Oñati International Institute for the Sociology of Law
Instituto Internacional de Sociología Jurídica de Oñati
Oñati Socio-Legal Series
ISSN: 2079-5971

Oñati Socio-legal Series, v. 7, n. 4 (2017) – 'Too Few Judges?' Regulating the Number of Judges in Society
ISSN: 2079-5971

Judicial Capacity in a Transforming Legal System

HUGH CORDER°

Corder, H., 2017. Judicial Capacity in a Transforming Legal System. *Oñati Socio-legal Series* [online], 7 (4), 770-789. Available from: http://ssrn.com/abstract=3039518

Abstract

Given the perennial problem of lack of access to justice; the fact that there was no shortage of superior court judges until 1994; the demands on court process which flow directly from transition to the constitutional democratic system; and the urgent and justified necessity for the demographic transformation of judicial personnel, two challenges to the capacity of the judicial system present themselves in South Africa:

- Enlarging the number of suitable candidates for judicial appointment to redress the former demographic imbalance; and developing the kind of skills among those appointed as judges to be able to respond with confidence across a wide range of often complex legal issues; and
- developing a theory of judicial deference which observes the separation of powers and preserves judicial independence.

This paper explores these challenges, after setting out the socio-political context, as it impacts directly on their nature and scope, and the prospects of meeting them.

Key words

South Africa; judicial capacity; judicial appointments; demographic transformation; judicial deference

Resumen

Debido al constante problema de la falta de acceso a la justicia, al hecho de que no hubo escasez de jueces de tribunales superiores hasta 1994, las demandas del proceso judicial que surgen directamente de la transición al sistema democrático constitucional, y la necesidad urgente y justificada de la transformación demográfica del personal judicial, el rendimiento judicial en Sudáfrica se encuentra con dos desafíos:

- Aumentar el número de candidatos aptos al nombramiento judicial para compensar el anterior desequilibrio demográfico y desarrollar en los jueces

I acknowledge financial support for this work from the National Research Foundation of South Africa (Grant 85861). Any opinion, findings, and conclusions or recommendations expressed are mine, and the Foundation does not accept any liability for them. I am grateful for the editorial assistance of Calli Solik in the final stages of preparation of this paper.
° Professor of Public Law. Faculty of Law, University of Cape Town, Private Bag X3, Rondebosch, South Africa, 7701. hugh.corder@uct.ac.za.

(cc) BY-NC-ND

nombrados aquellas habilidades que les permitan responder con confianza a asuntos jurídicos a menudo complejos; y
- desarrollar una teoría de deferencia judicial que respete la separación de poderes y preserve la independencia judicial.

Este artículo explora estos desafíos tras explicar el contexto sociopolítico, ya que éste afecta directamente a su naturaleza y alcance, y las probabilidades de que se superen.

Palabras clave

Sudáfrica; rendimiento judicial; nombramientos judiciales; transformación demográfica; deferencia judicial

Table of contents

Oñati Socio-legal Series, v. 7, n. 4 (2017), 770-789
ISSN: 2079-5971

1. Preliminary Observations

Almost all the papers presented at this workshop focus on judicial systems in developed countries. South Africa is not an easy state to classify as either developed or developing, as several aspects of its economic and social life fit comfortably into the "developed" niche, while for the vast majority of its citizens daily life represents a struggle to survive, notwithstanding the developed infrastructure and sophisticated services available to those who can afford to use them. One critical aspect for this paper is the very narrow basis for access to justice, a material factor when one is considering whether the capacity of the courts is adequate to meet the needs of the population. So I proceed on the basis that South Africa is overwhelmingly to be analysed as a developing country, albeit with significant pockets of development which measure up with those typical of the most developed societies internationally.

With this in mind, I would argue that, while processes and structures which work in developed countries are certainly instructive when considering whether there are sufficient judges in any governmental system, one should approach their transplantation into different political terrain with caution, not assuming anything. Equally, problems currently besetting Europe, North America, and Australasia should not blind us to much more basic concerns afflicting most of the world's population: in a sense, such disparities in power and wealth are more closely and unevenly present in South Africa than almost any other country, so perhaps constructive lessons may be learned from its experiences. In particular, two social realities which have not featured much in other contributions to this workshop are present in South Africa and impact strongly on debates about the judicial system: the role of customary (mainly African traditional) and religious personal law within the civil and criminal law applied through the courts; and the extremely limited resources (both financial and human) facing most of those seeking access to the courts, especially when challenging those with wealth and power.

I am wary of the frequent criticism of those writing about South Africa who rely too much on its "exceptionalism", as though that country alone faces the kind of challenges which arise on a daily basis. The South African state is truly blessed and cursed, but as the democratic era has persisted, it becomes less of an exception, and it is in this spirit that I approach the theme under review.

2. Constitutional governance: the context

South Africa has long been regarded as a strange society, or at least one that contains within its body politic cause for both despair and celebration, usually at the same time. Remarkable leadership has characterised many aspects of its formal and civil governance, particularly over the past quarter century or so, and the judiciary and legal profession have benefited from the presence of some visionary and courageous lawyers; among them the two most prominent leaders of the African National Congress over the last fifty years, Oliver Tambo and Nelson Mandela. The transition to a constitutional democracy in 1994 made possible the appointment to high judicial office of several of the most prominent lawyers who resisted apartheid, among them Arthur Chaskalson, John Didcott, Pius Langa and Ismail Mahomed. Bram Fischer, George Bizos and Godfrey Pitje are others who fall into the category of fighters for justice under apartheid. The rampant injustices which were the cornerstones of apartheid fundamentally undermined the legitimacy of the law and the courts (Dugard 1978, Dyzenhaus 1991), yet a number of successful challenges to injustice through the courts sustained sufficient belief in limited government through the rule of law to justify the adoption of such a governmental model post-apartheid (Corder 1984, Forsyth 1985). Meierhenrich (2008) provides an account of the reasons for the survival of this belief in the limiting authority of government under law.

In order to describe and assess the current capacity of the judicial branch of government to cope adequately with the demands made on it for court services, it is necessary both to understand the nature of the constitution-making and legislative

processes over the past twenty years or so and to situate the judiciary within its own immediate past and awkward present. In doing so, I shall focus only on the superior courts of the country (*viz*. the Constitutional Court (CC), which sits at the apex of the system, the Supreme Court of Appeal (SCA), an intermediate court of appeal, and the High Court level, as well as some specialist courts of similar status). I shall not be taking the lower/ magistrates' courts into account, except in passing when noting the racial breakdown within magisterial ranks: although a vital part of the system (particularly as regards criminal matters),[1] the raw material which would allow any proper assessment of their capacity is well-nigh inaccessible, and these courts in any event are substantially guided in their approach by precedent set at superior court level.

2.1. Constitution-making 1910 to 1996

The constitutional history of the last century in South Africa is relatively notorious, and it is not necessary to consider it in any detail for present purposes. What mark it, however, are its "nation-building" and "social-engineering" characteristics, both under imperial rule and as an independent nation state, and these aspects form critical elements of the analysis which follows. The South Africa Act (1909) ("1910 Constitution") effectively attempted to foster unity among bitterly contesting language groups in what was then known as the "European" section of the population, with limited acknowledgement of a small part of the rest (the overwhelming majority) of the people. Successive amendments of the constitutional framework aided by many Acts of Parliament consolidated white hegemony in all aspects of government and the economy, which reached its zenith in the proclamation of republican status in the Republic of South Africa Constitution Act (1961) ("1961 Constitution").

For over half a century, therefore, constitutional and statute law had attempted to bring white people closer together, to reorder social relations to achieve separation between white and black South Africans in all aspects of life, and to batten down the hatches against an increasingly changing and critical world.

The Republic of South Africa Constitution Act (1983) ("1983 Constitution") amounted to a belated attempt to buy time for the white minority by widening its support base to include compliant sections of the black population and by appeasing world opinion which had reached fever pitch in its professed abhorrence of the injustices of apartheid. The 1983 Constitution sought to do this by creating a "tri-cameral" Parliament, in the election of whose members those South Africans classified as white, coloured and Indian were enfranchised, but for the purpose of constituting three racially-segregated houses of Parliament, in which the house representing white people maintained the numerical majority and its hold on political power (Boulle *et al.* 1989). Critically, however, it eliminated the formal constitutional aspirations of participation in national government of all black African South Africans. In both these objectives the "tri-cameral Constitution" failed miserably: not only did its adoption unleash a remarkable unity of purpose and degree of resistance from the vast majority of the population, it also led to an intensification of campaigns to isolate the South African regime internationally, including punitive measures in the financial and trade spheres (Corder 1994).

Against this background, the complexity of the constitution-making which occurred over the period 1990 to 1996 and the enormity of its impact can be appreciated. Describing it as a miracle is perhaps an exaggeration, but there is no doubt that it was utterly extraordinary and unpredicted. Much has been written about the process (see, for example, Ebrahim 1998), but again the features which demand attention

[1] The *South African Yearbook 2015/6* (South African Government 2015) notes that approximately 275,000 criminal cases served before this level of court, as compared with about 35,000 before the Regional Magistrates' Courts, and about 1,000 criminal matters before the High Courts. The last two sets of courts would naturally also have dealt with a considerable case-load of civil disputes.

here are its attempts to capture in the constitutions[2] what was deemed to be a social consensus around the essential foundations of the constitutional democracy to which the majority aspired, often through compromise by the main parties involved. In addition, in certain critical respects, the constitutions sought to generate change in the social consensus so as to ease the passage from the wickedness of the past to the ideal future of a united nation in which dignity, equality and freedom were the hallmarks. These values are repeatedly stressed in the Final Constitution, see sections 1(a), 7(1), 9, 10, 12 and 36, for example. In doing so, those who wrote the constitutions were certainly trying to engineer shifts in social relations to undo the patterns of the past, and they were often expressing a desire for a degree of change which was probably unrealistic, if not wishful, in the circumstances (Du Plessis and Corder 1994, Spitz with Chaskalson 2000).

This is not the forum in which to set out, even in summary format, the essential elements of the constitutional democracy which now pertains, but the shift to a system of government based in the supremacy of the Constitution and the rule of law, among other fundamental values, is a critical one, precisely because it requires more, in a "political" sense, of the superior courts. In addition, the prominence given to a progressive and nuanced Bill of Rights further elevates the judiciary in the public domain. It is significant that neither of the major political groupings negotiating the constitutional future of the country (the African National Congress and the National Party, and their respective allies) had, until shortly beforehand, published detailed proposals about protecting fundamental rights, although the former grouping had a long-standing practice (Ebrahim 1998) of formulating lists of such guarantees. Against such a framework, the capacity of the courts, and in particular their "suitability" to confront and respond positively to the transformative agenda which underlies the constitutional enterprise, forms the substance of what follows. There can be no doubt about the fundamentally "transformative" character of the Final Constitution (Klare 1998), but this has recently become strongly contested territory in political discourse. In short, while there had been intermittent statements since 1994 to the effect that the constitutions represented too much of a liberal compromise between the apartheid regime and the liberation movements, student protest groups over the past eighteen months have loudly and repeatedly denounced the constitution as a "sell-out", particularly as it lends a degree of negative protection to property rights in section 25 of the Bill of Rights in the Final Constitution.

Such claims (for they are rarely substantiated in any rational manner) require detailed rebuttal, but they are not the main focus of the current exercise, although they do impact on the centrality of the role of the courts as guarantors of the Constitution, and thus their capacity so to act. For this reason, I shall return briefly to such questions once I have sketched the development of the superior court structures and their judicial record over the same period.

2.2. Court structure and judicial attitudes 1910 to 1994

Once again, only the essential features germane to the current focus will be isolated in what follows. It is germane to note at the outset that, while South Africa enjoys many benefits from having a "mixed" legal system, in that its legal doctrines are based in both Roman Dutch Law and English law due to its colonial heritage, the administration of justice is almost entirely grounded in the English approach, with the exception of the absence of the jury system, which disappeared for practical purposes in the 1930s. The foundations of South Africa's superior courts were laid by the British in 1828, and the coming into force of the Union Constitution in 1910 realised the dream of a number of judicial reformers in the constituent colonies, in that provision was made for a single court of appeal for the whole country, in the

[2] As is well known, South Africa took a two-stage approach to democratic constitutionalism, with first an "Interim Constitution" (Constitution of the Republic of South Africa 1993), followed by the "Final Constitution" (Constitution of the Republic of South Africa 1996).

form of the Appellate Division of the Supreme Court of South Africa, through the South Africa Act (1909). The court sat in Bloemfontein, which was thus regarded as the "judicial capital" of the country until 1994. While appeal to the Privy Council remained possible, it was seldom used and was formally abolished in 1951 by the Privy Council Appeals Act (1950), as part of the apartheid regime's strategy to negate the effects of the only limitation on the sovereignty of its Parliament. British influence was strong in shaping judicial customs and practice, most of the appellate judges until the 1950s having obtained at least part of their legal education in the United Kingdom.[3]

Faced over the course of the twentieth century with the gradually accelerating erosion of basic liberties and of the rule of law said to be the counterweight to the notion of parliamentary sovereignty in Westminster constitutional doctrine, the South African appellate judiciary effectively succumbed to the pressure to adapt its approach to the straitened circumstances in which it found itself (Sachs 1973, Dugard 1978, Corder 1984, Forsyth 1985, Dyzeznhaus 1991, Du Plessis and Corder 1994, Spitz and Chaskalson 2000, Meierhenrich 2008). There were notable moments of light in the darkness, at which the courts found for justice in the face of a legal regime quite out of line with its basic precepts, and there were certainly pockets of resolute resistance to the legislative and executive inroads to be found in the ranks of both practising and academic lawyers (chapter 6 in Du Plessis and Corder 1994, Meierhenrich 2008). The overall picture, however, is bleak, and the process of undermining any form of implicit connection between the notions of law and justice continued relentlessly, and even intensified, as apartheid reached its high-point and then began to disintegrate amidst the legal barrenness of the states of emergency of the mid-1980s[4]. The then top court, the Appellate Division of the Supreme Court of South Africa (the AD), distinguished itself by its craven submission to executive discretion in the individual-state relationship, and it even appeared that the Chief Justice was forming panels of judges to hear such cases in a way that a "safe" outcome for the government was likely, if not ensured (Ellmann 1992).

The record of the superior courts under colonialism and apartheid can safely be described as technically competent but overwhelmingly submissive to legislative will and executive fiat. As far as access to justice was concerned, and thus an assessment of the effectiveness of judicial services, both the lower and superior courts rendered at least sufficiently prompt and efficient service, given that a very small proportion of the population was able personally to afford legal services, that legal aid provided by the State since the late 1960s was grossly under-budgeted, and that the observance of procedural rights in criminal trials was not hindered by constitutional obligations but rather based in statute law, whose terms were not known to the average undefended accused. "Criminal justice" was therefore effectively dispensed, and civil justice was freely available to those who could afford it. The result was that no questions were asked about the capacity of the courts, nor about whether there were too many or too few judges (and magistrates).

It was in this atmosphere that constitutional negotiators met to craft a court system for a democratic South Africa. They did so in the knowledge that the adoption of a supreme written constitution with guaranteed basic rights and values which would limit the power of the Parliament and the Cabinet would effectively redistribute constitutional authority among the three branches of government. The ultimate authority in the state, giving life and meaning to the Constitution, would be the highest court. With the recent performance of the AD firmly in the minds of the negotiators, it was always unlikely that it would be assigned this role, especially in the light of the decision that, for reasons of overwhelming pragmatism, the judges

[3] For details of appellate judicial background from 1910 to 1950, see chapter 2 in Corder 1984.

[4] For a multi-faceted treatment of the effects of emergency rule on law and the administration of justice, see the contributions to Acta Juridica (1987) with the theme *Law under Stress—South African Law in the 1980s: First Published as Acta Juridica 1987* (1988).

Oñati Socio-legal Series, v. 7, n. 4 (2017), 770-789
ISSN: 2079-5971

then in office would be allowed to continue to serve. The only real dispute was whether a second "constitutional" chamber of the AD should be created or whether an entirely new court should be established. Sentiment was strongly in support of the latter option, and the seat of the new Constitutional Court was decreed to be Johannesburg (section 106(1) of the Constitution of the Republic of South Africa 1993), further emphasising the break with the past. Furthermore, the AD was excluded from considering "constitutional matters", the highest authority for which was the CC, even though the superior courts in the provinces enjoyed such jurisdiction at first instance (sections 98(2), 101(3) and 101(5) of the Constitution of the Republic of South Africa 1993). The only gesture towards the old order was the requirement that at all times at least four (of the eleven) justices of the CC had to have been serving members of the superior courts before appointment (section 99(3) of the Constitution of the Republic of South Africa 1993).

The first group of justices was appointed to the CC by the end of October 1994, and the Court opened its doors to hearing argument on legal disputes in February 1995, significantly electing to consider the constitutionality of the death penalty as its first case. The AD continued to act as the highest authority on "non-constitutional matters" but, given the relatively wide scope of the rights protected in the interim Bill of Rights, its work became more and more mundane. However, the impracticality of the denial of constitutional jurisdiction to the AD persuaded the Constitutional Assembly to restore the AD (now renamed the Supreme Court of Appeal or SCA) to the constitutional jurisdiction fold (section 172 (2) (a), read with section 168 of the Constitution of the Republic of South Africa 1996). Thus a typical constitutional dispute is heard initially by one of the High Courts, can be taken with leave on appeal to the SCA, after which the CC is the court of final instance. In practical terms, this seems to be working well, with the SCA increasingly making its voice heard in constitutional matters, as will be seen. In addition, the Constitutional Seventeenth Amendment Act (2012) and the passage of the Superior Courts Act (2013), which came into force in 2014, have since 2014 designated the CC as the apex court on all matters of law, with its leave.

Before moving to consider the current challenges, we must take note of certain official statistics relating to the justice sector.

2.3. Some Relevant Statistics

According to the latest census (Statistics South Africa 2012), the total population stood at 51.77 million people, although an estimate in 2014 puts this at 54 million. One of the imponderables here is the high likelihood of a large number of undocumented and unlawful migrants resident in the country: especially since the political and economic implosion of Zimbabwe in the late 1990s, several million citizens of that country have entered South Africa, some of whom are documented and so are likely to have been counted. In addition, large numbers of migrants have entered South Africa from the Democratic Republic of the Congo, Somalia and Mozambique, as well as almost every country in Africa south of the Sahara, since 1994, many of whom would not be part of these estimates. However, it is also highly likely that almost all of these people would not seek to make use of court services, other than against their will when accused of criminal offences.

Of this total population, just over 80% are "black", as opposed to white, *coloured*, or Indian by self-classification. Any account of South African life must take race into account. In the past, such classifications were initially an informal measure, becoming a matter of law in 1950, until 1994. Since then, "race" has become the basis of affording economic preferment and of measuring progress towards socio-economic transformation, but this now occurs through self-declaration, within the framework used under apartheid, so black, coloured, Indian and white are the categories used; while "broadly black" includes all those not "white". By far the largest proportion of those living in poverty is "black", although the blurring of race divisions within

economic classes has occurred to some extent over the past 22 years. Poor people are far less likely to know about or be able to use legal services, unless assisted by a public-interest law firm.

The total number of superior court judges and their distribution across courts in the country is seen in this table:[5]

TABLE 1

	CC	SCA	High Court Divisions	Labour Court and Appeal Court	Land Claims Court	**TOTAL**
Number of superior Judges	11	23	194	19	2	**249**

Table 1. Total number of judges by superior court.

The total number of judges in 1994 was 164, of whom all but three were "white" and all but two were male. So there has been an increase of more than 50% in the total number of judges, reflecting not only the establishment of the CC, but the increase in the number of judicial posts in every superior court.

More broadly as regards race and gender, the approximate proportions are (as at 2015) 64% "broadly black", while female judges make up about 36% of the total number of judges. This represents, as regards race, quite a rapid pace of demographic change, while the success in appointing women is less marked. If one considers seniority, then the situation as far as women are concerned is much less good: in the Constitutional Court, only two out of the 11 justices are female, while in the SCA only five out of 23 are female. As regards race and seniority, in the SCA, there were 17 non- white judges (11 blacks, one *coloured*, five Indians), while in the CC, eight out of ten are black. (Although this is an 11-member court, there is currently one vacancy.) Of the leadership figures in the judiciary (Chief Justice, President of the SCA, Judges President), all but one are black, while only two are women.

Let us now look at some evidence of "case handling", the extent to which matters are finalised each year. In the CC, in the period 1995 to 2008, the number of cases in which judgment was given has varied between 19 and 34, with the average at about 25 per annum, with the mean time from hearing to delivery of judgment varying from 58 to 157 days annually, with the average set at about 125 days. This is a relatively light "load" in terms of matters brought to it for resolution, but of course one has to acknowledge not only the weighty precedent which attaches to each decision of the CC, but also the fact that it disposes of many more matters by refusing leave to appeal than it actually hears. In the SCA, the percentage of cases finalised has been as follows: 68% in 2012 /13, which dropped to 52% in 2013/14 and now stands at 70% as at 2014/15. Across all the High Courts, the number of criminal cases on the backlog roll has been as follows: 362 in 2012/13, 287 in 2013/14 and 281 in 2014/15. The percentage of criminal cases finalised with verdicts has been as follows: 58% in 2011/12, 61% in 2012/13, 66% in 2013/14 and 60% in 2014/15. There are no statistics available on civil cases. In the Labour Court, the percentage

[5] These statistics, as well as those which follow immediately, are drawn from a range of sources: this is something of a moving target. I have relied here mainly on annual reports of the Office of the Chief Justice, as well as statistics issued from time to time by the Judicial Service Commission. I am confident that the overall picture presented here reflects accurately the distribution by race and gender, as well as the case management statistics included.

Oñati Socio-legal Series, v. 7, n. 4 (2017), 770-789
ISSN: 2079-5971

of cases finalised is as follows: 61% in 2011/12, 75% in 2012/13, 86% in 20143/14 and 50% in 2014/15. This level of activity represents less than 10%.

As far as state assistance for litigants is concerned, the following are key statistics for Legal Aid South Africa (2015):[6]

Total Budget was ZAR 1,638,622,972.

Total number of staff recruited was 2,619.

394,172 criminal cases and 54,023 civil cases were handled.

Compared with the almost negligible support in this area before 1994, this is an impressive reflection of service delivery, although the need vastly outstrips the capacity to provide access to justice.

Although the lower courts do not form the focus of this study, it is instructive to note some bare statistics relating to magistrates (Olivier 2014). As of late 2013, there were 1,711 magistrates at all levels (Regional, Chief, Senior and District) in the country. Of these, 42% were black, almost 9% Indian, a similar percentage of *coloured* magistrates, and 40% white. Just under 40% of these magistrates were women. So at this level of court, the demographic change was better as regards gender than race, when compared with the superior courts.

Against this historical and statistical background, we are now ready to consider the challenges identified in regard to the capacity of South Africa's superior court system to render an efficient and accessible judicial service to those who seek it. When considering the number of judges, and whether this is sufficient to render the required services, several factors need to be borne in mind, some of which have been adverted to above. Without anticipating what follows, the critical elements in assessing these challenges are socio-economic and political in nature. In a deeply divided society, in which the "wealth gap" grows by the year, the number of judges appears adequate to meet current demands: whether the judges are doing so efficiently and effectively remains subject to doubt, for the reasons to be outlined. We will start by reviewing the constraints in the process of appointing judges.

3. The Appointment of Judges

The legal regime governing the appointment of judges underwent substantial change after 1994, while the practical outcomes have been less clear-cut. Those negotiating South Africa's constitutional future in 1993 clearly recognised (Du Plessis and Corder 1994, Spitz with Chaskalson 2000) that the allocation of the judicial review power to the courts would require both strong entrenchment of judicial independence but also additional measures to ensure a degree of judicial accountability, over and above the traditional avenues (Cameron 1990) through which it is sought. Efforts to restore the legitimacy of the courts as a whole, after the battering that they had received in the popular mind through the executive-mindedness which characterised particularly the highest court during the states of emergency in the late 1980s (Ellmann 1992), were to be seen, among other measures, in the novel mechanism for the appointment of judges. To achieve the last, a Judicial Service Commission (JSC) was created, with its membership drawn from a relatively broad group of constituencies, and this model has been continued in section 178 of the Final Constitution.

Chaired by the Chief Justice, the JSC consists of representatives of the judiciary and of the advocates' and attorneys' professional bodies, a teacher of law, the Minister of Justice and Constitutional Affairs (Minister), ten serving members of Parliament (MPs) drawn from both Houses of Parliament, and four members designated by the President as head of the executive, after consultation with the leaders of opposition parties. Thus, of the 23 ordinary members of the JSC, fifteen are selected more for

[6] These statistics are extracted from its Annual Report 2014-2015. This body was formerly known as the Legal Aid Board. Its current legislative authority is to be found in the Legal Aid South Africa Act 2014.

their broadly political views than their standing as lawyers – being the ten MPs, the four Presidential nominees and the Minister – of whom at least twelve are likely to be loyal in the first instance to the ruling party in Parliament – being seven of the ten MPs, all four of the Presidential nominees and the Minister. Two additional members join the deliberations of the JSC on an ad hoc basis when specific appointments are being made viz the Judge President and Premier (or nominees) of the province in which an appointment is being made.

The JSC has a broad mandate, including advising the government "on any matter relating to the judiciary or the administration of justice" as provided for in section 178(5) of the Final Constitution. It is important to note that, except when it is considering the appointment of judges, the JSC sits without the ten serving MPs, reducing it in size to fifteen in such circumstances. Beyond judicial appointments, the JSC has a clear role to play in holding judges accountable for alleged misconduct, and in this respect it has a poor track record over the past decade or so, with some particularly prominent instances of its failure sufficiently vigorously to investigate and determine allegations of serious judicial misconduct, which have inevitably drawn negative public commentary (Corder 2014).

However, the function which most frequently propels it into the limelight is its role in the appointment of judges, provided for in section 174 of the Final Constitution. The procedure for filling vacancies on the Bench of all superior courts except the CC, for judicial transfers between courts – for example, when serving judges move from a High Court to the SCA or another appellate court – and for the appointment of administrative heads of court[7] is the same. The JSC secretariat calls for nominations and applications for any existing or anticipated vacancies, candidates fill in a detailed questionnaire relating both to their person and their professional experience, and a sub-committee of the JSC compiles a short-list of candidates to be interviewed. In a document entitled *Procedures of the Judicial Service Commission* (1995), this sub-committee is referred to as the "sifting committee", and defined in para 1.2 as an "ad hoc sub-committee of the Commission constituted from time to time". The whole JSC then gathers in April and October each year in Cape Town to interview, deliberate on and recommend those for appointment to the Bench. Section 174(1) of the Final Constitution provides that "[a]ny appropriately qualified woman or man who is a fit and proper person" may be appointed, except that South African citizenship is an additional criterion for those to be appointed to the Constitutional Court. To my knowledge, no non-South African has yet been appointed as a judge. In addition, and absolutely crucially, section 174(2) of the Final Constitution stipulates that: "The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed." The relationship between these two subsections has caused both the JSC and commentators much anxiety and generated considerable public controversy.

Once its deliberations are complete, the JSC sends its list of recommendations to the President who, as Head of State, must appoint those recommended "on the advice of" the JSC in terms of section 174(6) of the Final Constitution. The process for the appointment of justices to the Constitutional Court, which is set out in section 174(4) of the Final Constitution is significantly different, reflecting the immense authority of that court within the Final Constitution, as the final arbiter on the reach and distribution of the lawful exercise of power. Details of this much more consultative and drawn-out process are not relevant here: suffice to say that no amount of prescribed constitutional process can entirely eliminate the effects of political expediency in such appointments. Similarly, as provided for in section 174(3) of the Final Constitution, the appointment of the Chief Justice and his Deputy must be done

[7] Each of the High Courts, the Labour Appeal Court and the Competition Appeal Court is headed by a Judge President (JP), assisted by at least one Deputy Judge President, while the head of the SCA is styled its President. Collectively, the JPs and the President of the SCA are known as the Heads of Court, and they meet regularly, with the Chief Justice (CJ) as Chair, to discuss the management of the courts.

Oñati Socio-legal Series, v. 7, n. 4 (2017), 770-789
ISSN: 2079-5971

by the President (as Head of the Executive) after consulting the JSC (which interviews the candidates) and the leaders of parties in Parliament, and those of the President and Deputy President of the SCA after consulting the JSC.

Over the past twenty years of its existence, the JSC has developed a relatively efficient and fair means of operating in the context of appointments (Du Bois 2006). After something of a baptism of fire in October 1994, when it interviewed[8] 24 short-listed candidates for the first bench of the Constitutional Court in public session (Calland, dissertation for the LLM Degree by research. University of Cape Town, 1995), the JSC attempted to establish as a general practice that its interviews should take place behind closed doors. This was fiercely resisted inside and beyond the ranks of the Commission, and the JSC now generally operates as if it was a court of law when interviewing candidates for the Bench, meaning that members of the public and the media may attend the interview sessions, and report on them (although radio and television are generally not allowed to intrude), but not when it deliberates on its recommendations. The JSC conducted itself in an unpredictable and unacceptable manner in the period 2009 to 2014, in that it made several unjustifiable (indeed, on occasion, unlawful) decisions, but seems again to be on an even keel.

The quality of those appointed has, with limited exceptions, not drawn public or professional criticism and the JSC has succeeded in quite substantially transforming the demographic profile of the superior court judiciary as regards race, though less successfully as regards gender, as has been pointed out above. One specific aspect of the appointments process has drawn adverse comment, being the apparent requirement of the JSC in its approach in practice that anyone seeking appointment to judicial office must have served some time as an Acting Judge. Now the practice of appointing senior advocates (barristers) to the Bench for a period of one to three months, typically to replace a judge on long leave or to help reduce a backlog of pending trials, has been part of the administration of justice in South Africa for over a century. As well as serving the direct purpose of allowing the court concerned to keep pace with the demands for its services, it has allowed those who are likely at some stage to consider or be considered for judicial appointment a limited opportunity to experience judicial work, thus better informing any subsequent decision as to the person's suitability for judicial office, both from a personal as well as a collegial point of view.

There has been no significant controversy about such appointments, and the Final Constitution contemplates them in section 175 "(...) if there is a vacancy or if a judge is absent." Oddly enough, this is the reason given for acting appointments only in respect of the CC; in the absence of any such reason in relation to all other judicial appointments, it can be argued at least that the same reasons should apply. As regards process, the President must appoint acting justices to the CC on the recommendation of the Minister of Justice, who in turn must act "(…) with the concurrence of the Chief Justice and the President of the [SCA]". In terms of section 175 of the Final Constitution, all other acting appointments are made by the Minister of Justice, "(…) after consulting the senior judge of the court on which the acting judge will serve". The authority to appoint acting judges can potentially be used to speed up entry to judges' ranks by black or female lawyers and has been seen as a significant means to transform the Bench (Rickard 2001), but this has recently taken a negative direction. Some Judges President appear to be using acting judgeships in an unduly selective manner in which race plays a disproportionate part. In other

[8] Much media attention and public controversy was stimulated by these interviews and by the list of recommended candidates submitted to President Mandela. The interviews were carefully presided over by the then Chief Justice, Michael Corbett, who from time to time intervened to ensure the fairness of questioning of different candidates. He did this in accordance with a seven-page document, *Guidelines for questioning candidates for nomination to the Constitutional Court,* dated 26 September 1994, which sets out various selection criteria, as follows: independence, open-mindedness, integrity, and courage; diversity, empathy and sensitivity; intellect; fairness, judgment and perceptiveness; stamina and industry; and the (fostering of) vigorous internal debate.

instances lawyers continue in an acting judicial capacity for some years without tenured appointment, rendering them susceptible to external influences in order to try to please those in authority and making it very difficult for them to return to legal practice should they not be permanently appointed. As service in an acting capacity becomes more strictly required as a criterion for judicial appointment or elevation to an appellate court or perhaps to a more senior role in the management of the judiciary, so does concern for its potential misuse grow. This is an area of judicial appointability that needs to be monitored.

I have dealt with judicial appointments at some length as the imperatives and practices in this rather contested area clearly constrain the possibility of rapidly increasing judicial capacity. In other words, should it be deemed necessary to appoint a substantial number of additional judges to expand and improve judicial services (primarily for the reasons set out in the next section of this paper), finding suitable candidates to fill such posts may well prove difficult, both in absolute and relative terms. First, the pool from which demographically diverse women and men can be drawn is not large; second, there is often, especially at appellate level, a necessity for particular legal skills and knowledge, such as in shipping or intellectual property law, and there may be no black and/or female lawyers who are “appropriately qualified”.

One of the ways in which this shortage can be tackled is through judicial education, but regrettably in this respect the absence of political will and of judicial seriousness of purpose has conspired to make little difference until relatively recently. While there has been a thriving system of education and training in place for magistrates and lower court officials, including prosecutors, for many decades now, the legislation needed to establish an integrated judicial education programme, the South African Judicial Education Institute Act, was only adopted in 2008. The Institute (SAJEI) has struggled for resources, both human and financial, and has been plagued by an absence of inspired leadership since its foundation in 2009 (Mhango 2014).

One of the Institute’s relatively successful interventions has been to offer training programmes for “aspirant judges” drawn from the ranks of female practitioners, as well as black lawyers, in an attempt to increase the pool from which judges could be appointed. It has also begun to offer educational programmes in specialist areas not typically part of the attributes of such lawyers, like commercial practice. In this way, it is anticipated that there will, in the medium term, be ample candidates from across the racial spectrum and gender divides to justify the appointment of those who will further enhance the diversification of judicial ranks.

Another means of securing a diversified pool of appropriately qualified candidates for appointment to an expanded bench is for a shift in traditional briefing patterns to be engineered. Government is the single biggest user of legal services to defend itself in litigation or to pursue its own objectives against others, through civil litigation, and so it lies to some extent within the authority of the office of the State Attorney to allocate work to those from the under-represented groups. Although less traction can be gained in the private and commercial spheres, the several Bar Councils have put in place a number of measures to ensure a more equitable spread of work among its members, and to require senior counsel to choose their juniors with due regard to the gradual demographic transformation of the senior ranks of the advocates’ branch of the profession. These programmes are beginning to show dividends.

A further means of widening the pool of potential judges is by seeking appointees from outside the traditional source, and appointing judges direct from academic life (especially in an appellate court, where forensic experience is perhaps less relevant) and from the ranks of senior attorneys, magistrates or even public prosecutors. A number of such appointments has successfully been made, but this departure from convention has been slow to take hold in any significant manner.

In conclusion on the matter of judicial appointments, if one accepts that the demand for court services will begin to grow even faster, and that as a consequence more judges will need to be found, it will not be easy to fill such vacancies, due to the dearth of "appropriately qualified" candidates. The statistical sketch presented above shows that there is one superior court judge in office for approximately every 215 000 South African inhabitants. At present, the overwhelming majority of such people have no means of accessing the formal justice system in any meaningful way, but this inhibition may begin to ease as economic redistribution grows. Along with the trends outlined in the next section, this need for more judges may well become a reality within the next decade or so.

4. The Legalisation of Politics and the Political Seduction of the Law

The following socio-political realities have conspired to produce a context in which there is increasing resort to the courts to confirm hard-won gains or to attempt to arrest unconstitutional and/ or unlawful conduct or decisions by those in positions of governmental authority:

4.1. The rule of law and warnings about the growth of litigation

It was inevitable that the advent of the rule of law as a foundational value of South Africa's constitutional democracy, contained in section 1(c) of the Final Constitution, would lead to an increased resort to litigation as a means of entrenching basic rights, some of which had been eroded by autocratic government in the past, including the typical civil-political rights, such as the rights to freedom of expression, of movement, of association, and of religion, belief, and opinion and others which had never enjoyed protection, chief among them being the right to equality. In addition, the need to enforce the qualified grant of socio-economic rights and compliance with the processes laid down for the exercise of public power in the Final Constitution were both likely to generate considerable resort to judicial process. Some commentators warned against this trend, based on their experience of more litigious societies, where constitutional governance had been in place for a considerable time (Corder 1992, Asimow 1996).

Had this burgeoning of litigation to establish the principle of "limited government under law" taken place from the outset of constitutional democracy, there can be little doubt that the judiciary would have been hard pressed both to hear and decide efficiently all the disputes brought to them, and to adapt its processes and develop its jurisprudence to accommodate the flow of litigation. This would also too quickly have elevated the "political" profile of the judiciary both in society and in relation to the executive and legislature, and could have caused considerable political discomfort, and even given rise to a desire by the other branches of government to take down the courts a notch or two.

It should be noted that there is no specific mention of the doctrine of the separation of powers in the Final Constitution, although the CC has frequently held both that the doctrine is inherent in the structure of government laid down in the Final Constitution, and that it should be developed through a process of progressive interpretation (*De Lange v Smuts NO and Others* 1998, *Glenister v President of the Republic of South Africa* 2009). This awareness of an appropriate level of mutual deference between the different branches of government underlies many of the judgments of the courts, and is frequently expressed (see, for example, paragraphs 43-45 of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004). At the same time, the CC has sought not to stifle those who challenge the constitutionality of the exercise of public power through the courts, by seldom making orders of costs against even unsuccessful litigants, provided that the challenge has served the public interest.

Fortunately, with the benefit of hindsight, the initial vibrancy of political activity and the spirit of compromise immediately before and after the constitutional transition and the inspirational leadership displayed by government in the period 1994 to 2002

or so delayed this tendency to litigate. In particular, the leadership provided by President Mandela in fully accepting the judgment of the CC, even when he had been found wanting, for example, in the matter of *Executive Council Western Cape Legislature v President of the Republic of South Africa* 1995 provided a striking source of legitimacy for the review power of the courts. In their turn, the courts, led by the CC, displayed a sophisticated and balanced attitude to the relationship between politics and the law (Roux 2013),[9] which lessened the friction which may have arisen between the judiciary and the executive.

4.2. Litigation in pursuit of socio-economic rights

The "honeymoon" period began to erode, however, as some constitutional promises were slow to be realised. So those frustrated by the lack of realisation of socio-economic rights in the Bill of Rights began turning to the courts to achieve what popular struggle was unable to do, in a series of prominent cases: so we see a successful challenge to state obduracy in recognising the medical and scientific basis for the treatment of HIV/AIDS, particularly in relation to mother to child transmission of the virus, easily preventable through the administration of anti-retroviral drugs (*Minister of Health v Treatment Action Campaign (no 2)* 2002); several attempts to ensure the provision of basic shelter and to prevent the eviction of poor tenants (*Government of the Republic of South Africa v Grootboom* 2001, *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008); to gain access to chronic emergency health care (*Soobramoney v Minister of Health, Kwa-Zulu Natal* 1998); to gain access to water (*Mazibuko v City of Johannesburg* 2010); to electricity (*Joseph v City of Johannesburg* 2010); to the provision of social welfare payments (*Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004); and so on.

If anything, this sphere of litigation is set to increase in its frequency in all divisions of the superior court system, placing the judiciary under considerable pressure to interpret the rights at stake against the qualifications built into the language of their grant, and especially against the background of a declining economy and a frequently inefficient and corrupt executive and public administration.

4.3. Judicial review of the unlawful exercise of public power

Those acted against unlawfully in administrative law terms have, since the foundation of organised government, sought the protection of the courts to invalidate the exercise of public power or the performance of a public function. Before 1994, this was achieved by the well-known means of review through the high courts, but in the democratic era the scope of review has been raised several levels, both by the adoption of a set of rights to just administrative action, contained in section 33 of the Final Constitution and by its constitutionally-mandated statute, the Promotion of Administrative Justice Act (PAJA) 2000. Since 2000, the courts have developed a parallel set of review grounds (under the mantle of the "principle of legality") to test the lawfulness of "executive action", or the exercise of public power which does not comply with the narrow and complex definition of "administrative action" in section 1 of PAJA (*Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000).

Thus the scope of the review jurisdiction of the courts has been considerably widened beyond the traditional common-law grounds of review, to include review for reasonableness (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004), procedural fairness as a requirement of the rational exercise of public power

[9] See, for example, *Azanian Peoples Organisation v President of the Republic of South Africa* (1996), in which legal arguments questioning the critical role of the Truth and Reconciliation Commission as part of the constitutional settlement were rejected and the Commission was endorsed as constitutionally compliant, despite clear discomfort expressed in the judgment.

Oñati Socio-legal Series, v. 7, n. 4 (2017), 770-789
ISSN: 2079-5971

(*Democratic Alliance v President of the RSA* 2013, *Albutt v Centre for the Study of Violence and Reconciliation* 2010), the giving of reasons as part of the prerequisites for rational conduct (*Judicial Service Commission v Cape Bar Council* 2013), the review for rationality of decisions to prosecute or not (*National Director of Public Prosecutions v Freedom under Law* 2014), and so on. Perhaps the highest-profile such challenge affecting the head of state was the recent review of the authority of the Public Protector (the title given to the ombud appointed in terms of sections 182 and 183 of the Final Constitution) to make binding recommendations for the remedial action necessary when unlawful conduct had been found to have occurred, as a result of which President Zuma was compelled to pay back several millions of Rand by which he had been improperly enriched through improvements to his private dwelling (*Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016). Once again, the sharp increase in this form of litigation adds to demand for the services of the courts, and places a strain on the judicial capacity to hear disputes and deliver judgment, not to mention their increased exposure to criticism for their "intrusion into political" terrain.

4.4. Testing Legislative Authority to act

As the dominant governing party (with 62% of the National Assembly, and controlling eight of the nine provincial governments), the African National Congress (ANC), began to misuse its parliamentary and other powers to bolster its position, more especially against political groupings opposed to it or who had broken away from it, such adversaries turned increasingly to the courts, often in frustration at the failure of political action through community or popular mobilisation. Even without such action, political parties have frequently resorted to litigation almost as a first step when faced with governmental omission or alleged abuse of power. Details of these cases need not be recounted here, but they have among others questioned the authority of the Speaker of Parliament, the Parliament's role in holding accountable the national broadcaster, and the State's refusal to grant a visa to the Dalai Lama to visit the country (*Doctors for Life International v Speaker of the National Assembly* 2006, *Mazibuko v Sisulu* 2013, *Buthelezi v Minister of Home Affairs* 2013, *South African Broadcasting Corporation v Democratic Alliance and Others* 2016).

This tendency has been described as "lawfare"[10] waging war through the law, and it clearly fits into the idea of the "legalisation of politics and the political seduction of the law" (Corder 1992, Asimow 1996). The question is whether the political formations have too easily succumbed to the temptation of going to court before trying to achieve a political solution, lured by the prospect of quick and easy success, or whether the resort to court represents the last avenue open to ensure constitutional compliance. Either way, the judiciary is tested, both in terms of their capacity to cope with the manifest increase in case-load, and in terms of their nuanced approach to the matter of appropriate deference to the constitutional limits of legislative and executive authority.

4.5. Combatting Corruption in Government

As instances of manifest corruption have been exposed, frequently in public procurement processes and increasingly involving those in high levels of political authority, notoriously even the President , so have non-governmental organisations, commercial enterprises and public-spirited individuals sought judicial intervention to set aside such corrupt conduct and practices. Instances are sadly too numerous to recount fully here. Perhaps the best representative example is to be found in the persistent attempts by an individual businessman to achieve legislative and executive

[10] This term was coined to describe the "State's use of its own rules (…) to impose a sense of order… by means of violence rendered legible, legal and legitimate by its own sovereign world (…)." (Comaroff and Comaroff 2006, p. 30). I am using it here both in that sense and also to apply when the process is turned against the State by its opponents.

compliance with the demands of the founding values of the Final Constitution, legislative requirements, and South Africa's obligations under international treaties and customary law (*Glenister v President of the Republic of South Africa and Others 2*011).

The collective impact of all these developments has placed the superior courts under tremendous strain, both because they have struggled to keep pace with the demand for court time and because government has typically pursued repeated appeals to postpone the inevitable, almost always at taxpayers' expense. The strain has furthermore manifested in the role of the judges becoming contested in the party political terrain, with leading members of government not hesitating to attack judges for exceeding their constitutional mandate under the separation of powers. Judges have thus had to walk a very fine line between upholding the letter and spirit of the Final Constitution and the law, while showing due deference (as respect) to the legislature and executive branches. In my view, they have mostly succeeded admirably in this respect, but the temptation of government nevertheless to seek to influence the judicial process is strong.

Two obvious areas in which the executive could make life difficult for the courts is by indirectly limiting their budget, and by seeking a more influential role in judicial appointments. So while the demand from political opponents and those aggrieved by government action for judicial intervention increases rapidly, so could the number of judges be limited and the quality of their decisions be undermined. Both such factors naturally relate directly to the number of judges needed on the bench.

5. Concluding Questions

How likely is it that the demand for judicial services will continue to rise?

Will such demand be satisfied by the appointment of more judges, or by courts working more efficiently?

If so, will financial and infrastructural resources be provided for a greater number of judges?

Will there be sufficient candidates of sufficient quality and independence of spirit to show fidelity to the Final Constitution?

How can the legalisation of politics be arrested in a constitutional democracy based on limited government under law?

Will the growing resort to litigation not tempt the dominant party to undermine judicial independence directly?

This series of questions is incapable of firm and clear answers. As this paper is being finalised (October 2016), South Africa finds itself amidst a frenzy of litigation attempting to resolve a large range of essentially political issues. There seems no end in sight for this development, so long as the current holders of political power refuse to account for their misconduct and abuse of lawful authority. While the local government elections of mid-2016 showed some erosion of urban support for the ANC, it remains overwhelmingly in control of most of the formal levers of public governance and power. As repeatedly argued above, this places the courts at the centre of political contests, which is both a tribute to their legitimacy as well as endangering their independence and ultimately judicial impartiality.

President Zuma is a masterful public orator. Driven into a laager by the gradually tightening noose of judicial decisions which have found his actions to be both suspect and constitutionally flawed, he has resorted to populist rhetoric, as follows: "There's no longer any space for democratic debate. The only space there is [is] for court arguments by lawyers. That is not democracy".[11] This sentiment encapsulates the

[11] Reported by Reuters (2016), spoken at a rally in Kwa-Zulu Natal province.

Oñati Socio-legal Series, v. 7, n. 4 (2017), 770-789
ISSN: 2079-5971

major source of pressure on the capacity of the courts in South Africa over the next decade or two. At present, there are sufficient judges in place, and of the required quality of independence and impartiality, to meet this demand. The sustainability of this situation is, however, subject to considerable doubt. Close monitoring of this aspect of judicial service is required.

References

Asimow, M., 1996. Administrative Law under South Africa's Final Constitution: The Need for an Administrative Justice Act. *South African Law Journal*, 113, 613-634.

Boulle, L., Harris, B., and Hoexter, C., 1989. *Constitutional and Administrative Law: Basic Principles*. Cape Town: Juta.

Cameron, E., 1990. Judicial accountability in South Africa. *South African Journal on Human Rights*, 6 (2), 251–288.

Comaroff, J. and Comaroff, J. eds., 2006. *Law and Disorder in the Postcolony.* Chicago University Press.

Corder, H., 1984. *Judges at Work*. Cape Town: Juta.

Corder, H., 1992. Lessons from (North) America (Beware the 'Legalization of Politics' and the 'Political Seduction of the Law'). *South African Law Journal*, 109 (2), 204-224.

Corder, H., 1994. Towards a South African Constitution. *Modern Law Review*, 57 (4), 491-533.

Corder, H., 2014. Judicial Accountability. *In:* C. Hoexter and M. Olivier, eds. *The Judiciary in South Africa*. Cape Town: Juta, 200-244.

Du Bois, F. 2006. Judicial selection in post-apartheid South Africa. *In:* K. Malleson and P.H. Russell, eds. *Appointing Judges in an Age of Judicial Power*. University of Toronto Press Incorporated, 280–312.

Du Plessis, L. and Corder, H., 1994. *Understanding South Africa's Transitional Bill of Rights.*_Cape Town: Juta.

Dugard, C.J.R., 1978. *Human Rights and the South African Legal Order*. Princeton University Press.

Dyzenhaus, D., 1991*. Hard Cases in Wicked Legal Systems*. Oxford: Clarendon Press.

Ebrahim, H., 1998. *The Soul of a Nation: Constitution-Making in South Africa*. Cape Town: Oxford University Press.

Ellmann, S., 1992. *In a Time of Trouble*. Oxford: Clarendon Press.

Forsyth, C., 1985. *In Danger for their Talents*. Cape Town: Juta.

Judicial Service Commission, 1995. *Procedures of the Judicial Service Commission*. (WHT29/06/95).

Klare, K., 1998. Legal Culture and Transformative Constitutionalism. *South African Journal on Human Rights*, 14 (1), 146-x188.

Legal Aid Board of South Africa, 2015. *Annual Report 2014-2015* [online]. Available from: http://www.legal-aid.co.za/wp-content/uploads/2015/10/Legal_Aid_AR.pdf [Accessed 13 September 2017].

Meierhenrich, J., 2008. *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000.* Cambridge University Press.

Mhango, M., 2014. Transformation and the Judiciary. *In:* C. Hoexter and M. Olivier eds., *The Judiciary in South Africa*. Cape Town: Juta, 71-73.

Olivier, M., 2014. The Magistracy. *In:* C. Hoexter and M. Olivier, eds. *The Judiciary in South Africa*. Cape Town: Juta, 319-354.

Reuters, 2016. I'm not afraid to go to jail, says Zuma. *Independent On Line*, 5 November [online]. Available from: https://www.iol.co.za/news/politics/im-not-afraid-to-go-to-jail-says-zuma-2087164 [Accessed 13 September 2017].

Rickard, C., 2001. Acting judges won't be scrapped from SA legal system-- despite UN criticism. *Sunday Times*. Johannesburg, 28 January.

Roux, T., 2013. *The Politics of Principle*. Cambridge University Press.

Sachs, A., 1973. *Justice in South Africa.* London: Chatto-Heinemann.

South African Government, 2015. *South African Yearbook 2015/6.* Pretoria: Government Communication and Information System.

Spitz, R. with Chaskalson, M., 2000. *The Politics of Transition.* Johannesburg: Witwatersrand University Press.

Statistics South Africa, 2012. *Census 2011.* Statistical release. P0301.4. Pretoria: Statistics South Africa.

Case Law

Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA293 (CC).

Azanian Peoples Organisation v President of the Republic of South Africa 1996 (4) SA 671 (CC).

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC).

Buthelezi v Minister of Home Affairs 2013 (3) SA 325 (SCA).

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

Democratic Alliance v President of the RSA 2013 (1) SA248 (CC).

Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC).

Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly [2016] ZACC 11.

Executive Council Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA877 (CC).

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

Glenister v President of the Republic of South Africa and Others 2011 (3)SA 347 (CC).

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC).

Joseph v City of Johannesburg 2010 (4) SA 55 (CC).

Judicial Service Commission v Cape Bar Council 2013 (1) SA 170 (SCA).

Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) SA 505 (CC).

Law under Stress—South African Law in the 1980s: First Published as Acta Juridica 1987, 1988 Cape Town: Juta.

Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC).

Mazibuko v Sisulu 2013 (6) SA 249 (CC).

Minister of Health v Treatment Action Campaign (no 2) 2002 (5) SA721 (CC).

National Director of Public Prosecutions v Freedom under Law 2014 (4) SA 298 (SCA).

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg 2008 (3) SA 208 (CC).

Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC).

Soobramoney v Minister of Health, Kwa-Zulu Natal 1998 (1) SA 705 (CC).

South African Broadcasting Corporation v Democratic Alliance and Others 2016 (2) SA 522 (SCA).

Statutes

Constitution of the Republic of South Africa, 1993.

Constitution of the Republic of South Africa, 1996.

Constitutional Seventeenth Amendment Act of 2012.

Legal Aid South Africa Act, 39 of 2014.

Privy Council Appeals Act, 1950.

Promotion of Administrative Justice Act (PAJA), 3 of 2000.

Republic of South Africa Constitution Act, 110 of 1983.

Republic of South Africa Constitution Act, 1961.

South Africa Act, 1909. 9 Edward VII.

Superior Courts Act, 10 of 2013.