Democracy and the rule of law in South Africa: Observations on significant legislative and other developments after Polokwane

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A. Introduction

For the first time since the mid-90's more adult South Africans feel that the country is going in the wrong direction (42%) than in the right direction (38%). Satisfaction with the performance of the national government is on a steady decline since the previous election, with a decrease of 5% between November 2007 and November 2008. These are findings of a biannual study conducted by Ipsos Markinor in October and November 2008, released on 13 February 2009. The then President of South Africa in 2008 accordingly stated: 'I am aware of the fact that many in our society are troubled by a deep sense of unease about where our country will be tomorrow… They are worried about whether we have the capacity to defend the democratic rights and the democratic Constitution which were born of enormous sacrifices.'[1]

Policy areas of democracy and political governance, such as maintaining transparency and accountability, fighting corruption in the government, appointing the right people to lead government departments and agencies, attracted performance scores of lower than 50% (red lights). A follow-up survey conducted by Ipsos Markinor in October 2008 was released on 13 March 2009. It measures public confidence in the legal system, the police, parliament, local government, the constitutional court, the mass media and the ANC (as the governing party and the custodian of democracy). Its key findings are compatible with the results of the assessment of government performance. Recent developments in South Africa and the attendant allegations about abuse of state power for political purposes have created a public perception that the principles of the rule of law and the administration of justice are under threat, Parliament's role has been relegated to rubber-stamping the ruling party's resolutions and media freedom is in decline.[2] Therefore, it has been argued, 'South Africans might well come to the conclusion that there is a deliberate and sustained attack on important institutions involved in upholding the Rule of Law and in protecting the admini-

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1 State of the Nation Address of the President of South Africa, Thabo Mbeki: Joint Sitting of Parliament (8 February 2008), available at <http://www.info.gov.za/speeches/2008/08020811021001.htm>.

2 Law Society Council Comment on Disbandment of 'Scorpions' and Related Events. Press Release, 21 February 2008.

stration of justice.'[3] The question remains whether such a conclusion is justifiable, and if so, to what extent.

B. Constitutional Amendments and Judicial Independence

I. Threats to Judicial Independence

South Africa is a democratic state, founded on inalienable values, including constitutional democracy and the rule of law as stated in section 1 of the Constitution, 1996. The judicial system is a constituent component of this constitutional democracy. Attempts to undermine the independence or impartiality of the courts threaten the administration of justice and the democratic nature of the state.[4]

Sporadic filibustering attacks on individual judges in South Africa by the ruling party and its allies do not pose genuine threats to the independence of the judiciary.[5] The same applies to attempts to influence individual judges pending judgement in one or more cases.[6] Genuine threats are rather found in persistent and deliberate attempts to diminish or regulate the powers of the judiciary as a whole. These attempts are hidden in resolutions on the Transformation of the Judiciary and the justice bills as highlighted in the debate around these bills. They take many forms. In general, interference in any shape or form with the independence of the judiciary is seen as a recipe for disaster both politically and economi-

3 Ibid.

4 According to the Statement by the Judges of the Constitutional Court, 30 May 2008, available at <http://www.legalbrief.co.za>.

5 The capacity of political leaders and demagogic politicians to mobilize popular sentiment against judges is present in any democratic government. But it remains fairly difficult to target judges with any precision. See the unwarranted attacks on the Chief Justice and his deputy. Deputy Chief Justice Dikgang Moseneke was attacked by the ANC National Executive Committee because having said (at his birthday party): 'It's not what the ANC wants or what the delegates want; it is about what is good for our people.' Beyond Polokwane: Safeguarding South Africa's Judicial Independence. An Internal Bar Association Human Rights Institute Report, 2008, para 3.129 (IBAHRI Report), available at <http://www.ibanet.org>.

The chief justice of the Constitutional Court, Pius Langa, was attacked by ANC president Jacob Zuma who reportedly warned: 'I think we need to look at it, because I don't think we should have people who are like God in a democracy.' Zuma 'Threat' to Constitution, *Mail&Guardian* (17 to 23 April 2009). These attacks fall woefully short of the 'need to respect for the institutions of the democratic state by members and supporters of our movement' acknowledged by the Resolution on Transformation of State and Governance: Defending the Democratic State, in: Resolutions: ANC 52nd National Conference, 2007, para 1, available at <http://www.anc.org.za/ancdocs/history/conf/conference52/resolutions/html>.

6 Judges of the Constitutional Court were allegedly approached by the Judge President of the Cape High Court, Judge John Hlope, in an improper attempt to influence the court's pending judgment in four Zuma related matters. They simply complained to the Judicial Service Commission (JSC), the constitutional body appointed to deal with complaints of judicial misconduct. The matter was controversially resolved by the JSC. See Statement by the Judges, note 4, para 1-2.

cally.[7] However, not every attempt to restrict the powers of the judiciary amounts to an objectionable intrusion on judicial independence.

Whether or not a proposed legislative interference with the judiciary is questionable depends on the form it takes.[8] Other branches of government may legitimately interfere with the judiciary as a whole by regulating the administration of the courts, their jurisdiction and the appointment of judicial officers, even if this requires constitutional amendments. But any departure from the existing constitutional guarantees of judicial independence would require cogent justification. In other words, it cannot be or seen to be an unconstitutional, illegal or inappropriate attempt to undermine the independence or impartiality of the courts. Whether, for instance, a particular limitation of the judicial role in the appointment of certain judges constitutes objectionable interference depends on whether it is aimed at inducing judges to act partially in politically controversial cases. Partiality means that legally irrelevant factors influence how disputes are settled.

It has been persuasively argued that for political interference with judicial independence to occur there has to be 'a concatenation of power, interest, and will'[9]. In this view an organisation or person is a potential political threat to judicial independence if three conditions are satisfied. The entity or individual in question must have (1) reason to get a judge or court to reach a decision on grounds irrelevant in law; (2) sufficient resources – political, social and/or economic to influence or intimidate the judge; and (3) the capacity to form a will or intention to act in a way that interferes with judicial independence.[10] The ruling party in South Africa demonstrably satisfies all three conditions.

II. Resolution on the Transformation of the Judiciary

The ANC 52nd National Conference 2007 resolution on the Transformation of the Judiciary notes that previous decisions of National Conferences and the National General Council regarding the transformation of the judiciary 'have not yet been implemented' and that their implementation is 'long overdue'.[11] This is a reference to the shelving of two contentious

7 Submissions to the Portfolio Committee on Justice and Constitutional Development on behalf of the General Council of the Bar of South Africa, 19 May 2006, p. 22-23 (GCB Submissions).

8 *John Ferejohn*, Independent Judges, Dependent Judiciary: Explaining Judicial Independence, Southern California Law Review 72 (1999) p. 353, 355.

9 *Ferejohn*, note 8, p. 370.

10 Ibid.

11 Transformation of the Judiciary, note 5. In his first state of the nation address, the current president of South Africa, Jacob Zuma, said he believed in the independence of the judiciary and freedom of the press, but was unhappy about the lack of transformation of both institutions. Remarks on Judiciary, Media Cause for Concern, The Herald (20 April 2009).

bills in 2006, the Constitution Fourteenth Amendment Bill (CAB) and the Superior Courts Bill (SCB).[12] The implementation of the resolution seems a foregone conclusion.[13]

The concern is that these Bills might be reintroduced unchanged in spite of vocal opposition from the judiciary and the legal profession in the recent past which had led to their withdrawal.[14] The Government's failure to revise aspects of the proposed legislation which interfere fundamentally with the independence of the courts had been previously noted 'with grave concern'[15]. Increased executive and political involvement in matters of judicial independence is seen as a move in the wrong direction for this country.

III. General Observations on the Bills

The impact of specific provisions of the CAB and the SCB on the independence of the judiciary and its extent has been assessed in several submissions to the Ministry and to Parliament.[16] These submissions reflect the concerns that animate the judicial bills debate.[17]

12 IBAHRI Report, note 5, para 3.30. – The text of the bills is available at <http://www.legalbrief.org.za>.

13 According to the new Minister of Justice and Constitutional Development the Bills will be adopted in 2009. The Face of Legal Change, Mail&Guardian (12-18 June 2009).

14 IBAHRI Report (note 5 above) para 3.30.

15 Legislation Affecting the Judiciary: General Council of the Bar Press Statement, 30 January 2006, available at http://www.lrc.org.za/Docs/Constitution/Public%20Commentary/GCB_Press_Release (TheAdvocateApril2006).pdf>.

16 Legal Resources Centre Comments on the Constitution Fourteenth Amendment Bill, 14 January 2006; Legal Resources Centre Comments on Clause 1 of the Constitution Fourteenth Amendment Bill, 1 February 2006, available at <http/www.lrc.co.za//Focus_Areas/Submissions to Justice.asp>; International Bar Association Comments on the Impact of South Africa's Constitution Fourteenth Amendment Bill and the Superior Courts Bill, April 2006 (IBAHRI Comments), available at http://www.ibanet.org; GCB Submissions, note 5, available at <http://www.legalbrief.co.za/filegmt_data/files/GCB%20billssubmissions.pdf>; Institute for Democracy in South Africa Submissions: Constitution Fourteenth Amendment Bill 2005, 25 May 2006, available at <http//www.idasa.org.za/> (IDASA Submissions); Maritime Law Association of South Africa Submission on Constitution 14th Amendment Bill and Superior Courts Bill, 27 June 2006; IBAHRI Report, note 5.

17 *A. Spilg*, Opening Remarks, in: Transcript of the Conference on the Justice Bills, Judicial Independence and the Restructuring of the Courts, 17 February 2006, p. 12, 14, available at <http://www.lrc.org.za> (Conference Transcript).-- 'In discussions stakeholders also expressed their fears that recent provisions in draft legislation tabled before the parliament … could seriously threaten the independence and/or delivery of justice in the county. Their concerns relate to the powers given to the executive in the proposed Bills on matters such as the appointment of senior judges, and the management of the budget of the judiciary.' SA Country Review Report No 5, September 2007 (SA Report), para 199 available at <http://www.aprm.org.za/docs/SACountryReport5.pdf >.

In the view of legal commentators the independence of the judiciary is adequately protected by current provisions of the Constitution. A departure from the status quo requires cogent justification, but little has been offered. What has been tendered does not survive closer scrutiny. The amendments are not, as claimed, about resolving limited issues concerning the demarcation of governmental functions in line with best international practice. They demonstrably infringe objective standards that protect the judiciary's role in constitutional democracies.[18]

The Bills are not preceded by any detailed policy statement. Their policy objectives therefore have to be identified from the provisions of the Bills, but that has proved to be difficult, if not impossible in most instances. In the absence of any policy document commentators therefore must address the apparent effect and potential reach of obscure legislative provisions. This has created the impression that hidden policy objectives are being deliberately shielded from scrutiny. Claims that the Bills promote transformation have been rejected as unfounded.[19]

The explanations offered in the memoranda about the objects of the proposed legislation are as obscure as particular provisions of the Bills. The stated object of the CAB is 'to regulated responsibility in respect of the judicial and administrative functions of all courts'. It seeks to amend the Constitution, but for spurious reasons. The SCB purports 'to rationalise the various superior courts and the legislation applicable thereto in order to establish a judicial system suited to the Constitution'. In other words, it is a transitional exercise, but as such seen as a failure.[20]

The proposed constitutional amendments tamper with textual provisions in the Constitution which protect judicial independence and with structural protections of judicial independence afforded by the Constitution as a whole. This removes constitutional defences against intrusions by other branches of government and sets up circumstances of institutional confrontation. It diminishes the role of the judiciary in upholding the rule of law and protecting constitutional rights and thus, incrementally, subverts the foundations of constitutional democracy.

For these reasons legal commentators are unable to support key provisions of the CAB and their counterparts in the SCB. Significant findings are set out below.

18 GCB Submissions, note 15, p. 4-8.

19 Ibid. p. 2.

20 GCB Submissions, note 7, p. 60.

IV. Towards Political Control of the Courts

1. 'Separation of Powers' between Judiciary and Executive

Clause 1 of the CAB seeks to amend section 165 of Constitution by the introduction of new sub-sections 165(6) and 165(7).[21] It provides for a separation of powers between the executive and the judiciary, with the responsibility for the judicial functions of the courts the sole preserve of the judiciary and the responsibility for the administrative functions the sole preserve of the relevant minister. This demarcation of powers substantially limits the institutional independence of the judiciary. The rationale for the proposed changes is without merit.

The Memorandum on the Objects of the Bill claims that the amendment to section 165 of the Constitution maintains and constitutionally entrenches the Commonwealth model of the separation of powers between the judiciary and the executive. This claim is untenable both in fact and in law.[22] There is no such thing as a Commonwealth model of the separation of powers that could be maintained or constitutionally entrenched. The doctrine forms part of the Constitution anyway.[23] Commentators are not aware of any Commonwealth jurisdiction with an independent judiciary that would accept this as an adequate definition of judicial independence.[24]

The global trend is toward increasing the authority of the judiciary to administer its own activities even in countries where the judicial administration is assumed by the executive branch, usually the ministry of justice. Furthermore judicial leaders in several commonwealth countries, most notably Britain and Canada, argue that administrative, policy and budgetary functions should be exercised by the judiciary, not by the executive.[25] The

[21] Amendment of section 165 of Constitution

'1. Section 165 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), is amended by the addition of the following subsections: "(6) The Chief Justice is the head of the judicial authority and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law. (7) The Cabinet member responsible for the administration of justice exercises authority over the administration and budget of all courts."'

Clause 15(1) of the SCB complements clause 1 of the CAB: '15. (1) The Minister exercises authority over the administration and budget of all courts in accordance with section 165(7) of the Constitution.'

[22] This rationale has been debunked, politely by the former Chief Justice, unceremoniously by a former Justice of the Constitutional Court who did not mince his words: 'Anybody who can talk about a Commonwealth model of the separation of powers is a fool or a scoundrel. There is no such thing as a Commonwealth model of the separation of powers.' *J Kriegler,* The Constitutional Importance of Judicial Independence, in: Conference Transcript, note 17, p. 46, 52.

[23] GCG Submissions, note 7, p. 12.

[24] Ibid. p. 11.

[25] Both Spain and Italy created judicial councils in the 1980s to assume from the ministries of justice the management functions of the judicial system. A number of countries in South America

proposed separation of powers is out of step with international developments. It can be seen as a move in the wrong direction.

2. Central Regulation of the Judiciary

Section 165(6) provides that the Chief Justice will be 'the head of the judicial authority and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law.' The concept of 'the judicial authority' is a novelty. Its parameters are both obscure and perplexing.[26] Most significantly, its introduction points to a diminished role for the judiciary. It reflects either a lack of understanding of the judiciary's role in a constitutional democracy as the third branch of government or, more likely, a deliberate attempt to diminish that role.

The proposed amendment distinguishes between the judicial function generally and the actual adjudication of cases. Only in decision-making or adjudication are judges afforded independence from outside direction, restraint and potential interference. Otherwise they are to be subordinate to 'the judicial authority' and subject to its direction in accordance with as yet unspecified 'norms and standards'. This reflects a significantly narrower view of judicial independence than that articulated by the Constitutional Court.[27] The performance of judicial functions will be administered by an official responsible to the Minister.[28]

The centralisation of these matters in a single office by public servants responsible to the Minister leaves ample scope for political interference with the judicial work. This is even more so, when considered in the light of other proposed amendments to the Constitution regarding judicial appointments. It is deemed fundamentally important that adminis-

followed suit. The French judges association recently adopted resolutions supporting the complete separation of judicial functions from the executive. Only a few European countries, including Germany, the Netherlands and Belgium, have not shown interest in departing from the traditional model.' Office of Democracy and Governance, Guidance for Promoting Judicial Independence and Impartiality, 2002, p. 158-159. <http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf>.

26 GCG Submissions, note 7, p. 9. The former Justice Kriegler observed: 'The Chief Justice has never been responsible for the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts. Courts don't function like that and whoever wrote this just doesn't understand how the South African judiciary functions.' *Kriegler*, note 22. In Benthamite terms, this qualifies as 'nonsense upon stilts'. See Soza v Alavarez-Machain 542 US 692, 743 (2004).

27 GCB Submissions, note 7, p. 10.

28 SCB sections 11, 12, 13.

trative matters such as listing are operated independently of political influence. Otherwise access to justice runs the risk of political obstruction.[29]

Section 165(6) apparently prepares the ground for a centralised administration of all the divisions of the High Court by remote control.[30] The decision-making body is constituted by the Chief Justice and a forum including in the first instance all heads of courts, all of them selected by the President.[31] The functioning of the courts is therefore more or less controlled by the executive, either directly or by remote control (through individuals all of whom duly appointed by the political head of the executive). This is seen as a move away from judicial independence towards political control of the courts.[32] This even more so in the absence of compelling reasons to justify central judicial regulation and centralised administrative control of the courts.

3. Executive control over administration and budget of courts

In terms of the proposed subsection 165(7), the Cabinet member responsible for the administration of justice will control the administration and budget of all courts. Clause 15(1) of the SCB complements clause 1 of the CAB. It provides: '15. (1) The Minister exercises authority over the administration and budget of all courts in accordance with the new section of the Constitution.' Currently that is not the case. The Executive is precluded from interfering with the Courts' control over administrative decisions that directly affect the exercise of the judicial function, whereas the Courts' budget is fixed directly by an Act of Parliament (under the Judges' Remuneration and Conditions of Employment Act 47 of 2001).[33] In *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 70, the Constitutional Court referred to the 'administrative functions that bear directly on judicial functions', noting that they were part of the 'institutional independence' of the courts as set out in the Canadian case of *R v Valente (*1985) 24 DLR (4th) 161.

Administrative independence is one of the elements of judicial independence. Institutionally this requires structures to protect courts and judicial officers against external interference.[34] The proposed amendments in effect seek to dismantle these structures either inadvertently or, more likely, deliberately. They are seen as 'retrograde steps that remove from the courts a level of independence that they even enjoyed under the apartheid state'[35]. No convincing explanation for the amendment of the Constitution has been advanced. Its

29 English Bar Council (note 6 above).

30 GCB Submissions, note 7, p. 17, 18.

31 SCB section 11.

32 GCB Submissions, note 7, p. 19.

33 *A. Spilg*, Judicial Independence – Impending constitutional crisis?, in: Conference Trasnscripts, note 17, p. 130, 134...

34 GCB Submissions, note 7, p. 6n4.

35 Ibid 21.

perceived purpose is to establish a constitutional justification for unconstitutional provisions in the SCB dealing with judicial administration and thus to insulate administrative and budgetary matters affecting the functioning of the courts from judicial challenge.[36] In other wrods, it is seen as a pre-emptive measure.

4. Executive Control over Key Judicial Appointments

Section 9 of the CAB seeks to amend the manner in which the judges-president and the deputy judges-president of the divisions of the High Court are appointed. Currently they are appointed by the President on the advice of the Judicial Service Commission (JSC) under section 174 (6) of the Constitution. The new subsection (5) provides that these appointments are to be made, after consulting the Chief Justice and the Cabinet member responsible for the administration of justice, from a list provided by the JSC. The role of the JSC in the appointment process is thereby significantly diminished. At the end of the day the decision would be that of the President alone. The only constraint would be an obligation to consult. The presidential discretion is otherwise unfettered. This also applies to other key judicial appointments.

Presently the President appoints the Chief Justice and the Deputy, all the judges of the Constitutional Court and the President of the SCA and the Deputy. Now he would select every senior member of the judiciary. Over and above that, this power of appointment probably extends to the new special divisions of the High Court defined in the SCB. All heads of courts and all deputies, the entire complement of judges in the Constitutional Court and the Special Divisions of the High Court will be appointed by the President. He is therefore to be vested with truly extensive powers of judicial appointment.[37] Enormous powers of patronage within the judiciary go hand in hand with that.

The worldwide trend points in a different direction towards appointing judges on merit and with significant involvement of independent bodies, including the legal community. This proposal is seen as 'a reversion to the pre-Constitutional era when the State President, acting through the Minister of Justice made all judicial appointments'[38].

The motivation for the proposed amendment and the reason for the diminishment of the role of the JSC remain unclear, with some suggesting that the proposed change is motivated by the transformation agenda of the government of the day.[39] But that remains inconclusive. The shifting of power from the JSC to the executive is widely perceived as a move

36 Ibid 21 and 22.

37 GCB Submissions, note 7, p. 25.

38 Ibid.

39 IBAHRI Report, note 5, para 3.110. – SA Report, note 17, para 198, 211, observes: 'The challenge to transform the judiciary to be representative of South African demographics could pose a threat to its independence.' It advises South Africa to ensure that 'the transformation of the Judiciary' does not 'jeopardize or undermine the independence of the Judiciary.'

towards a more politicised process for the appointment of heads of court and away from a transparent and accountable selection process that affirms democracy.[40] Such a move is in conflict with the United Nations Basic Principles on the Independence of the Judiciary which require that judicial appointments must be made in a manner that safeguards the independence of the judiciary.'[41]

5. Executive Control over Acting Judicial Appointments

Clause 10 of the CAB seeks to amend the constitutional provisions regarding acting appointments. The proposed amendment does away with the concurrence of the Chief Justice for any acting appointments. All that is required is consultation. This disturbs the delicate balance of powers between the judiciary and the executive as endorsed by the Constitutional Court in the *First Certification* judgement.[42]

The proposed amendment limits judicial involvement in the appointment of a broad category of acting judges. This enables the executive to appoint acting judges to leadership positions in the judiciary for improper motives or purposes and not necessarily in the best interests of the administration of justice.[43] The proposed amendment effectively empowers the Minister to appoint acting judges that could swing the vote in any particular case in favour of the executive or its political allies. A recent politically charged case involving Cape Judge President John Hlope and judges of the Constitutional Court illustrates this point.

A complaint of judicial misconduct laid by the Constitutional Court judges against the Cape Judge President with the Judicial Services Commission (JSC) in 2008 was made public by these judges without first affording Hlope an opportunity to be heard.[44] If, for argument's sake, the matter had gone to the Constitutional Court, which it has not, all judges[45], including the then Chief Justice Pius Langa and his deputy Dikgang Moseneke, could have been asked to recuse themselves.[46] The Court sits *en banc*.[47] In the circumstances eight acting appointments would have to be made – unprecedented in legal history.

40 IBAHRI Report, note 17, para 3.114.-- *C. Albertyn,* Judicial Independence and the Constitution Fourteenth Amendment Bill , SAJHR 22 (2006), p. 126, 140.

41 Principle 10. IBAHRI Report, note 17, para 3.107.

42 Ex parte Chairperson of the National Assembly: In re: Certification of the Constitution of the Republic of South Africa 1996 (1996) SA 744 para 30.

43 Namely to the position of (a) Deputy Chief Justice, (b) judge of the Constitutional Court, (c) Deputy President of the Supreme Court of Appeal, or (d) Deputy Judge President of a Division of the High Court of South Africa.--The UN Basic Principles applicable here clearly state: 'Any method of judicial selection shall safeguard against judicial appointments from improper motives.' IBAHRI Report, note 17, para 3.107.

44 Statement by the Judges of the Constitutional Court, note 4.

45 Hlope to Appeal in ConCourt, The Times (01 April 2009).

46 But that is disputed. Expert rules out Hlope appeal, The Cape Argus (30 October 2008).

6. Jurisdiction Stripping

Clause 7(b) of the CAB seeks to prevent the courts from hearing any matter dealing with the suspension of the commencement of an Act of Parliament or a provincial Act, or making an order suspending it, despite any other provision of the Constitution. The Memorandum asserts that this provision introduces an 'important new principle', but no cogent justification for its introduction is offered. The covert purpose of the amendment apparently is to pre-empt a decision by the Constitutional Court on this issue.

In terms of section 172(2)(b) of the Constitution, a court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party. Such temporary relief probably includes the interim suspension of an Act in exceptional circumstances.[48] In this view, clause 7(b) of the CAB in effect deprives the courts of the power 'to suspend the commencement of an Act of Parliament in the interests of justice' even where such commencement 'may involve a gross violation of a right in our Bill of Rights'. The full extent of the threat to constitutional democracy 'may only become fully appreciated if a government in the future were to introduce legislation to fundamentally amend one of the guaranteed freedoms contained in the Bill if Rights'[49]. The proposed constitutional amendment is therefore seen as an ouster clause of the most pernicious kind and a reversion to old order practices.[50] In other words, it is classified as an instance of illegitimate jurisdictional regulation or jurisdiction stripping.

47 Section 167 (1) of the Constitution provides: 'A matter before the Constitutional Court must be heard by at least eight judges.'

48 GCB Press Statement, note 15, and Legal Resources Centre Comments Constitutional Fourteenth Amendment Bill (14 January 2006), para 3.6, 6.4, 7.4, 7.5., available at <www.lrc.org.za>. The Constitutional Court held that a court could grant interim relief in terms of section 172(2) of the Constitution, but such interim relief could merely suspend the operation of a provision in an Act, pending the constitutional challenge, without suspending the commencement of the Act. However, it is clear from this decision of the Constitutional Court that a court, in very limited and special circumstances, could suspend the commencement of an Act. In the absence of the proposed amendment this might indeed happen. The new principle apparently seeks to prevent that eventuality. See President of the Republic of South Africa and Others v United Democratic Movement 2003 (1) SA 472 (CC) para 28.

49 GCB Press Statement, note 15.

50 Mitigating its perniciousness is the fact that the proposed section is so badly drafted that it will not achieve its objective.' *T. Roux,* 'Thinkpiece' for Seminar on the Constitution Fourteenth Amendment Bill, 2005', p. 5, available at <www.lrc.org.za.>. There are other indications of bad drafting. In terms of sections 80 and 122 of the Constitution, members of a legislature may apply to the Constitutional Court to have all or part of an Act declared unconstitutional after signature by the President. Clause 7(b) effectively also wipes out sections 80(3) and 122(3) which, in the context of abstract constitutional review, make express provision for an order of suspension by the Constitutional Court. It is not clear whether this is an unintended side-effect. The repeal is brought about indirectly via an amendment to section 172, causing collateral damage to the Constitution.

7. The Impasse between Judiciary and Executive

The judiciary has consistently offered to cooperate with other branches of the government to develop a model of court administration that best reflects the principle of judicial independence, most recently at the judges' conference held near Pretoria in July 2009.[51] At that conference the new Minister of Justice and Constitutional Development, Jeff Radebe, publicly distanced himself from the controversial attempts to amend the Constitution discussed above. He reportedly said that 'he had no intention of amending the Constitution and would consult on contentious issues arising from the proposed reform of the judicial system'. He also reassured the judges that there were no hidden agendas.[52]

Former President Mbeki has taken the consultative route before. In 2006, he first had the deadline for comment extended and then axed the contentious bills altogether until further notice. This was done in order to slow down the process and 'engage the judiciary to understand properly'[53] their objections to the draft legislation.

These objections are easy to understand. Their core is essentially this: '[A] structure which in fact says that the Executive controls all aspects of the functioning of courts other than the way they decide their cases, is not consistent with judicial independence.''[54] Failure to properly understand this could mean that a constitutional crisis is a distinct possibility, with far reaching consequences: 'The other route will lead to a constitutional crisis impacting not only on our judicial system and our constitutional values for all time but also our ability to sustain socio economic objectives.''[55] The link between sustainable economic growth and the key objectives of constitutional democracy, including an independent judiciary, is the central premise of the NEPAD initiative, supported by South Africa and reaffirmed in the APRM Self-Assessment Report on South Africa of 2007. The Maritime Law Association of South Africa, in similar vein, observes that these bills (CAB and SCB)

See LRC Comments on CAB Clause 7(b), note 48, para 3.1, 3.2, 3.4 with IDASA Submissions (note 16 above) para 2.2.2 (iii-vii) concurring.

51 Judges aim for Judicial Independence, Business Day (6 July 2009). Previously, at the second judges' conference since 1994, after nearly half a decade of battles about the nature of the transformation process in the courts and charges against President Jacob Zuma. This resolve was reaffirmed by a resolution which states: 'The judiciary should be empowered to administer courts and its own budget. To this extent the judiciary will work with, and cooperate wit, other branches of government to develop a model of court administration that best reflects the principle of judicial independence.'

52 Tension Eases between Courts and Government, Mail&Guardian (10-16 July 2009).

53 Business Day (23 February 2006) (my emphasis). -- Indeed 'the greatest dangers to liberty lurk in the insidious encroachment by men [or women for that matter] of zeal, well meaning but without understanding.' Olmsted v United States 277 US 438, 479 (1928) per Justice Louis Brandeis.

54 *A Chaskalson*, Background to the Justice Bills, in: Conference Transcript, note 17, p. 44.

55 *Spilg*, note 39, p. 144 with the GCB Submissions, note 7 , p. 22-23 concurring.

'have the potential to very seriously damage the administration of justice in South Africa and to undermine its credibility in international commerce' and that 'undoubtedly foreign investment and foreign trade would suffer' as a result.[56]

However, the ruling party has firmly resolved that judicial independence refers to 'the adjudicative function of the courts' only, not to 'the administration of the courts, including any allocation of resources, financial management and policy matters relating to the administration of courts – which are to be the ultimate responsibility of the Minister responsible for the administration of justice'.[57]

This is not the judicial independence enshrined in the new Constitution and endorsed by the Constitutional Court. It truncates this independence with potentially dire consequences for constitutional democracy in South Africa. Addressing a conference of the international Commission of Jurists in Cape Town on 21 July 1998, the late Chief Justice, Ismail Mahomed warned: 'Subvert that independence and you subvert the very foundations of a constitutional democracy.'[58] A Letter from the then President in *ANC Today* of 10--16 June 2005 recites this statement with approval.[59] The Judges of the Constitutional Court, speaking for all the courts in the country, have meanwhile vowed not to 'yield to or tolerate unconstitutional, illegal and inappropriate attempts to undermine their independence or impartiality' which threaten 'the administration of justice in our country and indeed the democratic nature of the state'.[60]

The battle about the nature of judicial independence continues unabated, despite indications of a détente between the judiciary and the government after the recent charm offensive launched by the executive. In the course of these overtures President Zuma reassured the judges that 'the transformation of the judiciary should be advanced and undertaken without interfering with the principle of judicial independence, that an 'independent judiciary is one of the cornerstones of any democracy' and that the executive respected 'without reservation the principle of judicial independence and the rule of law'. In the view of the judiciary that principle includes the power to administer courts and its own budgets whereas the proposed legislation suggests otherwise. 'In the end, it is the impasse between the executive and the judiciary over this constitutional amendment that is the democratic problem.'[61]

56 Maritime Law Association Submission, note 16.

57 Transformation of the Judiciary, note 5, para 11, 12.

58 *I. Mahomed,* The Independence of the Judiciary, SALJ 115 (1998), p. 666.

59 Fiat justitia ruat caeclum – Let justice be done through the heavens should fail!, ANC Today (10-16 June 2005).

60 Statement of the Judges, note 4, para 8, 9.

61 *Albertyn*, note 40, p. 137.

C. Interference with Prosecutorial Independence

I. Enquiry into the National Director of Public Prosecutions

Section 179(4) of the Constitution guarantees prosecutorial independence. It stipulates: 'National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.'[62] Any legislation or executive action inconsistent with it is therefore subject to constitutional control by the courts. The prosecuting authority is accountable to parliament, while the Minister of Justice exercises final political responsibility over the prosecuting authority. It is crucial to note that the Act nowhere provides for ministerial control over the decisions of the NDPP or any Director of Prosecutions (NDP). The appointment of the National Director of Public Prosecution (NDPP) by the President does not compromise the independence of the prosecuting authority.[63]

The National Director of Public Prosecutions (NDPP), Vusi Pikoli, was suspended on 23 September 2007, allegedly for a breakdown of communication between him and the Minister of Justice and Constitutional Development, Brigitte Mabandla. According to his lawyers 'it was Pikoli's refusal to let the minister second-guess his decision to prosecute Selebi that prompted her demand for his resignation. When he refused, the president also asked him to resign. When Pikoli refused again, the president signed a letter of suspension that again underscored the centrality of the Selebi matter.'[64] A High Court judgement with far-reaching political consequences delivered on 12 September 2008 by Judge Chris Nicholson concurs.[65] The court inferentially found 'that the Selebi warrants were cancelled by Mr Mpshe [the acting NDPP] after political interference and that Pikoli was suspended because he refused to do so'. In the court's opinion 'the suspension was a most ominous move that struck at the core of a crucial State institution'.[66] These findings on matters not

62 The National Prosecuting Authority Act 32 of 1998 (NPA Act) gives effect to the provisions of s 179 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

63 *J. J. Joubert* (ed), Criminal Procedure Handbook, 7th ed, 2006, p.47.

64 *S Sole,* How Ginwala blew it, Mai&7Guardian (12 December 2008) <www.mg.co.za/article/2008-12-12-how-ginwala-blew-it>.

65 He ruled that the NPA's charges against ANC president Jacob Zuma were unlawful and found that the State President, Thabo Mbeki, had interfered with the prosecution of Zuma for political reasons. Mbeki was recalled on 19 September 2008 by the ANC leadership on the basis of these findings, since squashed on appeal as gratuitous. All charges against Jacob Zuma and others were controversially withdrawn in April 2009 when prima facie evidence of such interference was tendered. See Statement by the National Director of Public Prosecutions (6 April 2009) available at<http://www.npa.gov.za>.

66 Zuma v National Director of Public Prosecutions (8652/08) [2008] High Court of South Africa, NPD para 205 and 207.

66 Ibid. para 91.

in issue or canvassed in that case were set aside on appeal.[67] They are relevant here as an obiter dictum.

Under section 32(1) of the National Prosecuting Authority Act, 1998 (NPA Act) it is an offence to interfere with, hinder or obstruct the prosecuting authority or any of its members in the performance of their functions. The letter that instructed the DNPP to put on hold the investigation and prosecution of the National Commissioner of Police, Jackie Selebi, was signed by the Minister of Justice, Brigitte Mabandla. According to the Ginwala Report this 'letter was tantamount to executive interference with the prosecutorial independence of the NPA, which is recognised as a serious offence in the [NPA] Act.'[68]

The Ginwala Report concluded that the 'grounds advanced by Government for the suspension of Adv Pikoli have not been established before the Enquiry' and recommended that he be restored to the office of NDPP'[69]. But that has not happened. The application for judicial review of Pikoli's subsequent dismissal persuasively asserts 'that the decision to fire him was a breach of the constitutional guarantee of the independence of the National Prosecution Authority and the principle of legality'.[70]

D. Disbandment of the Directorate of Special Operations

I. Background

Article 36 of the United Nations Convention against Corruption of 2003 (which South Africa ratified on 22 November 2004) provides: 'Each State Party shall … ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental legal system of the State Party, to be able to carry out their functions effectively and without undue influence.' Article 5 of the African Union

67 National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1 (12 Jan 2009) para 48. The Report of the Enquiry into the Fitness of Advocate V P Pikoli to Hold the Office of National Director of Public Prosecutions (Ginwala Report) equally found that political interference could not be sustained on the evidence before the Enquiry. Report of Enquiry into NDPP (4 November 2008) para 12. Available at <http://www.iss.co.za/dynamic/administration/file_manager/file_links/20081208PIKOLIREP.PDF?>.

68 Ginwala Report, note 67, para 12.

69 Ibid. para 13 and Recommendations I.

70 Former DPA boss set to take Motlanthe to court, Business Day (14 February 2009). The Ginwala Report does not support this view. It observes: The 'Much of the focus of South African scholars, jurists and media has been on prosecutorial independence. Sufficient attention has not been paid to the requirement of democratic accountability of the prosecuting authority. In focusing only on independence from political interference they have erred in conflating freedom from control with freedom from accountability.' Ginwala Report, note 67, para 51.However that may be, the constitutional guarantee of prosecutorial independence is under the spotlight here, not the accountability to parliament. The Pikoli matter is about executive interference with the Prosecuting Authority.

Convention on Preventing and Combating Corruption of 2003 (which South Africa ratified on 7 December 2005) provides as follows: 'State Parties undertake to… (3) Establish, maintain and strengthen independent national anti-corruption authorities or agencies.'[71]

The Directorate of Special Operations (DSO) was established in terms of section 7(1) of the NPA Act and came into being on 12 January 2001. Its mandate was to deal with all national priority crimes, including police corruption, and to supplement the efforts of other law enforcement agencies in fighting national priority crimes, operating as a specialist unit equipped to deal with increasingly sophisticated levels of criminality and organised crime.[72]

On 1 April 2006 the President of South Africa appointed a judicial commission of enquiry into the mandate and location of the DSO, chaired by Judge S V Khampepe. The report of the Commission was handed to the president on 3 February 2006, but only released on 5 May 2008, at the same time when the General Law Amendment Bill and the National Prosecuting Bill – dealing with the disbanding of the DSO or Scorpions--were due to be tabled in Parliament.[73]

The National Prosecuting Authority Amendment Bill was published in Government Gazette number 31037 of 8 May 2008, the General Law Amendment Bill in Government Gazette number 31018 of 9 May 2008. According to the explanatory notes released the bills emanate from the decision to relocate the investigative capacity of the DSO in the SAPC. The stated aim of the NPA Amendment Bill is to repeal provisions of the NPA Act, 1998 that deal with the establishment and functioning of the DSO. The General Law Amendment Bill provides for the establishment of a Division in the SAPS, to be known as the Directorate for Priority Crime Investigation. These legislative measures give effect to resolutions of the ruling party.[74] The disestablishment of the DSO was a fait accompli in 2009.

71 See Glenister v President of RSA (note 106 above) para 23-27.

72 Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations: Final Report (February 2006) para 1 (Khamepe Report) available at < http://www.info.gov.za/view/DownloadFileAction?id>.

73 A Cabinet statement of 29 June 2006 reveals that Cabinet endorsed the National Security Council's decision to accept, in principle, the recommendations of the Khampepe Commission, including the retention of the DSO within the NPA. A further statement of 7 December 2006 recorded that, at its meeting of the previous day, Cabinet had reviewed progress in implementing the recommendations of the Khampepe Commission,' Glenister v President of the Republic of South Africa (CCT 41/08) [2008] ZACC 19 (22 October 2008) para 12. However, the Minister of Safety and Security, Mr Charles Nqakula, speaking during the debate on the President's State of the Nation Address in the National Assembly on 12 February 2008, announced: 'The Scorpions, in the circumstances, will be dissolved and the Organised Crime Unit of the police will be phased out and a new amalgamated unit will be created.' Ibid para 13. This was in the aftermath of the Polokwane conference in December 2007 and the election of ANC president Jacob Zuma.

74 The ANC resolutions on Peace and Stability, under the heading Single Police Service, state that the DSO must be dissolved, members of the Scorpions performing policing functions must fall

Yet the judicial commission of inquiry into the mandate and the location of the DSO unequivocally disapproved of such measures. In the light of 'the totality of the evidence and the law relevant in terms of reference', it found it 'inconceivable that the Legislature will see it fit to repeal the provisions of the NPA Act that relate to the activities of the DSO'[75]. Both the legal mandate and the location of the DSO were unequivocally endorsed. In its considered view, the argument (advanced by the ruling party) 'that the legal mandate of the DSO to investigate and prosecute serious organised crime is unconstitutional within the meaning of section 199(1) of the Constitution is without merit' and that 'the rationale for locating the DSO under the NDPP [National Director of Public Prosecutions] and the Minister for Justice and Constitutional Development in 2002 still pertains'.[76] It therefore recommended that the 'the DSO should continue to be located within the NPA'[77].

A recent critical analysis of the crime investigative system within the South African criminal justice system arrives at a similar conclusion. It recommends the establishment of a new single prosecution-led investigation agency and the retention of the brand name 'Scorpions'.[78] The Law Society of South Africa concurs: 'We firmly believe that South Africa requires a dedicated and specialised crime-fighting unit such as the DSO.'[79] None of these recommendations were institutionalised for apparently no principled reasons. The executive's decision to introduce the bills has since been challenged in court. But the Constitutional Court found it not appropriate for the Court to intervene in the affairs of Parliament in this case.[80]

under the SAPS and that the relevant legislative changes be effected as a matter of urgency to give effect to the foregoing resolution'. Single Police Service, Resolutions, note 5, para 8-10.

75 Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations: Final Report (February 2006) para 47.1 (Khamepe Report) available at < http://www.info.gov.za/view/DownloadFileAction?id>.

76 Ibid. para 47.1.

77 Ibid. para 47.2 and 47.4. The report of the Commission was handed to the president on 3 February 2006, but only released on 5 May 2008, at the same time when the General Law Amendment Bill and the National Prosecuting Bill – dealing with the disbanding of the Scorpions – were due to be tabled in Parliament.

78 *M Montesh*, A Critical Analysis of the Crime Investigative System within the South African Criminal Justice System: A Comparative Study, 2007, p. 238, 234.

79 LSC Comment, note 2.

80 'In conclusion, then, I find that the applicant has not established that it is appropriate for the Court to intervene in the affairs of Parliament in this case. He has not shown that material and irreversible harm will result if the Court does not intervene. In the circumstances, both the application for leave to appeal (in Part A) and the application for direct access (in Part B) must be refused as it is not in the interests of justice for the applications to be granted.' Glenister case CC (note 73 above) para 57.

II. The Reasons behind the Decision

The reasons behind the decision to disband the DSO have remained shrouded in secrecy right to the end of the decision-making process. Allegedly, they were not even disclosed to the members of the DSO until after the publication of the most recent bills in May 2008 and, inexplicably, to members of Cabinet either until the day when the cabinet approved the bills (30 May 2008).[81] An ulterior motive or purpose can therefore not be ruled out, but none has been substantiated so far.

The DSO in the National Prosecuting Authority was tasked with the investigation of allegations of criminal activities relating to the so-called 'arms deal'. The involvement of ANC politicians in these activities is well-documented.[82] These investigations had been abandoned in 2001 for lack of evidence.[83] They were resumed in 2007 when damning new evidence surfaced in Germany.[84] Hence there is a reasonable apprehension that allegations of impropriety and corruption in the arms deals have substance.[85]

Against this background, both the timing of the resolution to disband the DSO and the decision to give effect to it as a matter of urgency make perfectly sense. Inferentially, the call for the disbandment of the Scorpions was not based solely on what is best for the administration of justice and the investigation of organised crime in South Africa.

The applicant in the *Glenister* case accordingly argued that the President and Cabinet had decided 'to disestablish the DSO and place its members in a dysfunctional unit (the SAPS) because a number of members of the ANC are (or have been) subject to the unwelcome attentions of the DSO.'[86] This argument is bound to resurface in future litigation which is on the cards. The court did not rule on its merits, but found it irrelevant in dealing with the purely jurisdictional matter at hand.

81 On 29 April 2008 two members of cabinet and their legal representative, the Director General of the Justice department filed affidavits, in which they flatly 'denied that any decision whatsoever was taken to disestablish the DSO'. On 30 April 2008 Cabinet approved the Bills aimed at relocating the DSO from the NPA to the SAPS. Glenister v President of the Republic of South Africa (14386/2008) [2008] High Court of South Africa, TPD (27 May 2008) p. 17.

82 The Arms Deal Virtual Press Office available at < www.armsdeal-vpo.co.za>*; D. Welz,* Nolle Prosequi! Corruption in the Political Sphere and the Decision not to Prosecute, Speculum Juris 19 (2005), p. 223, 231.

83 The Joint Investigation Report into the Strategic Defence Procurement Packages of 2001 concluded that 'up to now no evidence has emerged, to suggest that these activities affected the selection of the successful contractors/bidders, which may render the contracts questionable.'

84 The Public Protector in his letter to Trent on 20 April found: 'It is therefore for the NPA to decide whether the allegations made by Der Spiegel warrant any further investigation in South Africa, at this time.'

85 Joint letter from Desmond Tutu and F W de Klerk to President Kgalema Motlante (1 December 2008) < www.armsdeal-vpo.co.za>.

86 Glenister case CC, note 73, para 53.

E. Freedom of the Press and other Media

I. Declining Media Freedom

The trend of declining media freedom in South Africa has been spotted before with attendant calls to reverse it before it is too late.[87] In 2006 the ANC seemed to endorse these sentiments in its National Press Freedom Statement.[88] However, a year later the Polokwane Conference resolved that 'the right to freedom of expression should not be elevated above other equally important rights such as the right to privacy and more important rights and values such as human dignity'[89]. It therefore proclaimed 'the need to balance the right to freedom of expression, freedom of the media, with the right of equality, to privacy and human dignity for all'[90] and called for external regulation of the media, in effect prepublication censorship. The stated reason for this resolution is 'that the current form of self regulation … is not adequate to sufficiently protect the rights of the individual citizen, community and society as a whole'[91]. Hence the call for the establishment of a media appeals tribunal (MAT)[92]. However, in the view of stakeholders, self-regulation in the new South Africa has served the media and the public well. In their experience and in principle self-regulation by key stakeholders in the press is better for democracy than regulation by external forces with political agendas: 'With no State or other external oversight, the media can perform as an independent agency – the 'Forth Estate' – alongside executive, legislative and judicial authorities.'[93] The Freedom of Expression Institute (FXI) therefore suggests that this system could be applied in the academic context with equal success.

In a National Press Freedom Day statement of 2006 the ANC had called on all South Africans 'to declare that never again shall the right of our people to free expression be silenced by censorship or intimidation'.[94] However, the Polokwane resolutions no longer

87 In 2006 FXI called on civil society and journalists to unite and 'reverse' this trend 'before it becomes difficult to reverse' at all, cited 'the deteriorating state of media freedom at the SABC' and 'the recent issue of the SABC seeking an interdict against the Mail and Guardian website publishing its report about allegations that it banned using certain analysts and commentators'. SA must save press freedom, available at <http://www.fxi.org.za>.

88 Statement on Media Freedom Day (18 October 2006), available at <http://www.anc.org.za/ancdocs/pr/2006/pr1018htlm>. 'Media Freedom Day…provides an opportunity for all South Africans to declare that never again shall the right of our people to free expression be silenced by censorship or intimidation.'

89 Communications and the Battle of Ideas, Resolutions, note 5, para 125.

90 Ibid para 128.

91 Ibid para 93.

92 Ibid para 126-131.

93 Freedom of Expression Institute Submission on the State of Academic Freedom of Expression in South Africa to the Council on Higher Education (11 June 2007) para 5 and 7 available at <http://www.fxi.org.za>.

94 National Press Freedom Statement (2006), note 88.

seem to heed that call. They are about limiting the right to freedom of expression and media freedom, not about acknowledging 'the important role of the media and freedom of expression as one of the pillars of democracy'[95]. Indeed, almost half of ANC supporters agree that the ANC is a different party in the aftermath of the 52nd National Conference of the African National Congress (ANC) in December 2007.[96] This new ANC might well be perceived as an external force with political agendas that poses a threat to freedom of the press (and other media) and freedom of expression in general, including academic freedom.

II. Speaking to the Media

There is a long line of disciplinary cases in the new South Africa where academics have been disciplined for speaking to the media about the institution in which they work[97], some of them in terms of Conditions of Service with apartheid-era censorship written all over them.[98] That may come as a surprise in a constitutional democracy with freedom of expression, including academic freedom, enshrined in its bill of rights. The right to academic

95 As acknowledged by the Southern African Judges Commission at a meeting of Chief Justices from Southern and East Africa held in Windhoek, Namibia, on 11-13 August 2005. The Commission's stated objects include 'the promotion of the rule of law, democracy and the independence of the courts in the region'. <http://:www.concourt.gov.za/site/southernafricanjudgescommission.htm>.

96 According to an Ipsos Markinor poll conducted from 3 to 22 October 2008 published in 2009.

97 'Recently, the University of KwaZulu/ Natal has been a flashpoint for controversies around academic freedom, with disciplinary action having been taken against two academics for a number of alleged misconducts, including speaking to the media. A case has also arisen at Fort Hare University, involving a law professor who is being disciplined for criticizing the University administration in his lectures, at conferences, in private conversations and in the media. These academics are accused of bringing their respective institutions into disrepute, including by lying to the media, and defaming University managers. A member of the support staff of the Tshwane University of Technology is being charged with the apartheid era offence of immorality, for distributing sexually explicit photographs to some of his friends. A disciplinary case is also being heard at Wits University, where students are being charged for bringing the institution into disrepute for criticizing the lack of freedom of expression on campus, in the media.' *J. Duncan,* The Rise of the Disciplinary University, Harold Wolpe Memorial Lecture (17 May 2007). FXI Submission to UKWZ Council Committee on Governance and Academic Freedom: Recent cases (19 February 2009), available at <http://www.fxi.org.za>. – See also *K. MacGregor,* South Africa: Freedoms Gained Now being Lost, World University News (13 January 2008). <http://www.universityworldnews.com/topic.php?topic=SpecialReports&page=3>

98 Academics were charged with misconduct and dismissed in terms of Conditions of Employment which, inter alia, provide: 'An officer shall be guilty of misconduct and may be dealt with in accordance with the provisions of regulation D4, if he--(a) contravenes a provision of the Act ['the act' means the University of Fort Hare Act, 1965 (Act No 40 of 1996)] and these regulations or fails to comply with any provision thereof with which it is his duty to comply; (f) publicly comments on the administration of the University'. A request for an audit of subordinate legislation of this kind has since been referred by the South African Law Reform Commission to the Council of Higher Education with a view of resolving the problem jointly.

freedom, according to the High Court of South Africa, would 'include an unfettered debate on issues surrounding the autonomy of a university and the roles that managerial and academic staff, respectively, should play in that regard'[99]. In terms of the 1997 UNESCO Recommendations higher education teaching personnel are entitled 'to express freely their opinion about the institution or system in which they work'[100], without fear of institutional censorship. According to these standards academic freedom covers teaching and research as well as comments on conditions of service and the administration of the university. Comments made by academics that are not directly related to their area of expertise are thus permissible and desirable. A self-regulatory framework to protect academics from external censorship would therefore be appropriate[101] . Extramural comments on matters of public interest are warranted in the context of a democratic society and seen as essential for its further development.[102] Not necessarily so in the context of a developmental state, however, as recently argued at a regional forum on government regulation of academic freedom.[103]

99 *Chetty v Adesina* (33/2007) [2007] High Court of South Africa, ECD (02 November 2007) para 11.

100 FXI Submission to UKWZN, note 97.

101 FXI Submission to CHE, note 93, para 8.

102 This means: 'All higher-education teaching personnel should have the right to fulfil their functions without discrimination of any kind and without fear of repression by the state or any other source. Higher-education teaching personnel can effectively do justice to this principle if the environment in which they operate is conducive, which requires a democratic atmosphere; hence the challenge for all of developing a democratic society.' UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997) para 27 <http://unescodoc.unesco.org/images/0011/001102/110220e.pdf#page=32>.

103 'Academics had always had an image of the university as being a community of scholars, engaged in teaching, research and knowledge production, with a curriculum that went beyond just vocationalism and utility. But in the context of a developmental state, should one not have a developmental university that pursued that developmental agenda of the state? This idea might be seen in fundamental contradiction to traditional ideas of the university, where academic freedom was understood as the freedom to do research, to decide who should teach, and who should be admitted.' Council of Higher Education Regional Forum on Government Involvement in, and Regulation of, Higher Education, Institutional Autonomy and Academic Freedom (HEIAAF) (22 May 2006) available at <http://www.che.ac.za>.-- The Task Team on Higher Education, in its analysis of academic freedom, has since explored (section 2.3.1) 'how a renewed concept and practice of academic freedom in higher education can benefit South African society at large... It finds that any such reformulation begins by seeking to counter potential and actual external and internal threats to the academy – state repression and/or interference, over-control by government bureaucracies and institutional hierarchies, commercial and functional impingements on academic work, and unreformed institutional cultures.' Report of the Independent Task Team on Higher Education, Institutional Autonomy and Academic Freedom (HEIAAF): Academic Freedom, Institutional Autonomy and Public Accountability in South African Higher Education (August 2008) available at < http://www.che.ac.za/documents/d000183/CHE_HEIAAF_Report_Aug2008.pdf.

In the context of a developmental state, it was suggested, one should have a developmental university that pursued the developmental agenda of the state, admittedly in fundamental contradiction to the traditional idea of the university with academic freedom as endorsed by UNESCO. The implications of this suggestion for academic freedom as understood in South Africa today are ominous. The Orwellian concept of a developmental university pursuing the agenda of the state may well be seen as a potential threat to academic freedom as we know it even in its violation by censorious measures – not state sponsored as yet. [104]

F. Conclusion

In South Africa politics are rooted in the resolutions and election manifestos of the dominant party seeking to impose its own ideological vision on the larger society.[105] At the national conference in Polokwane the ruling party 'affirmed that the ANC remains the key strategic centre of power, which must exercise leadership over the state and society in pursuit of the objectives of the NDR [National Democratic Revolution]'.[106] Apparently the new ANC has resolved to intensify 'its efforts to bring all spheres of state and society under party control'[107]. In so doing 'the structures and collectives of the movement must make the decisions on the direction our country should take collectively.'[108] Clearly, there is nothing wrong with such aspirations in a multi-party democracy whether or not one shares this vision.[109]

[104] The argument about the crucial importance of freedom for development may have been conveniently overlooked in this debate. Assessments of the correlation between development and democracy corroborate the findings that there is a democracy advantage for well being and prosperity. See Poverty Reduction, Economic Growth and Democratisation in Sub-Saharan Africa, Afrobarometer, Briefing Paper No. 68 (May 2009), available at <http://www.afrobarometer.org>.

[105] SA Report, note 17, para 199.--Of course, it would be a mistake to see South African politics exclusively through he lens of democracy, given the limited experience with this form of political regime in this country. It is only one of ten African countries to be rated as 'free' and qualifies as a 'liberal democracy' with a Democracy Status score of 4.2 (out of 5). *R Mattes*, Democracy without People: Political Institutions and Citizenship in the new South Africa, Afrobarometer Working Papers 82 (November 2007), p. 10. However it is not ranked as a consolidated democracy with a sustained balance between perceived demand and supply of democracy. *M Mattes,* Neither Consolidated nor fully Democratic: The Evolution of African Political Regimes, 1999-2008, Afrobarometer Briefing Papers 67 (May 2009), p. 2. The project of democracy building has still a long way to go.

[106] Organisational Renewal, para 55, Resolutions, note 5.

[107] J *Myburgh,* ANC Targets Judiciary, Media, Politicsweb (23 January 2008), available at <http://www.policitcsweg.co.za>.

[108] Organisational Renewal, para 55, Resolutions, note 5.

[109] Prominent ANC defector Saki Macozoma with the benefit of hindsight reportedly said: 'The idea of a liberation movement that is the sole and authentic political vehicle for the national democratic

However, specific Polokwane resolutions impact on the independence of the courts, law-enforcement agencies and the mass media.[110] This has created a public perception that 'the new ANC has a driving motive to protect its leader (and other cadres) from investigation and prosecution'[111]. In other words, the independence of the judiciary and other institutions involved in upholding constitutional democracy and the rule of law have become vulnerable to party-political interference. Recent developments in the aftermath of Polokwane arguably suggest7 that there is a deliberate and sustained attack on important institutions involved in upholding the Rule of Law and in protecting the administration of justice, orchestrated by the ruling party and maintained by its cadres 'deployed'[112] in government or within the institutions targeted. The deliberate 'capture or co-optation' of parliament by the ruling party and the weakening of its oversight role is seen as a significant threat to multi-party democracy.[113]

The explanations offered for contentious aspects of the measures proposed or taken are untenable. The two judicial bills have nothing to do with the transformation of the judiciary. They are transitional measures[114] and as such must suit the requirements of the new Constitution, which they do not do. The suspension and subsequent dismissal of the NDPP are the result of unwarranted executive interference with prosecutorial independence which is constitutionally guaranteed. The relocation of the DSO is not constitutionally mandated as claimed, but serves another, prima facie ulterior purpose. The proposed external regulation of the press limits the constitutional right to freedom of expression and promotes pre-publication censorship. It has nothing to do with balancing the right of privacy with the right of the public to know as claimed. All this does not augur well for constitutional

revolution and the aspirations of the people of SA no longer hold water.' The Times (28 February 2009).

110 These are the Resolutions on Transformation of the Judiciary, Single Police Service and The Battle of Ideas read together.

111 *Myburgh,* note 107).--:According to an Ipsos Markinor poll conducted in October 2008, released on 26 February 2009, few South Africans from all walks of life and across the racial spectrum and less than half (41%) of ANC supporters think that Jacob Zuma is innocent of corruption. Merely 47% of eligible voters agree that government is ruling in the interests of all South Africans, 42% that government only thinks about the interests of the members of the ANC, 46% that it is difficult to tell what the interests of the ANC and what the interests of the state are. Merely 47% of eligible voters agree that government is ruling in the interests of all South Africans, 42% that government only thinks about the interests of the members of the ANC, 46% that it is difficult to tell what the interests of the ANC and what the interests of the state are.

112 The deployment of cadres 'to senior positions in government, such as President, Premiers and Mayors' is a problematic practice, however. Organisational Renewal para 55, Resolutions, note 5. SA Report, note 17, para 212.

113 Ibid. para 212.

114 *Albertyn,* note 40 , p. 126,

democracy in South Africa. According to the Constitutional Court, 'there is nothing wrong, in our multi-party democracy, with Cabinet seeking to give effect to the policy of the ruling party', but 'Cabinet must observe its constitutional obligations and may not breach the Constitution'.[115] Accordingly there is nothing wrong, in a multi-party democracy, with deployed cadres seeking to implement party resolutions. But, in so doing, they must observe their constitutional obligations and may not breach textual provisions or structural protections of the Constitution which guarantee the independence of important institutions of multi-party democracy. The complaint is that they have not done that or have not been seen to do it. This is perceived as one the most direct threats to democracy and the rule of law in South Africa since 1994 [116]. Following the elections in 2009, the Superior Courts Bill, 2003, was allowed to lapse, paving the way for the introduction of the new, revised Constitution Amendment Bill, 2010, and a new Superior Courts Bill, 2010, into Parliament. Both Bills result from further consultation with, particularly, the Judiciary. The draft Constitution Amendment Bill, 2010, is further being published in the Gazette for public comment in accordance with section 74(5)(a) of the Constitution and, since the Bill is closely linked to the transformation envisaged by the Superior Courts Bill, 2010, the latter draft Bill is simultaneously published for public comment.[117]

[115] Glenister case CC, note 73, para 54.

[116] *S. Friedmann*, ANC's Belief in its Divine Right to Rule Warrants our Attention, *Business Day* (1 July 2009).

[117] Memorandum on the Objects of the Constitution Amendment Bill, 2010

Democracy and the rule of law in South Africa: Observations on significant legislative and other developments after Polokwane

By *Dieter Welz*, Fort Hare / RSA

The 52nd Conference of the African National Congress (ANC) held at Polokwane in December 2007 affirmed the ruling party as the key strategic centre of power in South Africa exercising leadership over state and society in pursuit of the objectives of the National Democratic Revolution. Specific Polokwane resolutions impact on the independence of the courts, law-enforcement agencies and the mass media. Aspects of the measures proposed for urgent implementation or already in place do not suit the requirements of the new Constitution. They either brazenly violate or seek to change these requirements – apparently for no principled reason and not inadvertently. These measures are widely seen as a potential threat to constitutional democracy in South Africa. They are discussed here with reference to the country's complex political realities and its evolving patterns of constitutional development

Late Nostalgia for *la madre patria*: Forms of Latin American Migration in Spain

By *Andreas Baumer*, Rostock

In the last two decades, Spain has undergone dramatic changes. The classic emigration country converted itself into one of the most important migrant-receiving countries in the European Union. Especially since the mid-nineties of the last century, migration to Spain experienced a massive acceleration, only curbed by the economic crisis starting in 2008. The percentage of citizens from foreign countries among the Spanish population increased from 1.3 percent in 1996 to 12.08 percent in 2009, exceeding the average figure of the traditional immigration countries in Europe.

Migrants from Latin America had a big share in this boom. At the turn of the century, Latin Americans, especially from countries of the Andean Region, became the predominant group among the migrant population in Spain – to an extent that led scholars to speak of a "Latin-Americanization" of the migration to the Iberian country.

Migration from Latin America to Spain became more dynamic more or less because of the same push- and pull-factors which determined migration processes originating from other regions: Poverty, unemployment and a general lack of perspectives on the one hand, and an apparently insatiable demand for work force in the booming Spanish economy on the other. But beyond that, some aspects rooted in the common history of *la madre patria* and their former colonies had a heavy influence on the development of these migration flows. A common language, the same religion and some kind of cultural vicinity provided to the Latin Americans some benefits compared to other groups, i.e. to Muslim migrants from Northern Africa. A great majority of the Spanish population prefers Latino migrants to immigrants from other regions.