Is South Africa Experiencing some Threat to Judicial Independence or Necessary Teething Pains?

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Abstract

The rule of law is a standard measure of the extent to which government upholds constitutionally and subjects itself to the laws of the land as well as international law. Its reigns over government, protecting citizens against arbitrary state action and protects individual/private interests. The rule of law ensures that all citizens are treated equally and are subject to the law rather than to the whims of the powerful. Law is applied indiscriminately irrespective of race, gender, religion or political persuasion. The independence of the judiciary is inextricably linked to the rule of law. In order to have a proper judiciary there is a need of technical competence, commitment to sound ideas and institutional (and personal) independence. The judiciary should be politically insulated from the legislative and the executive power. That is, courts should not be subject to improper influence from other branches of government, or from private or partisan interests. It is therefore, the purpose of this article, to explain the concept of judicial independence and its basis, give a background of complaints of possible threats of judicial independence in South Africa and determine whether judicial independence is threatened in South Africa.

Keywords: judiciary, independence, threats, politics, South Africa

1. Introduction

"If judges were angels, there would be no problems of judicial accountability" (Kosar, 2010)

One of the core characteristics of the civil and modern world is the existence of the rule of law. The rule of law and adherence thereto serve as the core that holds societies together by keeping authorities accountable for the actions and decisions they make. Equally they hold individual community members accountable to one another and authorities by providing a set of rules that govern conduct. In the Hobbesian sense, (a detailed discussion of this approach to jurisprudence is contained in Hobbes's seminal work *Leviathan*. See Tuck among other notable commentaries and analysis of the Hobbesian approach). The necessity of this arrangement is obvious as human beings would resort to their natural state in the absence of such standard rules or in the absence of an acceptable authority vested with powers to enforce rules that govern conduct.

The above arrangement is often seen through the theoretical lens of the rule of law. While there is no general consensus as to what constitutes the rule of law, there are some end goals that the rule of law strives for and their presence or absence is a good indicator of a country's adherence to and respect for the rule of law. Among those are: government bound by law, equality before the law, law and order, predictable efficient justice and lack of state violation of human rights. (Michael et al (2008), p.13) The essence of these end goals is the existence of laws and rules that govern human conduct coexisting with a legitimate state that has credible and legitimate instruments to enforce such laws and rules and, importantly, there being actual enforcement in case of violation.

South Africa, like many countries in the world, aspires for the existence and protection of the rule of law. She has legitimate and credible institutions and transparent processes that seek to ensure both the adherence to the rule of law and enforcement where such adherence is lacking. This can be seen in the elaborate constitutional arrangement of the country which, among others, provides for the existence of a justice system that is constitutionally directed to ensure that justice is availed to all with equality before the law as one of its key attributes. Before the courts, true to the demands of

the rule of law, the playing field is leveled and access is guaranteed on one basic condition, namely being a person. However, the rule of law is a concept that has to be jealously protected because—as history teaches—it is often threatened or even remodelled where a political authority sees it as a hindrance to its goals.

This article assesses the rule of law in South Africa by focusing on one of its core tenets, namely judicial independence. It is generally accepted that the existence of an independent judiciary is a condition for the existence of the rule of law. Put differently, the rule of law is inconceivable in the absence of an independent judiciary. The article starts by asserting that South Africa is a country that subscribes to the rule of law, deals with some emerging tendencies that affront the existence of the rule of law with a specific focus on judicial independence and concludes with a discussion of an ideal approach to judicial independence within a constitutional democracy. It calls for a balancing act between judicial independence and judicial accountability premised on the notion that the one cannot survive without the other.

2. Background Giving Rise to Complaints of Threat to Judicial Independence

Recent reports in South Africa have shown that there are those among the country's citizens who believe that the independence of the judiciary—by extension the rule of law—is under threat. These include political parties and members of civil society. Their views and opinions are not idle or founded in a vacuum. They were informed by a series of developments that took place in the country within the past ten years or so. One such event was the decision by the National Prosecuting Authority (NPA) to prefer criminal charges against the then deputy president of the African National Congress (ANC), Jacob Zuma. Some voices, especially from some leaders of the ANC, suggested that the criminal justice system was being used to deal with political issues. This suggested that one faction of the ANC was using the criminal justice system against Jacob Zuma as a way to reduce his chances of ascension to a higher political office. Some even wished for a political intervention from the office of the President to block the criminal justice process. One of the leading figures in the ANC, Ngoako Ramatlhodi, (See an article by the Sunday Times that reports Ramatlhodi as having said that people like Zuma and Tony Yengeni were being charged for nothing.

<http://www.sundaytimes.co.za/articles/article.aspx?ID=ST6A209384>).

Reportedly blamed the then president of the ANC and the country, Thabo Mbeki, for dividing the ANC and engineering or supporting charges against Zuma and other members of the ANC.

The charges against Jacob Zuma were eventually withdrawn by the NPA amidst reports that there had been political interference. This decision irked many people, especially those in the opposition political parties. The Democratic Alliance (DA), for instance, saw this as evidence of political meddling and instituted a court action that challenged the validity of the decision of the NPA. Related to this event was the removal from office of the former Director of Public Prosecutions, Vusi Pikoli. He had been suspended by the then President Thabo Mbeki and eventually removed from office by his successor, President Kgalema Motlanthe. The suspension and eventual removal from office of Vusi Pikoli stemmed from his refusal to heed the President's advice to delay the arrest of the then national commissioner of police, Jackie Selebi. Another casualty of this wrangling was South Africa's elite crime investigation unit commonly known as the Scorpions. (The official name of the unit was Directorate of Special Operations) This unit was disbanded and replaced with an anti-corruption unit commonly known as the Hawks. This move was received with skepticism and suspicion that it was aimed at putting the investigation unit under political control. The independence of the Hawks was eventually challenged in the Constitutional Court which ruled that the Hawks do not have enough protection against political influence and ordered a remedial action in that regard. (*Glenister v President of the Republic of South African and Others*, (2010)). Closer to the judicial independence home were three related matters. The first was an unsuccessful attempt by the President to extend the term of office of the then Chief Justice, Sandile Ngcobo. Sandile Ngcobo's term of office was to expire on the 14th August 2011 and the President had requested him to continue in office. This decision was challenged in the Constitutional Court where the legislation that authorized the President to take this step was declared unconstitutional as it violated the principle of judicial independence. (*Justice Alliance of South Africa & Others v President of the Republic of South Africa & Others*, (2011)). The second, and closely related to the first, was the President's nomination of Mogoeng Mogoeng as the Chief Justice. Opposition parties and some members of civil society challenged this nomination as they saw it as some manifestation of an unbridled power of the Executive (therefore political authority) to interfere with the judiciary and its independence. Arguments provided for the objection to the nomination of Mogoeng Mogoeng could be summed up as suggesting that he was not nominated in the interests of the judiciary but that of political convenience.

The last, and most important for the purposes of this discussion, is the mooted review of the courts and their judgments. The Department of Justice and Constitutional Development (DoJ&CD) announced that it is about to conduct a review of the courts and their judgments with a view to assessing their contribution towards the goals of the country. This

decision has—to say the least—been accepted with skepticism and suspicion by opposition parties and some in civil society. Such suspicion and skepticism are hardly surprising given particular events that preceded this decision. Among many complaints against judges, the Constitutional Court judges have been criticized of being counter-revolutionary. (Sachs, 2009) Courts, in general, have also been criticized of opening themselves up to be a venue for legislative process by parties that failed to gain political power through elections. (The essence of the debate between or about the judges and politicians is summed up in an article by Terblanche, 2011. Assault on the Judiciary – Dangerous Times. www.leadershiponline.co.za/articles/reports/1603-judiciary).

3. What is Judicial Independence and When is it Threatened?

The discussion above shows that judicial independence has become a site of battle between those seeing it as a hindrance to progress in line with the democratic ideals of the country, on the one hand, and those seeing it as a useful avenue to manage political power and advance democratic ideals, on the other. Unfortunately, the two camps seem to pitch and express their views in the extreme with elements of exaggeration on both sides. In order to assess whether judicial independence is under threat or not, it may be helpful to consider two related questions, namely what is judicial independence and when is judicial independence threatened? (Michael (2008) sees three key components as necessary for the existence of judicial independence. They are the transparency and merit-based appointment of judges, judges' security of tenure and adequate resourcing of the judiciary. (p. 68) This is supported by the provisions of the United Nations Basic Principles (This instrument was adopted by the United Nations General Assembly in 1985), on the Independence of the Judiciary which—as the name suggests—is an instrument that contains guidelines for judicial independence. As Guarneri (2010) puts it

Judicial independence is often considered the simple by-product of a set of legal provisions aimed at wholly insulating the judge not only from state influence—usually the executive—but from the external environment: the more insulated the judge, the more independent she is deemed to be. (p. 234)

Using this definition as a measure, South Africa and her judges can be said to be enjoying judicial independence. However, as will be discussed later herein, the mere presence of the three components cannot be said to be sufficient as evidence of judicial independence. It is submitted that judicial independence is threatened when one or more of the components discussed above is challenged or negatively affected. Thus if the Executive were to decide to abolish judges' security of tenure, for instance, such action would constitute a threat to judicial independence. The reasoning behind this is astonishingly simple and logical. A judge who is conscious that the Executive has the power to terminate his/her employment is likely to take such reality into consideration when adjudicating. This point needs no elaboration if one considers that the state (through its many functionaries) is often a party to legal disputes judges are called upon to adjudicate.

In real life, however, issues are never as clear cut and straight forward. There exist subtle ways in which judicial independence can be threatened. These include filling of judicial positions with individuals politically aligned to the ruling elite, promise of ascension to higher office for those who find for the ruling elite and/or the state in their judgments, moral sanction and/or public ridicule for those who find against political elite, the use of state resources by those in power to distort a factual picture presented to the judge, etc. As it is submitted that South Africa is compliant—fully—with the requirements for the existence of judicial independence on the basis of the above guidelines, the focus below is on the subtle manifestation of threat to judicial independence.

4. Politics and Justice: The Unholy Alliance

It is a foundational principle in many democracies—if not all—that there should exist a separation of powers among the three arms of government. These arms of government have their roots in political power that is usually determined by popular vote. With South Africa as an example, the simple picture manifests in the citizens electing their preferred leaders (i.e. the legislature) who, in turn, elect their executive (i.e. the president who appoints cabinet; the executive). The President is vested with authority to appoint judges (the judiciary). From this picture it can be gathered that there cannot be any reasonable hope for a purely independent judiciary and it is debatable if same is necessary or advisable. The President of South Africa has a right to nominate and appoint the country's chief justice over and above his power to appoint judges. To bridle the obvious potential for abuse, the exercise of this power is regulated by specific legislative provisions. The apparent conflict between the executive's exercise of its power and the independence of the judiciary confronted South Africa in 2011 when the President attempted to extend the tenure of the Chief Justice in terms of the provisions of Section 176 of the Constitution. (See judgement in *Justice Alliance of South Africa & Others v President of*

the Republic of South Africa & Others (2011) *supra*)

The ability of the courts to intervene where there has been some illegality by the Executive has been shown in a number of cases. One of those cases is that of the Democratic Alliance v The President of the Republic of South Africa and Others (2011), the question for decision was whether the President, in appointing Menzi Simelane in 2009, complied with the prescripts of the Constitution and section 9(1) of the National Prosecuting Authority Act, (National Prosecuting Authority Act of 1998). It was held that the decision by the President to appoint an NDPP constitutes administrative action, subject to review in terms of the Promotion of Administrative Justice Act (Promotion of Administrative Justice Act of 2000), and because the President did not make an objective assessment of Menzi Simelane's fitness for office, his decision falls to be reviewed and set aside. The appeal succeeded on the basis that the President's decision is inconsistent with the Constitution and invalid. In *Masetlha v President of the Republic of South Africa and Another* (2008), the issue was the President's power to appoint and terminate the services of the head of the National Intelligence Agency. The Constitutional Court's view was that the power to dismiss by the President is constrained by the principle of legality which is implicit in the constitutional ordering. Firstly, the President must act within the law and in a manner consistent with the Constitution. He, therefore, must not exercise the power conferred to him arbitrarily. Secondly, the decision must be rational and related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law. The judiciary, undoubtedly, is vested with powers to keep the exercise of power on the part of the other spheres of government in check as evident from the outcomes in the foregoing cases.

However, there remains a subtle way in which this formula of power relations and regulation can be subverted. A collection of essays, edited by Waltman and Holland (1988), sketches developments in a number of countries regarding judicial function and operation of courts and, to paraphrase, points out that law and politics are inherently partners in a democracy. This is true in countries such as the United States of America, Canada, Germany and Australia. The common denominator appears to be that judges are appointed and not elected through popular vote. And they are appointed by those who have ascended office through popular vote.

It follows, therefore, that those with political power are vested with ample capacity to influence the judiciary and, for obvious reasons they would seek to mould such judiciary into an instrument sympathetic to their political objectives. Common sense and logic dictate that no president would prefer or appoint a judge or chief justice who is opposed to his/her political goals. This, it is submitted, becomes a contestation for the soul of justice. The type of justice that flows from the courts of a country in a particular period in history—unsurprisingly—reflects the political slant and political power base of such period. (South Africa is a good example in this regard. The pre-1994 jurisprudence represents the apartheid political ideology of that time while the post-1994 one represents the ethos of the constitutional democracy attained in 1994. For a further discussion of the pre-1994 role of judges, see Andrews, P. (2010) <http://ssrn.com/abstract=1628292>.)

While there is no hope of divorcing the judiciary from politics—for that is the core of a democratic dispensation—there persists a possibility that political patronage can negatively impact on the judiciary and its independence. This becomes particularly significant given that in many countries where there are more than one judge involved in a case, the decision of the court is arrived at through voting. A prudent political party, therefore, would seek to increase a number of sympathisers to its ideals in such a court. Burbank (2007), in a different context, described such a tendency as "... court packing as a means of ensuring decisions in accord with the preference of the dominant coalition". This is particularly true if one considers the process that a presiding officer or presiding officers follow in arriving at a decision. In his recent book, Judge Albie Sachs, details the process that the Constitutional Court of South Africa follows in deciding a case and his particular personal process before arriving at a decision. He states, among others, that decisions that he arrived at while sitting on the bench were not necessarily a result of intense legal labour but a result of particular considerations that influenced his thinking. In his classic way, he underscores this point by asserting that "Every judgment I write is a lie" (Sachs (2009) as a statement he made at his lecture at the University of Toronto. (p. 47) Elsewhere in the same book, he further states

When deciding whether a ban on the sale of liquor on Sundays, Christmas and Good Friday violated the right to freedom of religion, four members of the Court felt that freedom of religion was not infringed. Three others held that it was violated because the religious holidays of Christianity alone were being respected. **My mind was eventually made up in a most unusual way: by seeing a hurt look on the face of my law clerk, Fatima. When I asked her what the frown was about, she pointed out that what appeared to be trivial could be deeply injurious when it formed part of a wider pattern of exclusion. So I wrote a separate judgment, supported by a colleague, holding that the state was indeed limiting religious freedom by endorsing a particular religion, however trifling the endorsement might seem.** On the facts of the case, however, I held that the limitation was justifiable for achieving the meritorious secular objective of cutting down on alcohol abuse on double days of rest. (p. 156) The emphasis, in bold, is not in the original

text but added by authors for emphasis.

The above statement by Judge Sachs reveals how fluid the judicial decision-making process is in the Constitutional Court of South Africa. The judge's encounter with his law clerk influenced his decision on the outcome of a case outside the legal wrangling that takes place in the court and the voluminous law books in his chambers. These were used to justify the decision made on the basis of other considerations by the judge. It is on this basis—the absence of certain and objective measures that prescribe the decision-making process—that the individual outlook and beliefs of a judge are important. This informs, and perhaps justifies, the political interest as to who among citizens should be trusted with that responsibility. That becomes a political decision and, eventually, a decision in the hands of the ruling political elite. It is within the context of this unholy alliance between politics and justice that the current debates regarding the threatening or otherwise of the judicial independence in South Africa should be seen. It is a debate about the brand of justice that is necessary and how better to achieve it. On the one side, the ANC and its allies fight for the transformation of the judiciary and berate any moves that, in their view, affront this goal. On the other hand, some opposition parties—chief among them the DA—fight for the retention of the status quo or retention of the basic tenets of the rule of law. The judiciary is caught between the two and has, thus far, managed to withstand undue pressure to be swayed one way or the other.

The one important form in which the politicising of the judiciary can be seen is in the composition of the Judicial Services Commission (JSC). (Of the 23 members of the Judicial Services Commission, 15 are political nominees while only 8 represent the legal fraternity. (See Terblanche (2011) www.leadershiponline.co.za/articles/reports/1603-judiciary) This body—entrusted with the screening of potential judges—is comprised of a significant number of politicians. Is it far-fetched a notion then—for argument's sake—if a potential judge were to make a political calculation to better his/her chances of appointment to the bench by impressing the dominant political party given that nomination is done through voting? What—again for argument's sake—would stop a potential judge from making campaign promises to the political elite? The leader of the DA, Helen Zille, has raised this point sharply. She sees the role of the JSC as being subverted by political interference in the form of the ANC saturating the body with people that the Executive can control either directly or indirectly. Arguing that the Deputy Chief Justice, Dikgang Moseneke, has been by-passed for the position of the chief justice on several occasions for having stated that he would not serve the needs of the ANC; she suggests that future judges may be intimidated into impressing the Executive. Referring to Dikgang Moseneke and the consequence of his remark, she argues

This innocuous and self-evident comment elicited a counter attack from the ANC's National Executive Committee, and is one of the reasons that Judge Moseneke has consistently been by-passed for promotion. And it has not escaped the attention of advocates and judges looking to advance their careers on the bench. (See the full text of Helen Zille's statement at www.polity.org.za/article/da-statement-by-helen-zille-democratic-alliance-leader-on-an-independent-judiciary-12092011-2011-09-12.)

For the current discussion it is not necessary to take this point any further save to observe that there are no water-tight safe-guards to prevent the undesirable and/or undue intrusion of politics into the judiciary.

5. Is Judicial Independence Threatened in South Africa? The Diagnosis

It is fair to state that there is nothing wrong with the role played by the political elite from a democratic point of view. Hence this is a practice throughout the world with different modifications in different countries but the core principle remaining the same. The core principle is that those who have been elected to political office by the voters of a particular country have a right to appoint members of the judiciary. There is also no evidence of the South African judiciary being unfairly subjected to political influence. On the contrary, the judiciary has proved to stick to their guns even where the highest political office in the country has been a party to a dispute. The judiciary has also not shied away from declaring pieces of legislation unlawful where justifiable. (A pertinent example in this regard is the case of *Justice Alliance of South Africa & Others v The President of the Republic of South Africa & Others* (2011) where legislation that enabled extension of the Chief Justice and other judges' tenure of office was found to be unconstitutional.) Based on this observation, South Africa is doing well in terms of judicial independence.

If this be so as is submitted to be the case, then what irks South Africa and her citizens? Why are people worried about the independence of the judiciary? There are a number of organisations and individuals who are worried about the independence of the judiciary being threatened or even the whole constitutional set-up being at risk of being undermined or eroded. Why?

It would seem that the debate about the independence of the judiciary is a manifestation of some consequences of romanticism and false sense of security that the country lulled herself into at the dawn of democracy. For varied (or even justifiable) reasons, after attaining political power no radical transformation of the justice system took place. Progressive

transformation of the justice system was preferred as opposed to a complete overhaul thereof. This practically meant that those who were in judicial office before 1994 were allowed to remain in that office with very minimal interference in their approach to justice and its application as well as the general brand of justice they were used to meting out. Their tools of trade (i.e. their main sources of law) remained the same and were only to be subjected to constitutional scrutiny for alignment with the ethos of the new democratic order. During the first ten years of democracy, there was very little criticism of the judiciary outside the borders of transformation which often seemed restricted to appointment of black and female judicial officers. It would appear that that period represented general contentment, or disinterest at least, with the inward functioning of the court machinery. Judges were allowed to apply the law as they know best with minimal political interference and/or public outcry. At the same time the transformation of the judiciary (in the appointment sense) was proceeding steadily.

The debate and attention to the judiciary emerged in the 2000s. It originated, mostly, from the marginalized sections of the ANC. It was directly linked to the removal from the office of deputy presidency of the country of Jacob Zuma. His supporters held the view that the criminal justice system was being used to settle political scores. In the main, the blame was placed on the shoulders of the Scorpions—by extension the NPA—for being used by politicians to investigate and charge Jacob Zuma. The NPA also did not help matters by making a series of decisions that gave credence to this belief. Chief among those blunders was the decision to announce their intention to charge Zuma immediately after he had been elected to the presidency of the ANC in 2007. The judiciary also attracted unnecessary attention and scorn when the Deputy Chief Justice, Dikgang Moseneke, made comments that were seen as opposed to the ANC and, in particular, the Zuma camp. (See <http://mg.co.za/article/2008-01-15-anc-takes-issue-with-deputy-chief-justice>.) The Supreme Court of Appeal was also not to be outdone in the blundering contest. In an appeal by Shabir Shaik, this court used words that were attributed to the trial judge in the case only to be corrected by the said judge publicly. (See <http://www.iol.co.za/news/south-africa/squires-never-used-generally-corrupt-phrase-1.302781>.) Judge Squires had apparently found that there had been a 'generally corrupt' relationship between Shaik and Zuma. In a newspaper article, Judge Squires explained that he had never used these words and had hoped for the Supreme Court of Appeals to correct the wrong reporting. Zuma's allies, among other things, called for the resignation of the judges who were involved in the appeal case. (See <http://groups.google.com/group/cosatu-press/msg/932e756b7621f610>.) Judge Nicholson, to add salt to injury, wrote a judgment that facilitated the exit of Thabo Mbeki from office only for it to be overturned by the Supreme Court of Appeal which had very uncomplimentary things to say about his (Judge Nicholson's) findings. (Among other things, the judge was accused by his peers of changing the rules of the game and engaged in conspiracy theories not even canvassed by the defence. <http://mg.co.za/article/2009-01-12-zuma-not-off-the-hook>.) The criticism of the judiciary became fierce.

The foregoing developments, among others, show that the criticism of the judiciary which gives rise to the complaint about it being threatened is well-earned. The judiciary has—to some extent—exposed itself to this criticism. Many other examples can be added to this list with ease. These include the unimpressive way in which the JSC dealt with the complaint against Judge Hlophe and then being embarrassed when the court ruled against it. (Judge Hlophe, the President of the Western Cape High Court, was accused of having attempted to influence two judges of the Constitutional Court to arrive at a particular decision in a matter involving Jacob Zuma. The matter was reported to the JSC which finalised the same in a manner that was later found to be wanting by the Supreme Court of Appeal. This case has now been referred back to the JSC by the Constitutional Court. See *Hlophe v Premier of the Western Cape & others*, (2011). Another was the former Chief Justice's support for an unconstitutional provision in a legislation that authorized the extension of his tenure. (The chief justice was a party in this case as a respondent and did nothing when the case was heard, thereby implying that he supported the constitutionality of the provision, only to—embarrassingly—withdraw his acceptance of the request from the President on the eve of the judgement which turned out to be against the president and himself.)

The most recent of these manifestations would be the confrontation between Dikgang Moseneke and Mogoeng Mogoeng during the interviews for the position of the chief justice. (The exchange and apparent antagonism between the two was evident in the televised interview and prompted a member of the JSC, Dumisa Ntsebeza, to express his concern about the two judges being played against each other. De Vos www.timeslive.co.za/local/2011/09/04/judge-v-judge-mogoeng-and-moseneke termed this exchange Judge v Judge: Mogoeng and Moseneke.) The question that begs answering is whether a judiciary that has acted in this fashion can be said to be unfairly attacked or criticised when its shortcomings are pointed out by the citizenry and/or politicians. It is submitted that there seems to be no basis for this claim (threatening of the independence of the judiciary). The judiciary, in a democratic society, cannot be left as a holy cow but should be made to account for the decisions made including doing introspection where necessary. The public has a right to express their concerns and disagreement with opinions, decisions and/or ideologies where they deem

appropriate. That seems to be a healthy democratic approach and those who cry wolf when these criticisms are raised may find their stance affronting to democratic practice. Equally, there cannot be fault in the concerns raised by members of society when they see evidence of moves that undermine the judiciary for judicial independence—the very cornerstone of the democratic enterprise—needs to be vigilantly protected. However, the problem arises when those seeking to protect judicial independence do so in a way that suffocates and/or ignore the need for judicial accountability. There is an ever existing need for judicial accountability with the only problem being how it is ensured. The starting point is that the judiciary should account to both the citizenry and the political leaders. Burbank (2007) has succinctly summed up judicial accountability thus

...just as independence must be conceived in relation to other actors (independence from whom or what?), so must accountability (accountability to whom or what?). As a result, judicial accountability should run to the public, including litigants whose disputes courts resolve, and who therefore have a legitimate interest in the court proceedings that are open to the public and in judicial decisions that are accessible. Judicial accountability should also run to the people's representatives, who appropriate the funds for the judiciary and whose laws the courts interpret and apply, and who therefore have a legitimate interest in ensuring that the judiciary has been responsible in spending the allotted funds and that, as interpreted and applied by the courts, laws are functioning as intended.

It can hardly be denied that the judiciary in South Africa has been subjected to criticism by politicians and some members of society. The question that remains is whether such criticism can be regarded as threat to judicial independence and why. It is submitted that while undue and unfair criticism of the judiciary can constitute a threat to it, not every criticism should be regarded as threat to judicial independence with ease. Moreover, criticism of the judiciary is not peculiar to South Africa. It is an international phenomenon and it is doubtful if such can be said to be a threat to judicial independence.

Writing about this subject, Prefontaine and Lee, (1998), stated:

...the use of this power by the courts has resulted in increasingly severe criticism of the judiciary, by some politicians, the media and other commentators who decry the so called 'activist judges' who have struck down legislation as inconsistent with the Charter, or have otherwise protected the Charter rights. This has led to the calls for limitations in the discretion, power and independence of the judiciary, and has included calls for greater accountability, term limits and judicial elections.

In the South African context Jacob Zuma has stated: (See the detailed report of President Jacob Zuma's speech at Hansard 2012 <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=287311&sn=Detail&pid=71656>.)

Equally, the judiciary makes decisions - judgments - that, at times, are actually overturned by it. Other levels of court make judgments; the higher courts overturn them, saying that the judgments were not correct. So, the issue of powers and decisions cannot be separated. If we say that we are reviewing and assessing whether these decisions or functions that have been undertaken emanate from the powers and are fine, we just want to make sure that everything is done according to what needs to be done in the country. That is what we are saying.

The very fact that this Parliament has, in fact, reviewed about 16 aspects of the Constitution tells you the story. Nothing is perfect. Only God is perfect; He does not make mistakes. We make mistakes, and that is why He had to sacrifice his Son to come and help us.

The two quotes show that the debate about the extent to which the judiciary can be criticised and the appropriateness thereof is not only a South African problem but an international one. From the available material, it appears that no one is totally against criticism of the judiciary. The tension seems to be about the form that it must and/or should take. (Analysts, such as Pierre de Vos (De Vos 2012 <http://constitutionallyspeaking.co.za/mixed-signals-on-the-review-of-our-courts>), have expressed their discomfort and objection to the way in which the impending review of the powers of the Constitutional Court in South Africa is to take place as well as what seem to be the factors influencing it or the motivation behind the move. None of them questions criticism of the judiciary.) Zuma rightly points out the uncertainty, infallibility and unreliability of law and judges when he refers to the reality that judges often do not agree on a judgment. He asserts, correctly, that lower courts' judgments are often overturned by the higher courts. The question that begs answering is: who then is the Constitutional Court accountable to? When and where this court makes mistakes—as it most probably have and will in the future—who is there to correct it? This necessary remedy cannot be found in the judicial system for the Constitutional Court is the highest court in the land.

Hypothetical, therefore, if the Constitutional Court were to be occupied by judges with a particular political allegiance or sympathy, this court can produce judgements reflecting that political stance with impunity. The opposite is

also a logical hypothesis. The answer lies in the noble ideal of democracy. People—represented by their duly elected political leaders—have to hold the judiciary accountable. This principle cannot be faulted. What creates a myriad of problems is how that process of accountability is and should be managed. In a developing and polarised community such as South Africa, there has to be more honesty and sincerity in approaching this problem. There has to be acknowledgement that there are core tenets of the rule of law that should not be tempered with, on the one hand, and the admission that the courts—including the Constitutional Court—are representative of the elite and inaccessible to many South Africans, on the other.

As legal realists remind us, judges and judgments are influenced by a variety of factors such as individual political ideals, social upbringing, views as to what is right or wrong, etc. The Constitutional Court, therefore, should be representative of aspirations of all South Africans and this should be reflected in the appointments of members of this court. It would be self-defeating for any political party to win elections on the basis of promises made to the electorate only to have the court opposing all its ideals. In doing this, however, there is a need for balancing such that the Court is not completely left to the whims of the political party in power.

This brings us to the elusive balancing act between judicial independence and judicial accountability. These two concepts have been referred to as Siamese twins and history shows that where the one was promoted at the expense of the other the results have not been pleasant. As Kosar (2010) aptly put it:

The trick is how to find a proper equilibrium. First we should not accept judicial independence uncritically. As Voigt observes 'independent judges are not only a necessary condition for the rule of law, they also constitute a threat to the rule of law: if there is a rule of judges, the rule of law will not be realised'. Hence both judicial accountability and judicial independence can be abused.

It is within this context that the complaints of the ANC and its allies should not be ridiculed and dismissed as a threat to judicial independence. It is an outcry that expresses their dissatisfaction with the level of judicial accountability in South Africa. Hence those more explicit among them have even labelled the courts counter-revolutionary. In essence the charge is that the ideals of the courts—as shown in their judgements—do not support the developmental agenda of the South African nation. This is an issue about judicial accountability. A resounding response to this has been an outcry about judicial independence being threatened instead of it being a constructive engagement to find ways to find if these accusations have merit. Some shiver at the idea of the judiciary accounting to politicians for they see that as affronting the independence of the judiciary. This may not necessarily be the case if one accepts that judicial accountability—in a broad sense—is a necessary attribute to the rule of law.

What is generally seen as a conduct amounting to a threat to judicial independence may just be democratic teething pains. As countries transit from one form of governance to a democracy, the judiciary has to embark on its own journey of adjustment. In the South African context, judges—unlike in the past—often face the challenge of playing an activist role as they are called upon to propel other arms of government to align their actions with the demands of constitutionalism. It is this action that will often put them (judges) in the firing line from those in political office at the time. It may be comforting that the friction between the political elite and the judiciary regarding independence and accountability is not an issue peculiar to South Africa. Writing in and about one of the most stable of democracies worldwide (the USA), Burbank (2007) observed:

Recent years have witnessed attacks on the courts, federal and state, that have been notable for both their frequency and their stridency. Many of these attacks have been part of strategies calculated to create and sustain an impression of judges that makes courts fodder for electoral politics. The strategies reflect a theory of judicial agency, the idea that judges are a means to an end, and that it is appropriate to pursue chosen ends through the selection of judges who are committed or will commit to them in advance.

6. Conclusion

The article sought to reflect on the raging debate about the rule of law being threatened in South Africa. It eschews the extreme stance that sees the country's judiciary as being under threat. It emphasises the need for the judiciary—and citizens who warn all about the threat to the rule of law—to accommodate the need for judicial accountability as judicial independence and judicial accountability are Siamese twins. Equally, it cautions against exposure of the judiciary to political will of those with political power at a given time.

The complaints raised about the judicial independence being threatened are well-founded to the extent that there is evidence of a political push and rhetoric from leading political figures in the ANC. This cannot be ignored given the court review that, arguably, flowed from concerns about the unbridled powers of the judiciary. Equally important, however, is the reality that there are no adequate measures that ensure judicial accountability. It is undeniable that the Constitution is

the light house of the South African democratic state. The Constitution, however, is as good as the Constitutional Court judges charged with the responsibility to interpret and give effect to its meaning in practical ways.

There seems to be merit in the suggestion that the JSC should be constituted in a way that makes political interference difficult. (This suggestion has been made by Helen Zille of the DA. See www.polity.org.za/article/da-statement-by-helen-zille-democratic-alliance-leader-on-an-independent-judiciary-12092011-2011-09-12.) For, eventually, the strength and jurisprudential direction of the Constitutional Court—and by extension that of all the country's courts—depends on the calibre and quality of appointments screened and recommended by this body. The advantage of a politically balanced JSC is that it will enable appointment of only the very able and distinguished of the members of the legal fraternity. This would go some significant way in diluting appointment of politically anointed judges and, eventually, hinder saturation of the judiciary with judges preferred by the Executive.

This, however, cannot solve the problem of the tension between those elected into office and the judiciary. There will always remain the reality that the courts will be used to ensure that those in political office are true to the rule of law. That, ironically, seems to be what constitutes a democratic order. Before legislation is passed and before an administrative decision is made, there should prevail the necessary question of whether the particular legislation or administrative decision made will be found to be rational, legal and sound should it be taken to court. Instead of this consideration being an irritant to politicians and government officials, it should serve as a comforter for they all swore allegiance to the Constitution and the rule of law. The constant debate about judicial independence and judicial accountability is a necessary attribute of any democratic order. The boundaries between the two are always murky and fluid such that even the most matured of democracies still find themselves constantly mediating the link, relationship and tension between the two concepts.

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List of Abbreviations

ANC African National Congress
DA Democratic Alliance
DoJ&CD Department of Justice and Constitutional Development
NIA National Intelligence Agency
NDPP National Director of Public Prosecutions
NPA National Prosecuting Authority
JSC Judicial Services Commission