of South Africa was not a sovereign state and was unable to make any law without the approval of the British monarchy. All parliamentary Bills had to be sent to the representative of the British monarch, also referred to as the Governor-General, for approval before they could come into effect as law.⁸¹ The British Parliament ensured its power over the Union of South Africa by entrenching certain provisions in the *South Africa Act*; section 35 and 152 provided that the two Houses of parliament could not amend the constitution without the required two thirds majority.⁸²

In an endeavour to entrench apartheid laws and its system of government, a Bill which was intended to disenfranchise coloured people from the common voters roll was introduced. The National Party government introduced the Separate Representation of Voters Bill in parliament and its objective was to remove coloured people from the common voters roll which was then adopted as law.⁸³ The Bill was adopted into law by a majority of the two Houses of Parliament sitting separately. In the adoption of this Bill into law, Parliament failed to consider the fact that this process required certain

⁷⁸ Currie and de Waal *The New Constitutional and Administrative Law* 10.

⁷⁹ Currie and de Waal *The New Constitutional and Administrative Law* 45.

⁸⁰ The Republic of South Africa was founded in terms of the Constitution of the Republic of *South Africa Act* 32 of 1961.

⁸¹ Currie and de Waal *The New Constitutional and Administrative Law* 43.

⁸² Section 35 of the *South Africa Act* of 1909.

⁸³ Separate Representation of Voters Act 46 of 1951.

procedures to be followed in terms of the 1909 Constitution.⁸⁴ By removing these other races from the common voters roll, Parliament would continue to thrive on its absolute power.

Throughout this period, the judiciary was silent on the passing of questionable legislation in Parliament. The only power it appeared to have was that of judicial review based on the procedures of the passing of legislation. In *Harris v Minister of Interior*⁸⁵ the validity of the *Separate Representation of Voters Act*⁸⁶ was questioned when a legal issue was raised as to whether parliament had the authority to amend section 35, an entrenched clause of the Constitution of 1909.

The judiciary was not independent from the executive and the legislature. However, the apartheid government insisted that the judiciary was an independent organ of state in order to legitimise the apartheid legal order.⁸⁷ It is nearly a universal acceptance that judicial independence is the hallmark of democracy and such recognition resulted in the apartheid government benefiting by asserting that South Africa had an independent judiciary even though this was not so.⁸⁸

Section 35 of 1909 Constitution provided that no law could disenfranchise voters in the Cape Province on the basis of race unless that law was passed by the majority of both members of the houses of parliament.⁸⁹ The Appellate Division held further that the court had the power to declare any law which was not adopted in accordance with the

⁸⁴ Section 35(1) of the *South Africa Act* 1909. Parliament may by law prescribe the qualifications which must be satisfied to entitle persons to vote at the election of members of the House of Assembly. However no such law must disqualify any person in the province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only. Unless the Bill has been passed by both Houses of Parliament sitting together, and at the third reading it should be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill which has been passed at such joint sitting will be taken to have been duly passed by both Houses of Parliament.

⁸⁵ *Harris v Minister of Interior* 1952 2 SA 428 (A).

⁸⁶ *Separate Representation of Voters Act* 46 of 1951.

⁸⁷ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

⁸⁸ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

⁸⁹ The *South Africa Act* of 1909. The Amendment of several sections of the *South Africa Act* 1909 required a special procedure. This applied to the entrenched sections provided for within the Act. Section 152 of the 1909 Union Constitution provided that 'Parliament may by law repeal or amend any of the provisions of this Act'. However, the repeal or amendment of the provisions of section 35, 137 and the entrenching section, 152 itself, would only be valid if the Bill was passed by both Houses of Parliament sitting together and agreed to by not less than two thirds of the total number of members of both Houses. Section 35 protected the non-white franchise in the Cape Province and section 137 protected the equality of the two official languages, Dutch and English.

provisions of the 1909 Constitution invalid.⁹⁰ The court held further that Parliament could not rename itself as the court in order to make a decision which it was not empowered to make as parliament.⁹¹

What followed as a result of the decision in *Harris* was that Parliament promulgated the High Court of Parliament Act.⁹² The Act was simply passed by both Houses of Parliament sitting separately. With promulgation of this Act, the High Court of Parliament was established. The High Court of Parliament Act conferred this body with the retrospective and prospective authority to review and set aside any judgment of the Appellate Division where the court had declared an Act of Parliament invalid.⁹³ The decision in *Harris* provided clarity on the constitutional role of the legislature and the judiciary. It was made clear that even in a constitutional system without a meaningful judiciary, laws which had not been passed according to the correct parliamentary procedures could be set aside.⁹⁴ A distinction between the constitutional role of the legislature and the judiciary was established.

Parliamentary supremacy was at its peak during the era of the Union Constitution; however it was made clear from the *Harris* case that although it had the power to make law with no restrictions, this did not mean that the Union Constitution could not impose procedural restrictions on its law making powers.⁹⁵ In its attempt to validate the *Separate Representation of Voters Act* parliament increased the number of Senate members in order to obtain the required two thirds majority by the Constitution of 1909.⁹⁶

Although the judiciary had limited power, it appeared to be active in questioning the procedures of the enactment of statutes. As a result of the actions and decisions taken by the courts to decide on matters which were brought forward on legislation, Parliament sought to ensure the protection of its power and supremacy by taking drastic measures and expanding the senate in order to obtain a two thirds majority. Section 59 of the Republic Constitution provided that:

⁹⁰ *Harris v Minister of Interior* 1952 2 SA 428 (A).

⁹¹ *Harris v Minister of Interior* 1952 2 SA 428 (A).

⁹² High Court of Parliament Act 35 of 1952.

⁹³ Langa 2006 SAJHR 3.

⁹⁴ Langa 2006 SAJHR 3.

⁹⁵ Currie and de Waal *The New Constitutional and Administrative Law* 47.

⁹⁶ *Harris v Minister of Interior* 1952 2 SA 428 (A).



Parliament shall be the sovereign legislative authority in and over the Republic and shall have full power to make laws for the peace, order and good government of the Republic.⁹⁷

In *Collins v Minister of Interior*⁹⁸ the validity of the *Senate Act*⁹⁹ and the 1956 South Africa Amendment Act was challenged. It was argued that the Senate Act provided for the restructuring of the Senate and the Amendment Act was established in order to amend section 35 and 152 of the 1909 Constitution where these two measures were created as a legislative scheme. Both Acts were declared valid by a margin of ten to one of the eleven judges that heard the case.

The reason behind the decision of the court was that the motive behind the creation of the Act by the legislature was not one which the court could enquire about. It held further that both Acts were enacted according to the required procedure by the Constitution.¹⁰⁰ One out of the eleven judges in *Collins v Minister of Interior* held that the Senate which was established by the *Senate Act* was not a House of Parliament as it was contemplated in section 152 of the 1909 Constitution.¹⁰¹

The power of Parliament was unconstrained to the extent that judges were unable to carry out their official orders due to the restrictions which were imposed on it by the legislature. The extent of the power which parliament had over the judiciary was so great that the courts served in favour of parliament. The display of such power was illustrated in *Sachs v Minister of Justice*¹⁰² where the court held that:

Parliament, through legislation may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of the courts to enforce its will.

2.3.3 *The tricameral constitution and a divided state*

The 1983 Constitution of South Africa deviated from the British constitutional model which was Westminster in orientation and was purely based on parliamentary sovereignty. The establishment of the 1983 Constitution was a strategy by the white government to secure its power. By introducing a new tricameral constitution,

⁹⁷ Republic of South Africa Constitution Act 32 of 1961.

⁹⁸ *Collins v Minister of Interior* 1957 1 SA 552 (A) para 37.

⁹⁹ *Senate Act* 53 of 1955.

¹⁰⁰ *Collins v Minister of Interior* 1957 1 SA 552 (A) para 37.

¹⁰¹ South Africa Act of 1909.

¹⁰² *Sachs v Minister of Justice* 1934 AD 11 para 37.

parliament had three separate houses and each represented one of the three races, namely, the whites, coloureds and Indians.¹⁰³

Changes in the system of government began to occur when the 1983 Constitution came into force. The executive and the legislature were no longer closely linked and the President ceased to be a Member of Parliament once elected as the head of the executive. Although changes had come with the new Constitution in 1983, the interdependence between the legislature and the executive continued.

The representation of the three races in Parliament was predominantly in favour of the whites. Whites had 88 members, 25 were coloured and 13 were Indian members. The election of state President was based on majority vote. This invariably enabled the white racial group to decide on the election of the President to the exclusion of the other two races as it had the majority number of members and thus held sway through the majority vote. The Africans were not represented in Parliament and were not allowed to partake in the election of the President.

The African people were completely excluded from parliament and were not represented. This was an enforcement of the apartheid dogma and it was stated categorically that African political rights were to be exercised in the Bantustans and not in parliament. The first elections for state president in terms of the new 1983 Constitution resulted in a rebellion from the other two races which were represented in parliament.¹⁰⁴ The United Nations had also expressly rejected this Constitution and deemed it null and void.¹⁰⁵

2.3.4 The interim Constitution and the birth of constitutional democracy

Despite parliamentary supremacy, the idea of the limitation of state power through fundamental rights and the constitution was kept alive by advocates for human rights.¹⁰⁶ The African National Congress's African Claims in South Africa was a Bill of Rights which made the revolutionary claim of 'one man one vote, of equal justice in the courts,

¹⁰³ Currie and de Waal *The New Constitutional and Administrative Law* 50.

¹⁰⁴ Ellmann *In a Time of Trouble* 20.

¹⁰⁵ Klug 1996 www.chr.up.ac.za.

¹⁰⁶ Currie and de Waal *The New Constitutional and Administrative Law* 57.

freedom of land ownership and demand of equal opportunity in training and in work.¹⁰⁷ This Freedom Charter promoted fundamental rights.¹⁰⁸

The provisions for the separation of powers were first expressly provided for in the interim Constitution in schedule 4. It was provided that there shall be a separation of powers with appropriate checks and balances to ensure openness, responsiveness and accountability. The doctrine of separation of powers provided the courts with the power to exercise their functions independently from the other arms of government.

Prior to the interim Constitution, it has been established that there was no Bill of Rights which could be used by the judiciary to check the actions and exercise of power by the other organs of state. The interim Constitution brought about many changes to this and made provisions for a Bill of Rights which the judiciary could make use of.

After months of negotiations at the World Trade Centre and by vote of 237 to 45 by members of the tricameral parliament, the interim constitution was adopted.¹⁰⁹ The adoption of the interim constitution led to the abolishment of the tricameral constitution and the apartheid order that it had upheld. The adoption of the interim Constitution resulted in the ascension of constitutionalism and constitutional supremacy in South Africa. Section 1 of the interim Constitution made provisions for the unity of South Africa.¹¹⁰

Constitutional supremacy was entrenched in the Constitution in terms of section 6 which provided that the Constitution was the supreme law of the Republic and further declared that any law which was inconsistent with the Constitution had no force or effect.¹¹¹ The supremacy of the Constitution was further ensured in terms of section 4 of the Constitution and this resulted in the fall of parliamentary supremacy.¹¹²

¹⁰⁷ Currie and de Waal *Sachs v Minister of Justice* 57.

¹⁰⁸ Suttner and Cronin *Thirty Years of the Freedom Charter* 4.

¹⁰⁹ Currie and de Waal *The New Constitutional and Administrative Law* 64.

¹¹⁰ Section 1 of the Constitution of the Republic of South Africa Act 200 of 1993.

¹¹¹ Section 6 of the interim Constitution.

¹¹² Section 4 of the interim Constitution.

2.3.5 Constitutional supremacy and judicial independence

The adoption of the final Constitution was in 1996. This Constitution came into effect once it was signed by the president of the Republic, Nelson Mandela, on the 10th of December 1996. The basic features of the new constitutional order were constitutional supremacy, separation of powers, co-operative government and division of power.¹¹³ All these features of the Constitution are justifiable as any law or conduct inconsistent with them are unconstitutional. Constitutional supremacy is thus expressly provided for in the Constitution.¹¹⁴

Although the Constitution does not make provisions for the doctrine of separation of powers, it has been stated in court decisions that it forms part of its constitutional design. In *Re: Certification of the Constitution of the Republic of South Africa*¹¹⁵ the court held that:

There is [however] no universal model of separation of powers and, in [a] democratic system of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation of powers that is absolute.

As the supreme law of the Republic, the Constitution made provisions for judicial authority and the judiciary is only subject and accountable to it. The judiciary is designated as the guardian of the Bill of Rights and the Constitution and must ensure balance of power through checks and balances. The doctrine of separation of powers prevents the excessive concentration of power in a single body and thus neither one of the three arms of government must be vested with too much power over the other spheres.

2.4 Judicial independence

An independent judiciary is a paramount element of democracy. Various international treaties including the *International Covenant on Civil and Political Rights* contain provisions asserting this principle.¹¹⁶ Article 14 of the *ICCPR* states that:

¹¹³ Currie and de Waal *The New Constitutional and Administrative Law* 73.

¹¹⁴ Section 2 of the Constitution.

¹¹⁵ In *Re: Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC) para 109.

¹¹⁶ International Covenant on Civil and Political Rights (1976), herein after referred to as ICCPR.

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.¹¹⁷

Article 26 of the *African Charter on Human and Peoples Rights* provides that:

State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.¹¹⁸

There are various reasons for the protection and application of judicial independence. One of those reasons is to guard against the excessive abuse of power by the executive.¹¹⁹ The President, as head of the executive sphere of government, is vested with many functions and duties. It is important that he or she carries them out within the provisions of the Constitution and the judiciary has the duty to guard against the abuse of such powers.

Judicial independence is based on two characteristics, namely, individual and institutional independence. Individual independence includes various factors which ensure that judges are able to act and make decisions within their judicial capacity to the exclusion of external factors.¹²⁰ Judges must be able to act freely without outside influences. To preserve this independence, the Constitution makes provisions for the security of their tenure, terms of office and the procedure for removal of judges.

One of the important factors of individual independence is the protection of financial security. Preventing other spheres of government from threatening judges with reduction of their salary for them to make decisions which are biased is pivotal. Judges must have adequate salaries and access to resources to exercise their functions effectively without any undue influence which may hamper judicial independence. For judges to act freely, independently and impartially, they must be protected from the fear of reprisals because of decisions made in their judicial capacity.¹²¹ They must be immune from civil suits or actions against them because of decisions made in their official capacity.

¹¹⁷ A 14 of the ICCPR (1976).

¹¹⁸ A 26 African Charter on Human and Peoples Rights (1981).

¹¹⁹ Cameron 2010 *Advocate* 24.

¹²⁰ Cameron 2010 *Advocate* 24.

¹²¹ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

The impartiality of judges is just as important as their ability to make independent decisions and this factor forms part of judicial independence. The independence of judges is objective and is based on how the judges must make their decisions effectively, impartiality is more subjective and is focused on the state of mind of the judges.¹²² Impartiality refers to the ability of judges to set aside their personal circumstances and bias and decide on cases objectively.¹²³

Prior to 1994, the independence of the judiciary in South Africa was overshadowed by parliament. The interim Constitution brought about many changes to the system of government and ensured the doctrine of separation of powers and checks and balances. During the apartheid era, the judiciary had no independence from the executive and the legislature and government consistently disregarded the little power judges were able to exercise.

The functions of the courts were limited and they were only allowed to review legislation based on procedure. Where legislation was enacted, the judges were only allowed to question the process which was followed in the adoption of such statute and not on whether it was constitutional or not. There was no Bill of Rights which the courts could use to check those laws and the executive used the legislature to empower itself through the enactment of statutes that were in its favour.

2.4.1 Judicial independence and public confidence

The history of the South African government did not provide the judiciary with enough power to exercise its functions and duties. After the adoption of the Constitution the judiciary had more power and independence from the other two arms of government and was able to carry out its functions. The judiciary has made certain decisions since then to affirm its independence and to re-assure the confidence of the public in the justice system. The courts have played an important role in providing clarity on the existence of the doctrine of separation of powers in the final Constitution. In *South African Association of Personal Injury Lawyers v Heath*¹²⁴ the court held that:

¹²² Cameron 2010 *Advocate* 24.

¹²³ Cameron 2010 *Advocate* 24.

¹²⁴ *South African Association of Personal Injury Lawyers v Heath* 2000 1 BCLR 77 (CC) para 22.

There can be no doubt that our Constitution provides for such a separation of powers, and that laws inconsistent with what the Constitution requires in that regard are invalid.

The Constitution ensured the protection of the independence of the judiciary and the doctrine of separation of powers by differentiating the three spheres of government and vesting them with different powers and functions. In *Bernstein v Bester*¹²⁵ the court held that:

Legislation that sought to bring the judiciary under the control of parliament or the executive could be struck down under the doctrine of separation of powers, even if there was no express conflict between such legislation and the Constitution.

Parliamentary supremacy deteriorated and the executive and judiciary were no longer subordinate to the legislature as the supreme law-making body. The three arms of government were provided with specific powers, duties and functions and Parliament was no longer supreme. Although Parliament has the legislative authority to make law, it must not encroach on the duties and functions of the other spheres of government by executing or interpreting it.

In *S v Dodo*¹²⁶ the court made it clear that the power of interpretation was the function of the courts and held that while the legislature may determine a minimum sentence for a particular crime, it may not determine the sentence which should be imposed in a particular case. The reason behind this was because the duty to impose sentence was that of the judiciary and not an executive function.

2.4.2 *The role of the judiciary on the principle of checks and balances*

The main objective of checks and balances is to ensure that the three arms of government control each other internally through checks and serve as counter weights to the power possessed by other spheres of government through balances.¹²⁷ The purpose of the principle of checks and balances is to make all three arms of government accountable to each other.¹²⁸

¹²⁵ *Bernstein v Bester* 1996 4 BCLR 449 (CC) para 105.

¹²⁶ *S v Dodo* 2001 5 BCLR 423 (CC) para 11.

¹²⁷ Mojapelo 2013 *Advocate* 40.

¹²⁸ Mojapelo 2013 *Advocate* 40.

In terms of the doctrine of separation of powers, the executive cannot resolve legal disputes between individuals and the judiciary must not execute laws or their own court orders. Judicial independence is the foundation of the separation of powers and requires absence of interference at institutional and individual level in the decision-making of a judge.

The functions of the judiciary are clearly provided for in the Constitution and in terms of the doctrine of separation of powers. In *De Lange v Smuts*¹²⁹ the court held that:

.It suffices to say that whatever the outer boundaries of separation of powers are eventually determined to be, the power in question here, that is the power to commit an uncooperative witness to prison, is within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers.

Section 165 of the Constitution vests the courts with judicial authority. To provide access to justice, some judicial functions are entrusted to tribunals such as the Commission for Conciliation, Mediation and Arbitration established in terms of the Labour Relations Act 66 of 1995. These tribunals fall under the executive even though efforts are being made to make them independent.¹³⁰ It is important to note that although these tribunals are within the executive, this does not mean that the executive can perform the functions of the judiciary by adjudicating over matters brought before them.

2.5 Conclusion

The history of South Africa clearly illustrates that the judiciary was not independent from the legislature and the executive prior to 1994. Throughout the apartheid government and legal system of the Republic, the judiciary had limited power and was unable to take action until the interim Constitution provided for the doctrine of separation of powers. During the period of Parliamentary sovereignty in South Africa, parliament was the supreme law-making body of the state and both the executive and the judiciary were subordinate to it.

As a result of this excessive concentration of power in one body and the political connection between the legislature and the executive, the courts did not have much

¹²⁹ *De Lange v Smuts* 1998 7 BCLR 779 (CC) para 60.

¹³⁰ Mojapelo 2013 *Advocate* 41.

power and thus were unable to exercise their functions effectively. The courts were unable to limit the actions of the legislature and the executive and hold them accountable as the Constitution at that time had no Bill of Rights which could be used to balance their exercise of power.

Throughout the period of parliamentary sovereignty in South Africa, the constitutions which were introduced from 1909 to 1983 all had the same characteristics. None of those constitutions had a Bill of Rights which the judiciary could utilise to test the extent of their abuse of power in government. The courts were only tasked with the duty of giving effect to the intention of the legislature, irrespective of how unreasonable or unconstitutional the law made by Parliament was.

The principle of constitutionalism, the doctrine of separation of powers and judicial independence play an important role in a democratic state. The limitation of state power, prevention of over-concentration of power and the protection of human rights ensures equality, order and accountability within a state. The Constitution provides each organ of state with authority and power and they must act within those provisions. Should either of these organs of state act outside the powers with which it was vested, it shall be held accountable by the relevant sphere of government through the principle of checks and balances.

Chapter 3 The Independence of the Judiciary in South Africa

3.1 Introduction

The independence of the judiciary is linked to the development of the rule of law.¹³¹ As one of the cornerstones of liberty and democracy, it is important that judicial independence be interpreted as directly as possible by the courts.¹³² It is the foundation of the rule of law and a mandatory cornerstone of justice and democratic state.¹³³ The precise limitations of the three arms of government is not a new debate. The adoption of the Basic Principles of the Independence of the Judiciary by the United Nations General Assembly resulted in an important breakthrough for judicial independence at an international level.¹³⁴

The principles enshrined in the *Universal Declaration of Human Rights* were dependant on the concept of the right to a fair and public hearing and impartial tribunal established by law.¹³⁵ The United Nations General Assembly further established that judges are charged with the ultimate decision over the life, liberties, rights and property of citizens. Due to these important duties which the judiciary must adhere to, the General Assembly decided that all states must guarantee the independence of the judiciary.¹³⁶

This chapter of the study provides a discussion on judicial independence in South Africa referring to various factors which contribute to this independence. Factors such as the appointment of judges, the role of the executive sphere of government and politics on the judiciary are effectively teased out. This chapter further discusses whether or not there are any attacks or threats to the independence and impartiality of the judiciary in South Africa.

3.2 The public's confidence in the independence of the judiciary

Public perception of judicial independence is of utmost importance in a democratic state. Citizens of the state must have faith in the justice system and believe that it is an

¹³¹ Mzikamanda 2007 http://www.saifac.org.za/docs/2007/mzikamanda_paper.

¹³² Greene 1988 *Osgoode Hall Law Journal* 178.

¹³³ Horn and Bösl The Independence of The Judiciary in Namibia 12.

¹³⁴ Chidyausiku "Modern Challenges to the Independence of the Judiciary" 3.

¹³⁵ Chidyausiku "Modern Challenges to the Independence of the Judiciary" 3.

¹³⁶ Chidyausiku "Modern Challenges to the Independence of the Judiciary" 3.

independent organ which is not subject to the whims and influences of the other arms of government or any external factors. The preamble of the *Bangalore Principles* provides the following:

Public confidence in the judicial system and [the] moral authority and integrity of the judiciary is of utmost importance in a modern democratic state.¹³⁷

The public's perception of an independent judiciary plays a fundamental role in the creation of an effective system of justice.¹³⁸ To maintain the public's confidence in the judiciary, independence is a significant factor without which the courts' legitimacy rapidly erodes and along with it human rights and the rule of law follow.¹³⁹

Those who are governed in a democracy have the right to criticise the judiciary which must be transparent, independent, impartial and free from bias. Judicial officers have the final say on the resolution and decision making of disputes and their appointments must be done with the utmost care and consideration.

As islands of justice, the courts are conferred with the duty to protect the citizens of its state from any illegal conduct or that which is inconsistent with the Constitution employed by the executive and the legislature. If people do not believe that the courts are independent they will not trust the decisions made by them in terms of the validity of government actions and thus lose faith in the justice system.¹⁴⁰ Lack of confidence in an independent judiciary by the public results in the legitimacy of government being called into question. If people doubt the independence of the judiciary they will not respect its decisions and stop turning to it for dispute resolution which may result in the public enforcing law on their own.¹⁴¹

3.3 Judicial independence in South Africa

The South African judiciary has transformed greatly since the apartheid period. Prior to 1994 the procedure which regulated the appointment of judges was in terms of section 10 of the Supreme Court Act¹⁴² which provided the state President with the duty to

¹³⁷ See the preamble of the *Bangalore Principles*.

¹³⁸ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

¹³⁹ Budlender 2005 SALJ 717.

¹⁴⁰ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

¹⁴¹ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

¹⁴² *Supreme Court Act* 59 of 1959.

appoint judges. The appointment of judges and the system of parliamentary supremacy during apartheid affected the independence of the judiciary as courts had to interpret the law in favour of the legislature.¹⁴³ The process of appointing judges to the bench was private and made no room for transparency and accountability.¹⁴⁴ The procedure did not allow the public to participate in it and could only observe. This contributed to the appointment of a judiciary made up of all male, all white and middle class Afrikaans speaking members under the apartheid dispensation.¹⁴⁵

Section 165(1) of the Constitution contains a simple declaration that the judicial authority of the republic is vested in the courts. Judicial authority must be distinct from legislative and executive authority. The primary duty of the courts is to protect the rule of law and the supremacy of the Constitution. The Constitution is the supreme law and provides for judicial review. In South Africa, the judiciary is vested with immense powers as they are infallible and their decisions are final. The courts are powerful to the extent that they are vested with the power to review and declare legislation, administrative and executive conduct unconstitutional.¹⁴⁶

3.4 The appointment of judges in South Africa

It has been asserted that judges are third parties who are appointed to settle disputes which they are not part of and thus are in positions to make independent decisions based on the facts and the law. It is therefore of the essence that judges remain independent throughout and their decisions are not influenced by outside factors.

The basic principles on judicial independence adopted by the General Assembly of the United Nations in 1985 provide guidelines for the appointment, removal, tenure, conduct and discipline of judges. These guidelines were designed to protect judges and ensure that they are not subject to executive control or influence. They were also established to ensure that judges are only subject to the law and the commands of their own consciousness and nothing else when implementing the law.¹⁴⁷

¹⁴³ *Sachs v Minister of Justice* 1934 AD 11 para 22.

¹⁴⁴ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

¹⁴⁵ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

¹⁴⁶ Mnyongani 2011 *Speculum Juris* 2.

¹⁴⁷ Robertson 2014 *International Bar Association's Human Rights Institute* 3.

Prior to 1994, the Supreme Court Judges were appointed by the State President based on the advice of the cabinet.¹⁴⁸ From the South Africa Act, it has been established that the executive arm of government was responsible for the appointment of judges. However, it has been said that the Minister of Justice was responsible for the selection and appointment of judges.¹⁴⁹

The process of appointment of judges must be based on clear criteria and the process must be transparent.¹⁵⁰ The process of appointments must safeguard and prevent judicial appointments for improper motives.¹⁵¹ Persons appointed as judges must be those who exhibit attributes of integrity, ability and must have appropriate training and qualifications in the law.¹⁵² Investigations into the candidates must be done prior to the final decisions of their appointment.¹⁵³

To protect the independence of judges, the system of promotion should be based on specific abilities, integrity and experience.¹⁵⁴ If judges are of the view that the content rather than the quality of their decisions might have an effect on the likelihood of their promotion, they may make decisions which government would not look at unfavourably as opposed to making decisions based on the facts and the law.¹⁵⁵

3.5 Independence and impartiality of judges

The concepts of independence and impartiality are closely linked yet they are separate and distinct from each other and it is important to define each one separately from the other. Impartiality refers to a state of mind of a tribunal in relation to the issues and the parties in a specific case. It also refers to the attitude which the tribunal has towards a case.

The concept of impartiality conveys the idea that there will be no actual or perceived bias in the decision made by a judge. Independence embodies more than the state of

¹⁴⁸ The *Supreme Court Act* 59 of 1959. Section 10(1) (a) provides that the State President has the duty to appoint 'fit and proper persons' to the bench.

¹⁴⁹ Mokgoro 2010 *Advocate* 44.

¹⁵⁰ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

¹⁵¹ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

¹⁵² Section 10 of the UN Basic Principles.

¹⁵³ Iyer 2010 *Mainstream Weekly* 2.

¹⁵⁴ Section 13 of the UN Basic Principles.

¹⁵⁵ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

mind or attitude of the person in their exercise of their judicial powers and functions but also the constitutional value of independence. It also includes the relationship to others, specifically the executive arm of government.

3.5.1 Institutional independence

Institutional independence entails a composition of structures which have been put in place to guarantee the protection of judicial officers and the courts from interference by external factors including the other two arms of government. Sections 3 and 4 of the Basic Principles on The Independence of the Judiciary 1985 make provisions for the independence of the judiciary and provide that institutional independence requires that the judiciary has sole jurisdiction over all issues which are of a judicial nature. It states further in section 1 as follows:

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

Chapter 8 of the Constitution makes provisions for the courts and administration of justice in South Africa. Institutional independence plays a significant role in the independence of the judiciary and the Constitution has made various provisions to ensure its protection. Section 165 of the Constitution protects the independence of the judiciary and makes provisions for judicial authority. It provides that the courts are independent and only subject to the Constitution. It further provides that no person or organ of state may interfere with the functioning of the courts.

Sections 176 and 177 of the Constitution provide for the remuneration and removal of judges from office.¹⁵⁶ These provisions provide certainty with regard to the security of tenure and remuneration of judges and protects them against unfair removal from office due to external factors. The Constitution makes provisions for the protection of judges in terms of Chapter 8.

¹⁵⁶ Section 176 of the Constitution provides for the terms of office and that the salaries of judges may not be reduced. Section 177 provides for the grounds upon which judges may be removed from office prior to the termination of their tenure.

3.5.2 Individual independence

Individual independence includes various factors which assist in ensuring that judges are able to act free from the influence of any external factors.¹⁵⁷ In order to ensure and protect the individual independence of judges, certain Constitutional provisions have been made. They include security of tenure, period of appointment, remuneration and a set term of office and retirement age.¹⁵⁸ Sections 11 and 12 of the UN Basic Principles also provide that judges must be given assurance in the form of security of tenure either in lifelong appointment or a mandatory retirement age.

There are various factors which influence the mind of a judge as an individual and these play a role in the independence of a judge. Openness, transparency and integrity are the core elements of the trust that should bind the state and its citizens. The judiciary is an institution which must strive to uphold these core elements and must not be false in any way.¹⁵⁹ Sachs states that:

By the time one is appointed to sit in a Court like ours, one's intuitions are not based on blind, untutored and highly subjective predilections. Nor can they be seen simply as the residue of books read, or, in my case, of years of political activism, or life in prison or in exile or as a victim of a bomb attack. These life experiences have certainly played a profound role in shaping my world view. But as far as my legal thinking is concerned they have been filtered and transmuted into an evolving lexicon of legal principles.¹⁶⁰

A proper procedure for the removal of judges must be put in place in order to prevent the executive and the legislature from removing judges in retaliation for unfavourable decisions. It should also prevent threats of impeachment to put judges under pressure to make favourable decisions. Judges should only be removed from office due to reasons of incapacity and behaviour that disables them from fulfilling their official duties.¹⁶¹ In order to protect judges and their independence, it is important that they are excluded or immune from civil suits made against them arising from their conduct when exercising their duties in their official capacity.¹⁶²

¹⁵⁷ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

¹⁵⁸ Section 176 and 177 of the Constitution provides for the terms of office and removal of judges.

¹⁵⁹ Sachs *The Strange Alchemy of Life and Law* 49.

¹⁶⁰ Sachs *The Strange Alchemy of Life and Law* 49.

¹⁶¹ Gordon and Bruce 2007 www.csvr.org.za/docs/transition/3.pdf.

¹⁶² Section 16 of the UN Basic Principles.

Another important factor to consider in securing individual independence of judges is security of remuneration. The other arms of government must not threaten judges with reduction of their remuneration in order to exert pressure on them. Financial security includes adequate remuneration and protection against arbitrary suspension of judges' salaries.

3.5.3 The role of the Judicial Services Commission

Section 178 of the Constitution makes provisions for the powers, duties and functions of the JSC in South Africa. The JSC is an independent body and is entrusted with the duty of identifying potential judges. However it is composed of a number of powerful politicians. The composition of the JSC raises concerns with regard to the independence and impartiality of judges that it appoints. A question may then be raised whether or not it would not be unlikely for a judge to make a political calculation to improve their chances of recommendation to the bench by impressing the dominant political party given that nominations are done through voting.¹⁶³ After the conduct of the public interviews of all the short listed candidates, the JSC decides in private on the ultimate recommendation. The successful candidates are selected through consensus or if necessary by means of a majority vote.¹⁶⁴ A selection done through a majority vote is one made through the support of the ordinary majority of all the members of the Judicial Services Commission.¹⁶⁵

3.5.4 Politicising the judiciary

Given the unique design of the South African Constitution and the transformation from the past, we now deal with different matters than we did in the past. This has given many lawyers, academics and politicians the opportunity to make their opinions on whether or not judges should be given the authority to test all laws against the Constitution and if such law is found to have failed the test, to declare it invalid.

¹⁶³ Morei and Tshehla 2014 *Mediterranean Journal of Social Sciences* 427.

¹⁶⁴ Hoexter and Olivier *The Judiciary in South Africa* 126.

¹⁶⁵ Hoexter and Olivier *The Judiciary in South Africa* 126.

With the Constitution and the promotion of the rights to access to justice and courts came many changes. It has been said that courts are used as tools to promote political agendas. In *Mazibuko, v Sisulu*¹⁶⁶ the court held that:

Courts do not run the country, nor were they intended to govern the country. Courts exist to police constitutional boundaries. Where the constitutional boundaries are breached or transgressed, courts have as clear and express [a] role, and must then act without fear or favour. There is a danger in South Africa, however, of politicization of the judiciary, drawing the judiciary into every political dispute as if there is no other forum to deal with a political impasse relating to policy or disputes which clearly carry polycentric consequences beyond the scope of adjudication.¹⁶⁷

The JSC is the most important body in assisting and protecting the independence, impartiality, accessibility and effectiveness of the courts.¹⁶⁸ The JSC is an independent body formed by the President and consists of twenty-three members. These members include the Chief Justice; the Judge President of the Supreme Court of Appeal; the Minister of Justice; one Judge President; two advocates; two attorneys; a university professor; six members of the National Assembly (at least three of whom must be members of opposition parties); And four delegates from the National Council of Provinces as well as four persons appointed by the President.

Judicial independence plays the role of the guarantor of the separation of powers in the state and the rule of law. The independence of the judiciary is important as it is the only check on a powerful government when that government commands an overall majority in Parliament and could, by its otherwise unrestrained law-making and executive power, place the liberty of citizens at risk.¹⁶⁹

3.5.5 Threats to judicial independence

The judiciary thrives on its legitimacy, reputation and respect from the public.¹⁷⁰ A firm judiciary often finds itself under unjustified attack by those who are supposed to protect it. As the guardians of justice, democracy and dispute resolution, it is foreseeable that some of the disputes that come before the courts would be of a political nature or have some political implications.¹⁷¹ In some cases, the courts have decided in favour of the

¹⁶⁶ *Mazibuko v Sisulu* 2013 4 SA 243 (WWC) para 256E.

¹⁶⁷ *Mazibuko v Sisulu* 2013 4 SA 243 (WWC) para 256E.

¹⁶⁸ Malan 2014 *PER* 1968.

¹⁶⁹ Robertson 2014 International Bar Association's Human Rights Institute 3.

¹⁷⁰ Mnyongani 2011 *Speculum Juris* 2.

¹⁷¹ Mnyongani 2011 *Speculum Juris* 2.

executive while in others they have ruled against policies of the ruling party.¹⁷² The judiciary must act as an independent body to the exclusion of influences by external factors. However, there will always be factors which attempt to put the reputation and independence of the judiciary at risk.

An independent judiciary is an essential part of a constitutional democracy. However, the establishment of this independence involves the judiciary inevitably being part of the political process. The political environment produces leaders who in turn are appointed to become members of the judiciary. As a result, it is to be expected that political actors may attempt to use their power to influence members of the judiciary. What may also pose a threat to judicial independence is that judicial officers are in the same circles as those who appoint them; some have the same level of education and belong to a similar class.¹⁷³ This raises a question of how one who is not at the same level as them could trust that they would receive impartial justice. It is important therefore that judges place themselves in an impartial position between two disputants, one of their own class and one not of their class.¹⁷⁴

Another challenge which could pose a threat to the independence of the judiciary is that of the human factor. Judges are trained to be professional; they also pledge to be impartial and independent when interpreting laws and making decisions in their official capacity.¹⁷⁵ They pledge to be true to the intentions of the lawmakers. It is possible that their preferences might stand in the way of their true impartiality.¹⁷⁶ In Zimbabwe, the President, Robert Mugabe, has managed to pack the courts with Zimbabwean African National Union supporters and handed out gifts in the form of land and money to ensure the judges' loyalty and therefore their partiality in reaching decisions.¹⁷⁷ Independent judges have been removed from office through psychological and physical threats of violence.¹⁷⁸

¹⁷² Mnyongani 2011 *Speculum Juris* 2.

¹⁷³ Iyer 2010 *Mainstream Weekly* 2.

¹⁷⁴ Iyer 2010 *Mainstream Weekly* 2.

¹⁷⁵ Horn and Bösl *The Independence of The Judiciary in Namibia* 18.

¹⁷⁶ Robertson 2014 *International Bar Association's Human Rights Institute* 3.

¹⁷⁷ Robertson 2014 *International Bar Association's Human Rights Institute* 5.

¹⁷⁸ Robertson 2014 *International Bar Association's Human Rights Institute* 5.

Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance and other weaknesses to which human flesh is heir.¹⁷⁹

Judges are human before they are judicial officers. They are prone to make human errors but they must guard against this when operating within their official capacity. If they are unable to do so, this may pose a threat to judicial independence. It has been recognised that those who sit in judgment may occasionally become subject to what is called 'judges' disease', which refers to a condition where symptoms include pomposity, irritability, talkativeness, a tendency to take short cuts and a propensity to make statements which are irrelevant to the judgment.¹⁸⁰ Unfortunately, there is no treatment for this pathology that would protect judges from impeachment. The only remedy available is removal from office which is often a political remedy that merely aggravates the problem.¹⁸¹

Individual independence and impartiality play an important role in the independence of the judiciary and it is pivotal that those bestowed with the duty to appoint these officials appoint persons who will not be easily swayed by outside factors in their decision-making. Judges must not only be independent in their official capacity but their personal way of thinking must also be independent and firm in order to ensure that they will not be in a position where their decisions are prejudiced or they are at risk of being influenced. Judges who are biased may place the independence of the judiciary at risk.

It is recognised that the President of the Republic is vested with various powers and duties and this includes the appointment of judges, the judicial commissions of enquiry, the appointment of the director of the National Prosecuting Authority, the National Commissioner of Police and the appointment of the Public Protector, to name a few. This makes the executive arm of government a powerful body. This paints an image that there cannot be any reasonable hope that the judiciary could be purely independent from the executive arm of government.¹⁸²

A potential for the abuse of his power as head of the national executive was when the President attempted to extend the term of office of the chief Justice in 2011 in terms of

¹⁷⁹ Iyer 2010 *Mainstream Weekly* 1.

¹⁸⁰ Iyer 2010 *Mainstream Weekly* 1.

¹⁸¹ Iyer 2010 *Mainstream Weekly* 2.

¹⁸² Hoexter and Olivier *The Judiciary in South Africa* 126.

section 176 of the Constitution.¹⁸³ This opened a door for political attacks on the judiciary. Former leader of the Democratic Alliance political party raised a sharp point in stating that the role of the JSC had been undermined through political interference from the African National Congress¹⁸⁴ as the majority ruling party.

She stated that the ANC was flooding the JSC body with members which the executive arm of government could easily control be it directly or indirectly. She also argued that Justice Dikgang Moseneke was not considered for the position of Chief Justice of the Constitutional Court due to remarks that he would not serve the needs and surreptitious agendas of the ANC and further that as a result judges could be intimidated into impressing the executive arm of government.¹⁸⁵

There are a few incidents which have raised questions as to whether the independence of the South African judiciary is at risk of being diluted by the executive arm of government. The removal of former director of the National Prosecuting Authority, Vusumzi Pikoli, from office after being suspended for refusing to delay the arrest of former National Commissioner of Police, Jackie Selebi, is a case in point. The disbanding of the elite crime and investigation unit, the Directorate of Special Operations, and replacing them with an anti-corruption unit also known as the Hawks, is another recent indicator of such influence. Many questions were raised in this regard and it was said that the Hawks were created to effectively place the investigation unit under political control and surveillance.¹⁸⁶

Another incident which raised bitter questions with regard to the independence of the judiciary was the unsuccessful attempt by the President to extend the term of office of former Chief Justice Sandile Ngcobo. In *Justice Alliance South Africa v President of the Republic of South Africa*¹⁸⁷ the court held that the action of the President was unconstitutional as it violated the principle of judicial independence. One of the most controversial actions taken by the executive in the appointment of judicial officers was the nomination of Mogoeng Mogoeng as the Chief Justice of the Constitutional Court by

¹⁸³ *Justice Alliance of South Africa v President of South Africa* 2011 5 SA 388 (CC) para 83.

¹⁸⁴ African National Congress, hereinafter referred to as ANC.

¹⁸⁵ Morei and Tshehla 2014 *Mediterranean Journal of Social Sciences* 433.

¹⁸⁶ In *Genister v President of the Republic of South Africa* the court held that the Hawks were not protected from political influence and ordered remedial action.

¹⁸⁷ *Justice Alliance of South Africa v President of South Africa* 2011 5 SA 388 (CC) para 68.

the President. It was argued by members of opposition political parties that it was not in the interests of justice but for political convenience.

If the broad review powers of the South African courts with their actual and potential political implications are taken into consideration, the composition of the JSC and its decisions pertaining to recommendations of candidates and disciplining of judges provided for in the Constitution and other legal instruments are obviously of political significance, rendering the JSC nothing less than an important political body.¹⁸⁸ Although the JSC does not form part of the executive, the way it is composed would ordinarily secure a dominant position for the ruling political party, once again demonstrating the political nature of the JSC.¹⁸⁹

A recent incident which has raised questions as to whether or not the decisions made by the courts are effective enough to place the other two arms of government in check was in the decision of the Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly and Democratic Alliance v Speaker of the National Assembly*.¹⁹⁰ The Constitutional Court found that the President failed to uphold, protect and respect the Constitution.¹⁹¹ This was adequate ground for impeachment and the judiciary allowed Parliament to decide on whether or not to remove the president from office. Parliament failed to remove the president from office even after the legal findings of the Constitutional Court.

A question would then arise if whether the president was not removed from office because the court did not use the words "serious violation of the Constitution" in its judgment hence parliament did not remove him from office. Although the judiciary does not have the capacity to decide on matters of parliament, the decisions of the courts must be upheld and this has proved to be a challenge as it was discovered in the judgment of the EFF case.

¹⁸⁸ Robertson 2014 *International Bar Association's Human Rights Institute* 3.

¹⁸⁹ Robertson 2014 *International Bar Association's Human Rights Institute* 3.

¹⁹⁰ *Economic Freedom Fighters v Speaker of the National Assembly, Democratic Alliance* 2016 5 BCLR 618 (CC) para 83.

¹⁹¹ Section 83 and 84 of the Constitution makes provisions that the President must defend, respect and uphold the Constitution as the supreme law and further provides for the powers and functions of the President.

Section 89 of the Constitution makes provisions for the removal of the President from office by the National Assembly. It further provides for the grounds upon which this removal must be based, which includes a serious violation of the Constitution or the law.¹⁹² The decision of the Constitutional Court in the EFF case had stated that the President had failed to uphold and defend the Constitution as provided for in section 83. Although the Court did not expressly make use of the word "serious" in its judgment, it is clear that this constituted a serious violation of the Constitution. This was a ground for the removal of the President by the National Assembly; however a display of political influence and power within Parliament by the ANC was clearly evident and manifest in the voting for the non-impeachment of the President after the decision of the Constitutional Court.

In a government where the majority is also the legitimate source of authority, it is important to ensure that an effective model of checks and balances is enforced. An independent judiciary is important in ensuring that political forces do not assume more power than the other organs of state which could threaten the liberty and rights of citizens and place the separation of powers at risk. A display of political power in Parliament was evinced by the impeachment vote after the decision of the Constitutional Court in the EFF case.

When the source of political power is the majority, no mere declaration of basic rights would be sufficient whenever that majority force wanted to transgress those rights.¹⁹³

Out of all the threats which could place judicial independence at risk, there is one which has managed to survive throughout the history of the South African government which is resident in the control of the judicial budget by the executive through the appointment to ministerial positions such as the Minister of Justice. This budget does not refer to the salaries and pension benefits of judicial officers as they are protected by the Constitution.¹⁹⁴ An adequate operational budget for the judiciary is controlled by the executive.¹⁹⁵ This poses a threat to the independence of the judiciary as it poses the

¹⁹² Currie and de Waal *The New Constitutional and Administrative Law* 64.

¹⁹³ Lippman *The Federalist Papers Re-examined* 4.

¹⁹⁴ Section 176 of the Constitution.

¹⁹⁵ Chidyausiku "Modern Challenges to the Independence of the Judiciary" 13.

risk to the judiciary of being influenced by the executive and other external factors, "for he who pays the piper calls the tune."¹⁹⁶

The principles of institutional judicial independence provide that the judiciary must have adequate resources in order for it to function effectively and efficiently without hindrance.¹⁹⁷ Further, it is provided that any interactions between the judiciary and the executive, if there are any, must not interfere with the independence of the judiciary.¹⁹⁸ The main objective of these principles is to protect the judiciary from political control or interference. This requires the judiciary to be financially and administratively independent from the executive.¹⁹⁹

3.6 Conclusion

The doctrine of separation of powers is commendable even though it comes at a price: it takes away the basic human instincts of self-preservation.²⁰⁰ As long as these human characteristics exist, threats to judicial independence will always be there.²⁰¹ There are various factors which pose a threat to the independence of the judiciary and those who are appointed must have the ability to decide without fear, favour or prejudice. The appointment of judges is based on the value of constitutional democracy and the significance of the concept of the doctrine of separation of powers, checks and balances.

An independent judiciary is important in sustaining the separation of powers.²⁰² South Africa is a diverse country and thus diversity in the appointment of judicial officers is important for the effective dispensation of justice.²⁰³ The Constitution has ensured the protection of judicial independence through the provisions of security of tenure and remuneration. Individual independence and impartiality is of the utmost importance as the Constitution cannot decide on how individuals think in their personal capacity as humans. Judicial officers must be able to decide on judicial matters independently to the

¹⁹⁶ Chidyausiku "Modern Challenges to the Independence of the Judiciary" 13.

¹⁹⁷ Cachalia 2011 *Advocate* 22.

¹⁹⁸ Cachalia 2011 *Advocate* 22.

¹⁹⁹ Cachalia 2011 *Advocate* 22.

²⁰⁰ Chidyausiku "Modern Challenges to the Independence of the Judiciary" 12.

²⁰¹ Chidyausiku "Modern Challenges to the Independence of the Judiciary" 12.

²⁰² Mokgoro 2010 *Advocate* 44.

²⁰³ Mokgoro 2010 *Advocate* 44.

exclusion of external factors which might pose a threat to their independence and consequently that of the judiciary.

Chapter 4 A Comparative Analysis: Judicial Independence in Other Jurisdictions

4.1 Introduction

The origin of the principle of judicial independence can be found in the evolution of a constitutional democratic state in Europe. This evolution is also linked to the concept of the rule of law and the doctrine of separation of powers and checks and balances.²⁰⁴ The debate about the role of the courts and judges evolved in the framework of the history of the application of unrestricted power by political rulerships, Great Britain and also in the United States and the rest of Europe.²⁰⁵ This section of the study discusses judicial independence in other jurisdictions outside South Africa including the United States of America, Canada and the United Kingdom.

The three jurisdictions have been selected because they contribute to the study as similarities in their laws and that of South Africa have been found. South Africa inherited most of its legal system from Britain. This is beneficial in determining how much the law has evolved since then and whether or not some solutions could be identified from these three jurisdictions.

4.2 Judicial independence in Canada

The main object of judicial independence is to serve the public and not the judges.²⁰⁶ The Supreme Court of Canada is the highest court in Canada. Its independence as an institution and that of the judges is undisputed and this has resulted in the current strong public confidence in the administration of justice in Canada. The Canadian judiciary has been given a duty in terms of the Canadian Charter of Rights and Freedoms²⁰⁷ which provides that the courts must protect the rights and liberties of citizens from violation or intrusion by government. This part of the study provides a comparative analysis of judicial independence in Canada against that in South Africa.

²⁰⁴ Horn and Bösl *The Independence of The Judiciary in Namibia* 22.

²⁰⁵ Horn and Bösl *The Independence of The Judiciary in Namibia* 22.

²⁰⁶ Binnie *Judicial Independence in Canada* 2.

²⁰⁷ The *Canadian Charter of Rights and Freedoms* is the Bill of Rights entrenched in the Constitution of Canada and is included in the first part of the Constitution Act of 1982.

Canada is a federation and consists of a constitutional division of powers between the federal and provincial governments.²⁰⁸ In order for the courts to fulfil their duties which include serving and providing just decisions to the exclusion of external factors including those of the two levels of government, they must be independent. Judicial independence in Canada requires the courts to serve as independent adjudicators of jurisdictional disputes between the two levels of government.²⁰⁹

Canada uses certain mechanisms to ensure the protection of judicial independence. These include security of tenure until retirement at the age of 75. The tenure must be secure against interference from the executive arm of government or other appointing authority in a discretionary or illogical manner.²¹⁰ Financial security and the collective independence of the judiciary regarding matters which directly affect adjudication are other mechanisms of this surety.²¹¹ This is similar to the provisions of section 165 of the Constitution which guarantee institutional judicial independence in South Africa.

Investigations and complaints about judicial conduct are overseen by the independent Canadian Judicial Council, which is composed entirely of members of the judiciary.²¹² In South Africa these complaints are dealt with by the JSC whose members are dominated by the ruling political party. The composition of the JSC differs from that of the Canadian Judicial Council.

There are similarities in terms of the appointment of judges between Canada and South Africa: the appointment of judges is strictly vested with the executive arm of government as it is in South Africa. The decision of the executive with regard to these appointments is not absolute; it is based on the advice of judicial advisory committees and the recommendations of the Governor in Council on specific appointments.²¹³

²⁰⁸ The Canadian Charter of Rights and Freedoms.

²⁰⁹ The Canadian Charter of Rights and Freedoms.

²¹⁰ Binnie Judicial Independence in Canada 7.

²¹¹ Greene 1988 Osgoode Hall Law Journal 194.

²¹² Binnie Judicial Independence in Canada 3.

²¹³ Gélinas 2010 <http://ssrn.com/abstract=1577842>.

4.3 *Judicial independence in the United Kingdom*

Theories which are considered as contributions to the governing power in the United Kingdom²¹⁴ are not as clear as they are in many other jurisdictions. Academics and politicians often use the terms parliamentary sovereignty, separation of powers and balance of powers in order to describe the legal system of the British government.²¹⁵ The system of government in the UK is that of parliamentary sovereignty, which means that the supreme law making authority is vested in Parliament.

The principle of balance of powers is based on the doctrine of parliamentary sovereignty. The British constitutional government uses a balance of powers among the legislative, executive and the judiciary as governing bodies without a formal or express description of those powers.²¹⁶ The foundation of the principle of a balance of powers is to ensure that Parliament is the sovereign head of government, and that no derivative part of that government can usurp the power of Parliament as the final law making authority.²¹⁷

In South Africa and other presidential systems, the doctrine of separation of powers is a strict fundamental principle which must be applied.²¹⁸ However, in the UK and other common law jurisdictions the doctrine of separation has not been distinctly and strictly applied.²¹⁹ The UK does not follow the strict application of separation of powers and the powers of Parliament, government and the courts are interwoven.²²⁰ The executive and the legislature in the UK are linked together and exercise their powers conjointly. It has been said that the executive and legislature are a close union.²²¹

In the UK the executive sphere of government consists of the Crown and the Government which includes the Prime Minister and Cabinet ministers.²²² The legislature consists of the Crown, the House of Commons and the House of Lords and lastly the judiciary consists of judges in the courts of law and senior appointments of judges are

²¹⁴ United Kingdom; hereinafter the UK.

²¹⁵ Hyre 2004 *Fordham Law Review* 430.

²¹⁶ Hyre 2004 *Fordham Law Review* 432.

²¹⁷ Hyre 2004 *Fordham Law Review* 432.

²¹⁸ Benwell and Gay 2011 *House of Commons Library* 1.

²¹⁹ Benwell and Gay 2011 *House of Commons Library* 1.

²²⁰ Benwell and Gay 2011 *House of Commons Library* 2.

²²¹ Benwell and Gay 2011 *House of Commons Library* 2.

²²² Benwell and Gay 2011 *House of Commons Library* 3.

made by the Crown.²²³ The executive and the legislature are closely linked and members of the executive can be members of the legislature simultaneously. This is similar to the South Africa system where members of the legislature remain to be so even after being elected as members of the executive, with the exception of the President.

Judges, as members of the judiciary, are prohibited from jointly being members of the other two spheres of government. The UK is governed under a system of parliamentary supremacy and judges are expected to interpret legislation in accordance with the intention of the legislature.²²⁴ This system of government is similar to that of South Africa prior to 1994 where Parliament was the supreme law-making body. Constitutionally, judges may not question the validity of Acts of Parliament as they are subordinate to the legislature.²²⁵

It appears as though the system of government in the UK is similar to that of South Africa prior to its constitutional democracy where Parliament was supreme and the judiciary had limited power as a result. Courts do not have the authority to make law as this is the function of the legislature.²²⁶ In *Magor and St. Mellons Rural District Council v Newport Corporation*²²⁷, the House of Lords rejected the approach of Lord Denning who had stated that where there are gaps in the law the judiciary had the authority to make laws through the courts. It was held that this was a clear usurpation of power of the legislative function under the pretext of interpretation.²²⁸

The system of government has evolved in the UK since the enactment of the Human Rights Act.²²⁹ It has been established that the duty of the judiciary is to protect the rights and liberties of citizens. The Act necessitated a compromise between the legislature and the rule of law and that the compromise relied on the sense of restraint between the legislature and the judiciary.²³⁰

²²³ Benwell and Gay 2011 *House of Commons Library* 2.

²²⁴ Benwell and Gay 2011 *House of Commons Library* 5.

²²⁵ Benwell and Gay 2011 *House of Commons Library* 5.

²²⁶ Benwell and Gay 2011 *House of Commons Library* 5.

²²⁷ *Magor and St. Mellons Rural District Council v Newport Corporation* [1950] 2 All ER 1226.

²²⁸ *Magor and St. Mellons Rural District Council v Newport Corporation* [1950] 2 All ER 1226.

²²⁹ Human Rights Act 1998.

²³⁰ Benwell and Gay 2011 *House of Commons Library* 6.

The appointment of judges is done through the recommendations of the Judicial Appointment Commission which was established in terms of the Constitutional Reform Act.²³¹ The Act gives the commission specific statutory duties to encourage diversity in the persons available for selection for appointments.²³² The procedure of appointments of judges is similar to that of South Africa where an independent body is appointed to make recommendations on the selection of candidates to be appointed in the superior courts.

The system of government in the UK is, nevertheless, different from that of South Africa. South Africa is a democratic state based on the constitutional values of human dignity, equality and freedom. The Constitution is the supreme law and no arm of government runs supreme as it is in terms of the British government where parliament reigns supreme. The system of parliamentary sovereignty was used prior to 1994 in South Africa from 1910 until the 1983 Constitutions. The system of government has since evolved and it is that of a constitutional democracy where the three arms of government derive their power. None of the three arms may usurp the power of the other and they can only act within the power which they are given by the Constitution.

4.4 Judicial independence in the United States of America

Judicial independence has been a core political value since the founding of the United States of America. The doctrine of separation of powers plays an important role in the constitutional government of the United States. The United States of America is a federal state and this federalism allows the state to divide political power between two levels of government, the Congress and States. Powers which are not delegated to the Federal government are reserved for the States.²³³ Article 1 of the Constitution of the United States of America makes provisions for the delegation of powers between Congress and the States.²³⁴ It further makes provisions for the prohibition of use of those powers for both Congress and the States. Some of the powers vested in

²³¹ Constitutional Reform Act of 2005.

²³² Benwell and Gay 2011 *House of Commons Library* 9.

²³³ McClellan *Liberty, Order and Justice* 295.

²³⁴ A 1 of the Constitution of the United States of America.

Congress are exclusive to it and others overlap and they are shared with another branch of government or States.²³⁵

Like the Constitution of the Republic of South Africa, the American Constitution does not make express provisions for the separation of powers among the three arms of government and further does not provide for a system of checks and balances.²³⁶ It does however make provisions granting the three arms of government to legislate, execute and adjudicate thus recognising the legislature, executive and the judiciary as the three arms of government as it is in terms of the doctrine of separation of powers.²³⁷ The Constitution of the United States provides the government with enough power to govern while withholding its ability to abridge the rights and freedoms of those they govern.²³⁸

The United States of America is a constitutional system of government based on the rule of law. The Constitution of the United States is the supreme law as it is in terms of South Africa.²³⁹ The President of the United States is vested with the executive authority to execute and enforce the law; however this does not mean that they are above the law in terms of the rule of law and separation of powers and he or she will be held accountable for his or her actions. The limitations on the powers of the President are derived from the method in which he is elected by the Electoral College and from the checks on his exercise of power by the Congress and the Supreme Court.²⁴⁰

The American system of government does not follow a strict separation of powers. The office holders of each branch of government are distinct and separate from one another even though the functions of each branch overlap.²⁴¹ There is a strict application of separation of personnel and no one person or group may serve simultaneously among the three arms of government.²⁴² This is different from the South African system of government. The reason for this overlap is to allow each branch to check on the

²³⁵ A 1 of the Constitution of the United States of America.

²³⁶ Killian, Costello and Thomas *The Constitution of The United States of America* 63.

²³⁷ Killian, Costello and Thomas *The Constitution of The United States of America* 63.

²³⁸ Killian, Costello and Thomas *The Constitution of The United States of America* 63.

²³⁹ See s 2 of the Constitution which provides for constitutional supremacy.

²⁴⁰ McClellan *Liberty, Order and Justice* 296.

²⁴¹ Killian, Costello and Thomas *The Constitution of The United States of America* 295.

²⁴² Killian, Costello and Thomas *The Constitution of The United States of America* 64.

encroachments of other branches of government, and this assists in the maintenance of the doctrine of separation of powers.²⁴³

In the American system of government there is a separation of personnel and it has already been established that there is no separation of personnel in terms of the three arms of government in South Africa, where members of the legislature are also members of the executive. Cabinet members are appointed by the President to be members of the executive; they also remain members of the National Assembly concurrently. The reason behind this was that it ensures an effective application of checks and balances as well as accountability.

4.5 Conclusion

The doctrine of separation of powers requires the three arms of government to be separate and independent. It is important that the judiciary remain independent and impartial in the exercise of the powers which it has been given by the Constitution of its state in order to protect the rights and liberties of the governed. The culture of the application of separation of powers in securing judicial independence differs in every state. With all these differences it has been established that states have the same objective, which is to keep the judiciary as an independent body which must not be influenced by external factors in order to provide a clear system of checks and balances and to prevent the abuse of power by any one of the three arms of government.

²⁴³ Article 1 of the Constitution of the United States of America.

Chapter 5 Findings, Recommendations and Conclusion

5.1 Introduction

This study intended to address two broad issues, firstly the judiciary as an independent sphere of government through the doctrine of separation of powers and how the doctrine relates to judicial independence; and secondly it sought to highlight some threats to judicial independence in South Africa. In addressing these two issues, this study discussed the history and development of the constitutional evolution in South Africa and the doctrine of separation of powers. It further discussed the judiciary as an independent arm of government and the role of the JSC in appointing judicial officers. The study discussed the impact of individual independence of judges and how it could place the judiciary at risk if not legally guarded. A comparative analysis of jurisdictions outside South Africa in the United States of America, Canada and the United Kingdom was also conducted. This chapter of the study provides findings, recommendations and reaches a conclusion on judicial independence in South Africa.

5.2 Findings

The Constitution has strived to ensure judicial independence in South Africa through the doctrine of separation of powers. Although the doctrine of separation of powers has ensured judicial independence in South Africa, it is not without critical gaps and challenges. One of the issues which was identified in this study is that of the composition of the JSC. Fifteen of the members of the JSC are political nominees. This nomination and subsequent appoint of fifteen JSC members is fraught with the menacing possibility of non-accountability in ensuring that the voting public is represented in such appointment process. With this challenge comes the recognition that political nominees within the JSC is over represented.

The procedure for appointing members of the JSC is that it broadly consists of members of the judiciary and the legal profession. Members of the legislature and the executive arms of government must also form part of the JSC. However, this is not the case in South Africa due to the fact that nominees are recommended for appointment through voting. This then results in the JSC consisting of political appointments who have been given the responsibility of appointing judges. This might cause a threat to the

independence of the judiciary as politicians could use this body to drive their own agendas, resulting in the public losing confidence in the courts and its judges.

Another issue which has been identified in this study is that save for a few exceptions, the interviews of interested parties are held behind closed doors and the public is not allowed to take any active part in the selection, interview and appointment process. The Constitution is founded on the values of accountability and transparency; the doctrine of separation of powers together with the principle of checks and balances require that the government be held accountable for its actions. This procedure by the JSC neglects the constitutional principles of accountability and transparency.

5.3 Recommendations

The Constitution and relevant legislation which has been enacted has guaranteed the protection of the independence of the judiciary to a certain but limited extent. There are certain issues which need to be addressed in order to strengthen the independence of the judiciary. This study submits that there are threats to judicial independence in South Africa. This part of the study provides some recommendations consistent with the Constitution which might be adopted in order to strengthen the independence of the judiciary in South Africa.

5.3.1 The JSC

The composition of the JSC and the non-participation of the public in the process of judicial appointments have proved to be problematic and could compromise the independence of the judiciary in South Africa. It is important to note that the JSC plays an important role in the functioning of the judiciary yet its current composition is untenable and unjustifiable. Just reasons have not been provided as to why the JSC is dominated by politicians which ultimately results in the JSC being politicised at law and it being turned into another political body. It is recommended that the composition of the JSC be amended in order to give judges and the representatives of the legal profession a majority representation.

The number of political nominees within the JSC must be reduced should the recommendation above be adopted. By increasing the number of legal representatives and decreasing that of political nominees in the JSC, such protocol and process

ensures that the judiciary is able to handle its own legal affairs. It also guarantees openness, accountability and responsiveness. Interviews of candidates must not be conducted in private and the public must be able to sit in during such proceedings. This would create transparency and the public would be able to understand the process of appointments by the JSC. This would further enable the public to have confidence in the JSC and eventually in the justice system as well.

5.3.2 The executive

The executive arm of government has currently too much power in the affairs of the judiciary. The executive has the authority to appoint members of the judiciary and this poses a threat to the independence of the judiciary which the Constitution is aimed at preserving through the separation of powers. It is recommended that the authority of the executive to appoint members of the judiciary should be amended and allow the legal profession to participate in the decision-making process of appointments and not only make recommendations.

5.3.3 Individual independence of judges

The danger to judicial independence is nascent and overt corruption which might affect the judiciary even at the highest level. Impeachment is not a permanent solution and judges must be deterred from committing corrupt conduct. This study recommends that the Judicial Services Commission, which deals with appointments, must be retained and another independent body dealing with the performance of judicial officers be instituted.²⁴⁴ The public must have a voice with regard to the appointment of judicial officers; the reason behind this stems from the Roman adage which says: 'whatever touches us all should be decided by all'.²⁴⁵

5.4 Conclusion

The aim of this study was to address judicial independence in South Africa and this was done with reference to the doctrine of separation of powers. Certain issues were raised from the problem statement which the study also ought to address. These issues were whether or not the South African judiciary was completely independent and whether or not there were any threats to the independence of the judiciary. In order to address

²⁴⁴ Iyer 2010 *Mainstream Weekly* 2.

²⁴⁵ Iyer 2010 *Mainstream Weekly* 2.

these issues, this study discussed the historical background and evolution of the doctrine of separation of powers and judicial independence in South Africa. It also provided the historical context that gave rise to the development of judicial independence in South Africa. The constitutional and legislative framework which protects judicial independence was discussed. This included specific provisions in the Constitution which vest judicial power in the courts and judges, as well as the *Judicial Service Commission Act 9 of 1994*.

From an international law perspective, certain conventions and basic principles which are aimed at protecting judicial independence were identified and discussed. A comparative analysis with jurisdictions outside South Africa has been conducted in order to identify some solutions which might be applied in South Africa to protect the independence of the judiciary from being influenced by external factors.

South Africa has gone to great lengths to ensure the protection of the independence of the judiciary in both its contexts of institutional and individual independence. In ensuring the impartiality and individual independence of judges from being influenced by external factors, the Constitution has made various provisions to protect judges. These provisions include security of tenure and remuneration of judges as well as the procedures for removal of judges. Through the establishment of the JSC the Constitution of the Republic of South Africa has provided clear procedures which must be followed in the appointment of judges.

The protection of judicial independence in South Africa has been achieved to a certain though limited extent. Many constitutional and positive legislative measures have been taken in order to ensure the protection of judicial independence. There are certain measures which have been put in place which undermine the existence of the judiciary as an equal and independent arm of government. Judicial reforms ought to be put in place to resolve these issues. The essence of the judicial function is that courts must be the voice of reason that not only pronounce the law and renew it but also nourish and develop the principles and values of the Constitution.

Judicial independence goes further than a claim against government and the society. It requires judges to show fidelity to the rule of law by applying the law impartially without fear or favour. Judicial independence requires judges to use their power in contested

cases to defend citizens of the Republic and those who are unable to do so themselves.²⁴⁶ It requires judges to use their power to apply the law and make decisions, even when such decisions are unpopular or politically inconvenient.²⁴⁷ Judicial independence is critical and pivotal to the protection of the rights and liberties of citizens and courts must always act impartially and independent of external factors and influences on behalf of society.

²⁴⁶ Chapter 5 of the Constitution.

²⁴⁷ Chapter 5 of the Constitution.

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