

TRANSFORMATION OF THE JUDICIAL SYSTEM IN SOUTH AFRICA, 2012–2013

JONATHAN KLAAREN*

ABSTRACT

In a two-year period, four distinct policy initiatives regarding the place of the judiciary in South African governance were operative, cumulatively holding the potential for significant change in the existing policy on the judiciary. When examined, these initiatives allow for a somewhat surprising set of conclusions to be drawn. First, despite formal majority party policy clearly preferring virtually no role for the judiciary in governance, the state is engaged in at least two processes that have the potential to both formally recognize and strengthen the capacity of the judiciary to engage in governance. Second, despite the sharp rhetoric and the acrimonious debates of 2012, there currently exist more points of consensus than of contention regarding the shape and place of the judiciary in South Africa over the next three to five years. Third, the policy debate about the role of the judiciary in governance remains constrained by a number of factors including divergent views on the separation of powers, a lack of transparency that exacerbates suspicions, perceptions of hidden agendas, mistrust, a largely untransformed legal profession, a lack of appreciation of the role of the media in debates over South African law and policy, and a failure by the South African state (including the judiciary) to come to terms with the increasing role of the judiciary as a regulator. A regulatory perspective provides an alternative way of conceptualizing the current debates on the role of the judiciary. From such a viewpoint, the politics of the judiciary in this period demonstrate five overlapping articulations of different logics of justification for regulating the judiciary.

I. INTRODUCTION

The year 2012 was a banner year for policy development regarding the judicial system in South Africa. In February, the Department of Justice and Constitutional Development (DOJCD) released the “Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental

* Professor and former Dean of the School of Law, University of the Witwatersrand. Ph.D. 2004, Yale University; LL.B. 1999, University of the Witwatersrand School of Law; J.D. 1991, Columbia University; M.A. 1988, University of Cape Town; B.A. 1986, Harvard University.

South African State.”¹ In March, the DOJCD published the terms of reference for “an assessment on how the decisions of the Constitutional Court advance social transformation and the reconstruction of the South African law in general.”² In June, the African National Congress (ANC) 4th National Policy Conference held at Mangaung in the province of the Free State approved a recommendation as follows:

The ANC reaffirms the position that the branches of the state are co-equal parties entrusted with distinct constitutional powers in their quest to realise the ideals of a democratic South Africa. Each branch of the state must therefore observe the constitutional limits on its own power and authority and that no branch is superior to others in its service of the Constitution.³

Finally, in November, the National Assembly passed the Constitution Seventeenth Amendment Act of 2012 changing the constitutional mandate for the structure of the judiciary.⁴

These events may all be seen as markers for linked, but ultimately disjointed, significant policy initiatives regarding the place of the judiciary in South African governance. However, because the implementation of these initiatives has continued in the year following these events—2013—this is an opportune moment to reflect on this process and the resulting policies. It is particularly important to pause and review these developments at this instant as each of these policy initiatives continues to hold significant potential for effecting change in the existing South African policy on the judiciary. The significance of these policy processes is further delineated by the amount of shock, awe, smoke, and ink spilled over the judiciary and the 2012 debate regarding the separation of powers—as well as the related topic of transformation, in particular the transformation of the bench.

1. Jeff Radebe, Minister of Justice & Constitutional Dev., S. Afr., Media Statement on the Occasion of Releasing a Discussion Document on the Transformation of the Judicial Sys. & the Role of the Judiciary in the Developmental South African State (Feb. 28, 2012), available at http://www.justice.gov.za/m_statements/2012/20120228_m_transformation.html.

2. Ministry of Justice & Constitutional Dev., S. Afr., Media Statement on the Assessment of the Impact of the Decisions of the Constitutional Court and the Supreme Court of Appeal on the South African Law & Jurisprudence (Mar. 26, 2012), available at http://www.justice.gov.za/m_statements/2012/20120326_m_transformation-tor-ms.html.

3. AFRICAN NAT'L CONG., RECOMMENDATIONS FROM THE 4TH NATIONAL POLICY CONFERENCE (2012), available at http://www.anc.org.za/docs/pol/2012/policy_conferencev.pdf.

4. See Siphso Hlongwane, *No 17: A Constitutional Amendment (Almost) Everyone Agrees On*, DAILY MAVERICK (Nov. 22, 2012, 02:26 PM), <http://www.dailymaverick.co.za/article/2012-11-22-no-17-a-constitutional-amendment-almost-everyone-agrees-on>.

When the necessary distinctions are made among these policy initiatives and when their implementation paths are sketched out, a surprising set of conclusions may be drawn. First, despite formal ANC policy clearly preferring virtually no role for the judiciary in governance, the DOJCD, a group spearheaded by the ANC, is engaged in at least two processes—namely, the discussion document and the assessment—that have the potential to both formally recognize and strengthen the capacity of the judiciary to engage in governance. Second, despite the sharp rhetoric and the acrimonious debates of 2012, there exist more points of consensus than of contention regarding the shape and place of the judiciary in South Africa in the medium-term future. Third, the policy debate about the role of the judiciary in governance remains constrained by a number of factors including: divergent views on the separation of powers, a lack of transparency that exacerbates suspicions, perceptions of hidden agendas, mistrust, a largely untransformed legal profession, a lack of appreciation of the role of the media in debates over South African law and policy, and a failure by the South African state, including the judiciary, to come to terms with the increasing role of the judiciary as a regulator.

In aggregate, the policy process is congested and slow if not stalled, yet it exhibits a fairly high degree of common understanding among the significant players. This is the case despite the regular battles over transformation and judicial selection. Drawing directly from these four policy events, the final section of this Article explores an alternative way of conceptualizing the current debates on the role of the judiciary. From a regulatory perspective, the debates and the various policy processes described in this Article may be seen as instances of overlapping articulations of different logics of justification for regulating the judiciary: legislative mandate, accountability/control, due process, expertise, and efficiency.

II. THE ASSESSMENT

Of these policy initiatives, it was perhaps the external evaluation process that has attracted the most media attention.⁵ Indeed, much of the heat of debate is captured in the tussle over whether this initiative was to be labeled an “assessment” or a “review.” Part of the salience of this terminological choice lies with the signifi-

5. See, e.g., Moshoeshoe Monare, *Concourt's Powers Need Reviewing, Says Zuma*, THE STAR (Feb. 13, 2012, 9:00 AM), <http://www.iol.co.za/the-star/concourt-s-powers-need-reviewing-says-zuma-1.1232428>.

cance of the term “review” as denoting the power of a court to pass judgment upon and set aside an act or decision of a government official (or even, in exceptional cases, to substitute an order for the act or decision reviewed).⁶ The use of the term “review” thus implies an exercise of power or regulation superior to that of the body being “reviewed,” in this case the Constitutional Court.

The initial statement issued concerning the Cabinet meeting of November 23, 2011—announcing the evaluation—used the term “assessment.”⁷ The statement itself gave a description of the intended process.⁸ This statement was then reported in some of the media using single quotes.⁹ Opposition parties and some civil

6. See generally LAWRENCE BAXTER, ADMINISTRATIVE LAW 30 (1984) (describing the system of judicial review in South Africa).

7. Media Statement, Gov't Commc'ns & Info. Sys., Statement on Cabinet Meeting of 23 November 2011 (Nov. 24, 2011), available at <http://www.gcis.gov.za/content/newsroom/media-releases/cabinet-statements/statement-cabinet-meeting-23-november-2011>.

8. In relevant and full part, the Cabinet statement stated as follows:

2.8 Assessment on the transformation of the judicial system and the role of the judiciary in a developmental state to be carried out with a reputable research institution. In the main, this assessment is three fold: firstly, to ensure the judiciary conforms to the transformation mandate as envisaged in the Constitution of the Republic in terms of non-racialism, gender, disability and other transformational variables. Secondly, access to justice on all levels of the courts from lower courts through to Constitutional Courts. Thirdly, to affirm the independence of the judiciary as well as that of the executive and parliament with a view to promoting interdependence and interface that is necessary to realize transformation goals envisaged by the Constitution. Cabinet agreed to the following approach to the transformation of the judicial system: That the assessment of the decisions of the Constitutional Court be undertaken by a research institution to establish how the decisions of the court have impacted on the lives of ordinary citizens and how these decisions have influenced socio-economic transformation and the reform of the law. The Judicial Education Institute be used as a vehicle for transformation through aspirant and serving judicial officers may acquire the requisite legal skills to contribute to the evolving local and global constitutional jurisprudence; Measures be taken to enhance the efficiency and the integrity of the Judicial Service Commission and the Magistrates Commission in the execution of their Constitutional mandate of facilitating the racial, gender and other Constitutional prescripts in the judiciary. An appropriate framework be established for the regular monitoring of the implementation of the court decisions by all State Departments. The mandates and compositions of the South African Law Reform Commission and the Rules Board of Law to be reviewed with a view to enhance the research capacity of the State to be able to lead transformation in the fields that have greater impact on the lives of the people, such as socio-economic transformation, land reform, mining, aviation and many more. Appropriate mechanisms be developed to facilitate for regular interface between the three spheres of the State to enhance synergy and constructive engagement among them in pursuit of common transformative goals that are geared to benefit the society at large.

Id.

9. See *Cabinet to Have Constitutional Court Decisions 'Assessed'*, MAIL & GUARDIAN (NOV. 24, 2011, 11:37 AM), <http://mg.co.za/article/2011-11-24-concourt-decisions-assessed-inline-with-transformation>.

society pressure groups lost little time in characterizing the exercise as a review and opposing it.¹⁰

While not the starting point, a significant characterization of the evaluation as a “review” stems from a candid interview granted by President Jacob Zuma to a major Johannesburg newspaper, *The Star*.¹¹ The February 13, 2012, news story stated: “President Jacob Zuma wants to review the Constitutional Court’s powers.”¹² “Zuma reiterated that judges were not ‘special people’ but fallible human beings.”¹³ The president also questioned the logic of having split judgments among judges, as follows:

[H]ow could you say that (the) judgment is absolutely correct when the judges themselves have different views about it. We don’t want to review the Constitutional Court, we want to review its powers. It is after experience that some of the decisions are not decisions that every other judge in the Constitutional Court agrees with. There are dissenting judgments which we read. You will find that the dissenting one has more logic than the one that enjoyed the majority. What do you do in that case? That’s what has made the issue to become the issue of concern.¹⁴

Zuma also added that judges were “influenced by [what is] happening and influenced by you guys (the media).”¹⁵ As noted above, the context for Zuma’s interview was one where the choice of precise term—“review” or “assessment”—was already a matter of political debate.

From its inception, the assessment was contentious from the point of view of at least some former Constitutional Court judges. For instance, former Constitutional Court Judge Johann Kriegler characterized the plan as inauspicious, saying “[The judiciary] is

10. See, e.g., Press Release, Council for the Advancement of the S. Afr. Constitution (CASAC), (Nov. 27, 2011) (on file with author) (characterizing assessment as a review); Nikolaus Bauer, *Ramphela Slams Cabinet’s Court Review Decision*, MAIL & GUARDIAN (Nov. 25, 2011, 4:34 PM), <http://mg.co.za/article/2011-11-25-ramphela-slams-cabinets-court-review-decision> (reporting Open Society Foundation opposition to the assessment); *DA Questions Cabinet’s ConCourt Assessments*, MAIL & GUARDIAN (Nov. 24, 2011, 7:09 PM), <http://mg.co.za/article/2011-11-24-da-questions-cabinets-concourt-judgment-assessments> (reporting on political resistance to assessment).

11. *Zuma Wants Constitutional Court Powers Reviewed: Report*, TIMES LIVE (Feb. 13, 2012, 1:03 PM), <http://www.timeslive.co.za/politics/2012/02/13/zuma-wants-constitutional-court-powers-reviewed-report>.

12. Monare, *supra* note 5.

13. *Id.*

14. *Id.* (internal quotation marks omitted).

15. *Id.*

not a platform in Polokwane. We are not talking politics.”¹⁶ The reference to Polokwane was pointed, referring to the ANC National Policy Conference held in Polokwane, Limpopo Province, in 2007, where the ANC adopted several far-reaching resolutions—including some that ultimately led to the resignation of Thabo Mbeki from the President of South Africa.¹⁷

By the end of March 2012, the implementation process for the assessment was under way. This took the form of a request for tenders in terms of a document entitled, “Terms of Reference for the Assessment of the Impact of the Decisions of the Constitutional Court and the Supreme Court of Appeal on the South African Law and Jurisprudence” (2012 ToR).¹⁸ These terms of reference sought to invite tenders “from competent institutions to undertake an assessment of the impact of the decisions of the Constitutional Court and the Supreme Court of Appeal on the transformation of society.”¹⁹ However, tenders could be submitted to address only selected portions of the assessment, not the whole.²⁰ The heart of the assessment was to be “a comprehensive analysis of the decisions of the Constitutional Court and the Supreme Court of Appeal, since the advent of democracy.”²¹ The goals of this analysis were as follows:

- (a) [t]o establish the extent to which such decisions have contributed to the reform of South African jurisprudence and the law to advance the values embodied in the Constitution; (b) [to] assess the evolving jurisprudence on socio-economic rights with a view to establishing its impact on eradicating inequality and poverty and enhancing human dignity; (c) [to] assess the impact on the development of a South African jurisprudence that upholds and entrenches the founding principles and values as espoused in the Constitution and how such jurisprudence contributes to and is enriched by the development of jurisprudence in the SADC [Southern African Development Community] region, the continent and globally; and (d) [to] assess the

16. *Judges Question ConCourt Assessment*, NEWS24 (Nov. 27, 2011, 9:47 PM), <http://www.news24.com/SouthAfrica/Politics/Judges-question-ConCourt-assessment-20111127>.

17. See Somadoda Fikeni, *The Polokwane Moment and South Africa's Democracy at the Crossroads*, in STATE OF THE NATION: SOUTH AFRICA 3 (Peter Kagwanja & Kwandiwe Kondlo eds., 2008).

18. DEP'T OF JUST. & CONST. DEV., S. AFR., TERMS OF REFERENCE FOR THE ASSESSMENT OF THE IMPACT OF THE DECISIONS OF THE CONSTITUTIONAL COURT AND THE SUPREME COURT OF APPEAL ON THE SOUTH AFRICAN LAW AND JURISPRUDENCE, *available at* http://www.justice.gov.za/m_statements/2012/20120326_m_transformation-tor.pdf (last visited Nov. 13, 2013).

19. *Id.* § 1. Section 3 uses the term “competent research institutions.” *Id.* § 3.

20. See *id.* § 8.2.

21. *Id.* § 3.1.

extent to which South Africa's evolving jurisprudence has transformed and developed the common law and customary law in South Africa as envisaged by the Constitution.²²

This tender was an open one, occasioning a number of conversations over potential collaboration among individuals and institutions that were considering making a formal tender. By the closing date of May 4, 2012, two bids were received: one from a consortium of three university law faculties (University of Cape Town, University of Pretoria, and the University of the Witwatersrand (Wits)) and one from the Human Sciences Research Council (HSRC) in partnership with the University of Fort Hare.²³ This initial tender was then cancelled "due to minor changes that had to be effected to the terms of reference."²⁴

In the second iteration of the tender in 2013, a closed tender was published on April 12, 2013. The terms of reference were nearly identical to those of the first tender. There was some further specification made of the methodology to be used in the comparative study (a desktop study and with consideration of limitation to those jurisdictions adopting a similar model of constitutional democracy to South Africa) of direct access and costs of litigation.²⁵ Perhaps most significantly, the boilerplate language of the standard DOJCD tender process now took up the first thirty-seven pages of the forty-three page tender document, with the very slightly revised version of the 2012 ToR now labeled an Annexure.²⁶ The tender was then awarded to a joint venture between the HSRC and the law faculty of the University of Fort Hare in the amount of R10,324,841.00.²⁷ The HSRC and Fort Hare aimed to begin the project by mid-September 2013. Even at this stage of implementation, the reaction to

22. *Id.*

23. See E-mail from Narnia Bohler-Muller, Deputy Exec. Dir., Human Sci. Research Council, to Jonathan Klaaren, Professor & former Dean of the Sch. of Law, Univ. of the Witwatersrand (Feb. 13, 2015, 01:36 PM) (on file with author); E-mail from Frans Viljoen, Professor of Int'l Human Rights Law, Univ. of Pretoria, to Jonathan Klaaren, Professor & former Dean of the Sch. of Law, Univ. of the Witwatersrand (Feb. 13, 2015, 01:09 PM) (on file with author); see also *Bids/Tenders Awarded*, DEP'T OF JUST. & CONST. DEV. (July 4, 2012), http://www.justice.gov.za/cfo_tender/tenders-awarded.html (referring to RFB [Request for Bid] 2012/03: The appointment of a service provider to assessment of the impact of the decisions of the Constitutional Court and Supreme Court of Appeal for period of eighteen months).

24. Letter from Dir. Supply Chain Mgmt., Dep't of Justice & Constitutional Dev., S. Afr., to Piet Barnard, Univ. of Cape Town (Apr. 12, 2013) (on file with author).

25. See DEP'T OF JUST. & CONST. DEV. (S. AFR.), RFB 2013 03: REQUEST FOR BID 38–39 (Apr. 2013) [hereinafter RFB 2013 03].

26. See *id.* at 1–38.

27. See *Bids/Tenders Awarded*, *supra* note 23.

the award continued to feature harsh words from opposition parties regarding the purpose and cost of the evaluation.²⁸

In the end, despite the degree of controversy and misunderstanding of its origins, the judicial assessment became more and more of a potentially constructive opportunity as it was implemented by the DOJCD. Indeed, its transformation from a frontal assault on the judiciary to a state-sponsored applied research project was remarkable. As Pierre de Vos has correctly pointed out, it represented a setback for the political forces within the majority party and government who were behind the initial call to arms.²⁹

III. THE DISCUSSION DOCUMENT

While the Cabinet statement regarding its meeting of November 23, 2011, referred only to the assessment project and not to the discussion paper, the discussion paper process is, in formal terms, the parent policy initiative.³⁰ Titled "Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State," the discussion paper itself was released in February 2012 by the Minister of Justice and Constitutional Development. In his statement accompanying the release, Minister Jeff Radebe framed the discussion paper as part of a fifteen-year anniversary of the Final Constitution, stating as follows:

On 4 February 1997 the Constitution of the Republic of South Africa, 1996 came into operation, symbolising the birth of the South African democratic state founded on the supremacy of the constitution and the rule of law. It is befitting that we today publish the Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State in remembrance and celebration of the 15th anniversary of this supreme law of the Republic that positively changed the course of the South Africa's history.³¹

28. See *id.*; *Court Review Assigned to HSRC, Fort Hare*, IOL NEWS (Aug. 26, 2013, 4:55 PM), <http://www.iol.co.za/news/crime-courts/court-review-assigned-to-hsrc-fort-hare-1.1568350>; Ina van der Linde, *HSRC, Fort Hare Assigned Review of Highest Courts*, HSRC (Aug. 27, 2013), <http://www.hsrc.ac.za/en/media-briefs/democracy-governance-and-service-delivery/hsrc-fort-hare-assigned-review-of-highest-courts>; *HSRC, Fort Hare to Review Court Rulings*, NEWS24 (Aug. 26, 2013, 4:02 PM), <http://www.news24.com/SouthAfrica/News/HSRC-Fort-Hare-to-review-court-rulings-20130826>.

29. See Pierre De Vos, *Assessment of Judiciary Represents a Retreat for Reactionary Forces in Government*, CONSTITUTIONALLY SPEAKING (Mar. 27, 2012), <http://constitutionallyspeaking.co.za/assessment-of-judiciary-represents-a-retreat-for-reactionary-forces-in-government>.

30. See Media Statement, Gov't Commc'ns & Info. Sys., *supra* note 7, § 2.8.

31. Radebe, *supra* note 1.

Radebe added that “the release of this Document marks (the beginning of the) articulation of policies that would guide the further transformation of the judicial system in South Africa Time is now opportune to initiate a national dialogue on these fundamental principles of judicial reform.”³²

There are substantial and significant linkages between the judicial assessment policy initiative and the Discussion Document, especially as the scope of the judicial assessment includes the submissions by interested parties in the Discussion Document.³³ Further, the minister highlighted the assessment in his Preface to the Discussion Document.³⁴ Indeed, in what may represent traces of an earlier draft, the Discussion Document appears to refer mistakenly to the judicial assessment as limited to the Constitutional Court and not to include the Supreme Court of Appeal and the High Courts.³⁵ The judicial assessment covers the Constitutional Court and the Supreme Court of Appeal in almost their entirety, including: a comprehensive analysis of judicial decisions, a study on the implementation of judicial decisions, an assessment of the costs of litigation, and an assessment of the speed within which cases are finalized.³⁶ The Constitutional Court is covered exclusively in terms of a comparative study of direct access.³⁷ This is appropriate as the Constitution ensures only direct access to the Constitutional Court.³⁸

As a final observation on the relationship between the Discussion Document and the judicial assessment, a passage in the minister’s Preface to the Discussion Document, as follows, bears close reading:

I have alluded to the fact that the kind of assessment we set to embark upon is not unusual. It occurs all the time and as research will show, universities undertake forms of research to evaluate the social-rights jurisprudence on the lives of peoples. Assessments undertaken by different institutions will be used as resource documents for purposes of our initiative. Ours is an in-depth research focused on implementable solutions and not on academic and curriculum advancement which some of the uni-

32. *Id.*

33. See RFB 2013 03, *supra* note 25, ¶ 3.6.

34. See DEP’T OF JUST. & CONST. DEV., S. AFR., DISCUSSION DOCUMENT ON THE TRANSFORMATION OF THE JUDICIAL SYSTEM AND THE ROLE OF THE JUDICIARY IN THE DEVELOPMENTAL SOUTH AFRICAN STATE (2012), available at <http://www.justice.gov.za/docs/other-docs/20120228-transf-jud.pdf> [hereinafter DISCUSSION DOCUMENT].

35. See *id.* § 5.1.2.

36. See RFB 2013 03, *supra* note 25, ¶¶ 3.1, 3.2, 3.4, 3.5.

37. See *id.* ¶ 3.3.

38. See S. AFR. CONST., 1996, § 167(6)(a).

versities' projects mainly seek to achieve. However the academic institutions remain an important player in this endeavour.³⁹

As the Cabinet statement of November 23, 2011, reads, the Cabinet not only considered and approved the assessment of the impact of the decisions of the Constitutional Court, but also considered a package of measures geared to fundamentally overhaul the administration of justice. Accordingly, the assessment should not be seen in isolation but as part of a holistic approach to the transformation of the judicial system in line with the values of the Constitution.⁴⁰ This methodology attempts to simultaneously draw in and distance the universities and law schools—all the while shifting the focus from the assessment to the content of the Discussion Document. Indeed, this quotation shows a defensive tone, one appropriate for a government at that point in time taking a media beating regarding a “review” of the Constitutional Court.

In broad strokes, the Discussion Document can be understood to consist of two parts aptly summarized by the Fort Hare team: “The Discussion Document outlines the reform initiatives that are underway in South Africa to transform the judicial system, and discusses the proposed role of the judiciary in the social transformation of society and State.”⁴¹ While its coverage is broad, it is nonetheless focused on the judicial system rather than the justice sector as a whole.⁴² The first part of the Document is comprised of an overview of six discrete institutions of governance, such as the Judicial Service Commission or the South African Law Reform Commission, and three specific policy processes, such as the Civil Justice Reform Programme.⁴³ These institutions and policy processes all share their source of legitimacy and institutional loca-

39. DISCUSSION DOCUMENT, *supra* note 34, at v.

40. *See id.*

41. FACULTY OF LAW, NELSON R. MANDELA SCHOOL OF LAW, UNIVERSITY OF FORT HARE, AN ANALYSIS OF THE COMMENTS/SUBMISSIONS MADE IN RELATION TO THE DISCUSSION DOCUMENT ON THE TRANSFORMATION OF THE JUDICIAL SYSTEM AND THE ROLE OF THE JUDICIARY IN A DEVELOPMENTAL SOUTH AFRICAN STATE 2 (2013) [hereinafter ANALYSIS OF COMMENTS/SUBMISSIONS ON DISCUSSION DOCUMENT].

42. For a discussion of the South African justice sector as a whole, see AFRI-MAP & OPEN SOC'Y FOUND. FOR S. AFR., SOUTH AFRICA: JUSTICE SECTOR AND THE RULE OF LAW: A DISCUSSION PAPER (2005), http://www.opensocietyfoundations.org/sites/default/files/afri-mapdiscussion_20060223_0.pdf; AFRI-MAP & OPEN SOC'Y FOUND. FOR S. AFR., SOUTH AFRICA: JUSTICE SECTOR AND THE RULE OF LAW (2005), http://www.opensocietyfoundations.org/sites/default/files/afri-mapreport_20060223.pdf. Among other topics, these reports cover the implementation of laws and access to justice, both of which are topics of judicial assessment with respect only to the Constitutional Court and the Supreme Court of Appeal.

43. *See* DISCUSSION DOCUMENT, *supra* note 34, at 17–26.

tion within the DOJCD and represent the fairly concrete ways in which the Department is attempting to transform the judicial system.⁴⁴

The remaining sections of the Discussion Document set forth the purpose and scope of the Document, explicate the constitutional imperatives underlying transformation both of society and of the judicial system, and examine the history and meaning of transformation of the judicial system. Perhaps surprisingly to some, this part of the Discussion Document contains a brief but relatively nuanced discussion of the separation of powers and the role of the judiciary.⁴⁵ This discussion includes reference to decided cases as well as to an academic study in a collection published by the Law Commission of Canada in 1999.⁴⁶ The academic work was driven by Richard Simeon, a Canadian political studies scholar who has written extensively on South African constitutional democracy, often with the South African scholar Christina Murray. Simeon's work is cited in what the Document refers to as an argument "for the need for interdependence and the collegiality of effort for the effective coordination and consolidation of programmes of the state towards a common vision."⁴⁷ The two parts of the Discussion Document are linked through an analysis of "the process of transforming the superior courts and the entire superior court system."⁴⁸

Another means of examining the Discussion Document involves a comparison of its most significant South African antecedent to a follow-up paper commissioned by the Department itself. The most noteworthy predecessor of the Discussion Document is a research

44. The institutions referred to in the Discussion Document are the Judicial Service Commission, the Magistrates Commission, the South African Judicial Education Institute, the South African Law Reform Commission, the Rules Board for Courts of Law, and the Office of the Chief Justice. The programs referred to in the Discussion Document are the Review of the Criminal Justice System, the Civil Justice Reform Programme, and what the Document refers to as "the concept of a single judiciary . . . a process through which the magistrate's courts and magistrates are integrated to form part of a court system, as envisaged by the Constitution." *Id.* § 4.2.6–4.2.6.1.

45. *See id.* at 10–16.

46. *See id.* § 3.3.12.

47. *Id.* The Law Commission of Canada report aimed to assist in the implementation of the Canadian decision, *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (Can.), a decision that was itself clarified by the Supreme Court in *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3 (Can.); *see* LAW COMMISSION OF CANADA, *SETTING JUDICIAL COMPENSATION* (1998).

48. DISCUSSION DOCUMENT, *supra* note 34, § 4.2.2.2 (referring to the Constitution Seventeenth Amendment Bill and the Superior Courts Bill).

paper commissioned by the Presidency as an input into the fifteen-year review process and written by two respected legal academics, Murray Wesson and Max du Plessis.⁴⁹ The significant follow-up analysis consists of the analysis performed by a team of legal academics from the University of Fort Hare contracted by the DOJCD to provide a review of the comments received on the February 2012 discussion paper.⁵⁰

It is impossible to draw out a clear line of analysis from the Discussion Document. Even from a narrow policy perspective, this is not necessarily a fault with the Document—it is, after all, a document intended to stimulate debate. Moreover, the Document itself faced the challenge of a particularly controversial and specific section—the judicial assessment—within the structure of a document intending to provide a broad overview. Nonetheless, it may be enlightening to examine the content of the Document through both direct and indirect methods.

Read directly, the Discussion Document has a brief, but relatively forthright, recognition of the problem of judicial governance as follows:

Striking a balance between policy and law becomes necessary in the current times where courts are increasingly placed in a situation where they have to pronounce on matters of public policy. The interface between the courts' power of judicial review and the policy terrain that is the purview of the Executive and the Legislature becomes even more delicate in the South African situation where the Constitution enshrines a justiciable Bill of Rights.⁵¹

The Document goes on to note that “[i]t is mostly in relation to the socio-economic rights that the courts are seldom required to pronounce on matters of public policy.”⁵² The gravamen of this discussion does not, however, continue to engage with this theme and instead wanders onto a different theme and is apparently contained in its conclusion, as follows:

The expectation is therefore that the collective mindset of those who function within the whole justice system must be qualita-

49. See MURRAY WESSON & MAX DU PLESSIS, THE TRANSFORMATION OF THE JUDICIARY: FIFTEEN YEAR POLICY REVIEW, SOUTH AFRICAN PRESIDENCY 2, available at http://www.thepresidency.gov.za/docs/reports/15year_review/jcps/transformation_judiciary.pdf [hereinafter WESSON & DU PLESSIS, TRANSFORMATION OF THE JUDICIARY]; Murray Wesson & Max du Plessis, *Fifteen Years On: Central Issues Relating to the Transformation of the South African Judiciary*, 24 S. AFR. J. HUM. RTS. 187 (2008).

50. See ANALYSIS OF COMMENTS/SUBMISSIONS ON DISCUSSION DOCUMENT, *supra* note 41, at 25–26 (referring to the Presidency fifteen-year review paper).

51. DISCUSSION DOCUMENT, *supra* note 34, § 6.2.2.

52. *Id.*

tively different from what prevailed under colonialism and apartheid. A Judiciary whose composition does not broadly represent society's demographical profile in terms of race and gender would normally not be perceived to be in a position to contribute meaningfully to pushing the frontiers of change towards inclusiveness and substantive equality.⁵³

It is also fruitful to engage in a less direct analysis by examining the antecedent and follow-up documents to the Discussion Document. These antecedent and follow-up texts demonstrate both similarities and differences. Reaching a quite positive conclusion, Wesson and du Plessis identify five themes related to the transformation of the judiciary: "the process whereby judges are appointed; the need to diversify the judiciary; the need to change the attitudes of the judiciary; and the need to foster greater judicial accountability [and ethics, and calls for efficiency and access to justice]."⁵⁴ The following conclusion of Wesson and du Plessis is a positive one:

South Africa has generally made impressive strides towards transforming the judiciary in its first fifteen years of constitutional democracy. Moreover, this has been achieved while respecting the independence of the judiciary and the separation of powers—principles that are themselves objectives of judicial transformation, as discussed in greater detail below. Ideally, this approach should be replicated in South Africa's next fifteen years of constitutional democracy.⁵⁵

Nonetheless, Wesson and du Plessis sound a minor but significant note of warning: "[u]nfortunately, recent legislative activity in this area, and resolutions and statements of the ruling African National Congress (ANC), while apparently motivated by legitimate objectives, have not always heeded this principle."⁵⁶

The University of Fort Hare team utilized a different structure in analyzing the comments received on the Discussion Document. After identifying a relatively disparate set of noncontentious comments, the Fort Hare analysis turned to a set of twelve issues. Seven of these were framed as concerns or criticisms of the Discussion Document—and were contested and countered directly in the Fort Hare analysis. The Fort Hare team identified: legitimacy issues, concerns regarding the independence of the judiciary, issues relating to public participation, research capacity of the institutions, methodology concerns and time period for assessment, concerns

53. *Id.* § 6.2.5.

54. WESSON & DU PLESSIS, TRANSFORMATION OF THE JUDICIARY, *supra* note 49 at 2.

55. *Id.*

56. *Id.*

on the exclusion of High Courts' decisions from the proposed review, and undefined concepts such as transformation and developmental state.⁵⁷ Five further issues were identified by the team but were not subjected to further analysis. These matters included: reform of the South African Law Reform Commission and the Judicial Services Commission, access to justice, implementation of court decisions, legal education, and transformation of the legal profession.⁵⁸

There is some common substantive ground between the Wesson and du Plessis and the Fort Hare team. In particular, the Fort Hare team draws upon Wesson and du Plessis to identify various themes within the context of judicial transformation—using those themes to counter the charge that transformation is an undefined concept.⁵⁹ The Fort Hare team concludes “[i]t is therefore our view that the concepts of ‘transformation’ and ‘developmental state’ as articulated in the Discussion Document have been adequately and satisfactorily elaborated as indicated above. The criticisms thus lack substance.”⁶⁰ Nonetheless, the documents differ

57. The treatment of the first of these issues provides a good example. The Fort Hare team first notes as follows:

One of the major concerns emerging from the comments is the alleged lack of clear rationale or purpose provided by the DoJCD for the assessment of decisions of superior courts. . . . The nub of some commentators is that the assessment of superior court decisions may be a precursor for a move to amend the Constitution so as to curtail the courts' powers to review executive decisions. The major source of discomfort is the legitimacy of an assessment of decisions of the superior courts carried [out] at the behest of the executive. The concern is that, however well intended, such a modus operandi gives rise to perceptions that the executive is attempting to second-guess the decisions of the courts.

ANALYSIS OF COMMENTS/SUBMISSIONS ON DISCUSSION DOCUMENT, *supra* note 41, at 9–10 (citing comments from the Johannesburg Society of Advocates, Section 27, Rhodes University, Stellenbosch, and Eythan Morris). Then the Fort Hare analysis argues the following:

It is fair to say that the Discussion Document has, in several places, clearly elaborated on the rationale and purpose behind the proposed assessment of the decisions of the superior courts. What clearly emerges from the Discussion Document is that the whole enterprise is aimed at facilitating the development of a holistic programme of action to address challenges that hamper the realisation of the Constitution's transformative goals. . . . The Discussion Document makes it explicitly clear that the assessment of the court decisions is predicated on the need to ascertain the impact of such jurisprudence on transformation of society; how it impacts on all branches of the law; and the extent to which such laws should be reformed to give effect to the transformation goals of the Constitution. . . . In our view, the Discussion Document is very clear as to the rationale and motive of the assessment of the decisions of the superior courts.

Id. at 10–12. The Fort Hare team appears to have fairly and forthrightly stated the concerns of the comments but then proceeded to answer those concerns largely on the basis of the document intended to stimulate debate.

58. *See id.* at 27–32.

59. *See id.* at 25–26.

60. *Id.* at 26.

more than they converge. While Wesson and du Plessis put forth constructive criticism, the Fort Hare analysis—perhaps reflecting its Departmental commissioning and terms of reference—largely defers to the Discussion Document.

IV. THE RULING PARTY: ANC POLICY ON PEACE, STABILITY, AND THE JUDICIARY

The third major policy initiative regarding the South African judiciary during 2012 took place around the June ANC Policy conference. This process began at least three months before the conference with the publication of a series of discussion documents in March 2012, one month after the release of the DOJCD's Discussion Document.⁶¹ Of the thirteen ANC policy papers, the title most relevant to the DOJCD Document would appear to be "Legislatures and Governance."⁶² However, as noted below, this document setting out the ANC policy on governance has no apparent place for the judiciary.⁶³ Instead, it is situated within the document entitled "Peace and Stability" with seven pages of material establishing ANC policy on the judiciary.⁶⁴

This policy document's principal theme might be termed an update from Polokwane—because the document reports on one of the more important and controversial policy resolutions taken at the previous ANC policy conference held in 2007 in Polokwane, regarding the transformation of the Judiciary. Specifically, at Polokwane, the ANC policy that attempted to give most financial power over the courts to the Minister of Justice rather than to the Chief Justice was adopted.⁶⁵ In the context of a recent public

61. See *Discussion Documents—2012*, AFRICAN NAT'L CONG., <http://www.anc.org.za/list.php?t=Discussion%20Documents&y=2012> (last visited Nov. 29, 2014).

62. AFRICAN NAT'L CONGR., LEGISLATURE AND GOVERNANCE: POLICY DISCUSSION DOCUMENT (2012), available at <http://www.anc.org.za/docs/discus/2012/legislaturek.pdf>.

63. See *id.* at 7–8. The document discusses cooperative governance and the role of the provinces, local government, ward committees and community participation, legislatures, and the concept of a single election. Note that the strategic and traditional "Balance of Forces" policy document mentions the judiciary in only two paragraphs and indirectly. AFRICAN NAT'L CONG., THE SECOND TRANSITION? BUILDING A NATIONAL DEMOCRATIC SOCIETY AND THE BALANCE OF FORCES IN 2012 (2012), available at <http://www.anc.org.za/docs/discus/2012/transition.pdf>.

64. AFRICAN NAT'L CONG., PEACE AND STABILITY POLICY DISCUSSION DOCUMENT 12–19 (2012), available at <http://www.anc.org.za/docs/discus/2012/peacev.pdf> [hereinafter PEACE AND STABILITY]. This material is organized under the headings: The Polokwane Conference Resolutions on the Judiciary, Judicial Governance, Court Administration, Impact of the Court Administration on Rule-Making (rules of court), Aspects for Policy Consideration, and Access to Justice as a Guiding Principle. *Id.* at 14–19.

65. See *id.* § 2.1. Polokwane resolved as follows:

debate over the Draft Constitutional Fourteenth Amendment, this resolution constituted a clear affirmation of the policy distinguishing between judicial and administrative functions of courts as well as the policy position that the executive and not the judiciary should be responsible for the administrative functions of courts.⁶⁶ This Polokwane policy on the transformation of the judiciary was effectively reversed two years later.⁶⁷ Again, the revised position was based on an access to justice rationale.

Therefore, the 2012 update noted and debated the progress of the Seventeenth Amendment Bill and the Superior Courts legislation.⁶⁸ The 2012 policy document supported the passage of those two pieces of legislation. Significantly, it looked forward to a further statute, one on “the regulatory aspects relating to the Judicial Council and Court Administration.”⁶⁹ In this envisaged statute, the Minister of Justice is not displaced entirely from a role in judicial governance, but neither is he at the center. This is the case even with regard to ANC policy where one issue to be discussed at the 2012 policy conference was: “the extent of the powers and functions of the governance structure, having regard to the policy-related functions of the Minister responsible for the administration of justice.”⁷⁰ It is worth quoting much of paragraphs 3.3 and 3.4, as they give the rationale for a separate piece of legislation, as follows:

[T]he Chief Justice, as the head of the judicial authority, should exercise authority and responsibility over the development and implementation of norms and standards for the exercise of judicial functions such as the allocation of judges, cases and court rooms within all courts in the court system. [T]he administration of courts, including any allocation of resources, financial management and policy matters relating to the administration of courts are the ultimate responsibility of the Minister responsible for the administration of justice.

Id.

66. See WESSON & DU PLESSIS, TRANSFORMATION OF THE JUDICIARY, *supra* note 49, at 19.

67. See PEACE AND STABILITY, *supra* note 64, § 2.5; *National General Council Report: Peace and Stability*, ANC TODAY (Nov. 19–25, 2010), <http://www.anc.org.za/docs/anctoday/2010/at43.htm>. As the 2012 ANC policy discussion document notes:

At its NGC held in Durban of 2009, the ANC reflected on the need to review the conference resolutions relating to judicial and court administration with a view to establishing a judicial system that is commensurate with the separation of powers and independence of the judiciary enshrined in the Constitution. The review of these resolutions in particular, is intended to establish an effective and judicial administration which is necessary for the efficiency and effectiveness of the court system. The current policy and legislative framework in terms of which the administration of processes which are connected with the judicial functions of the courts are the responsibility of the Minister do not promote an efficient and accountable judicial system that is consonant with the ideal of an accessible justice system.

PEACE AND STABILITY, *supra* note 64, § 2.5.

68. See PEACE AND STABILITY, *supra* note 64, §§ 2.6, 3.

69. *Id.* § 3.4.

70. *Id.* § 6.1.ii.

The Chief Justice and the Heads of Courts have commenced with discussion intended to formulate firm proposals on judicial governance and court administration. The proposals will be taken into account when the Minister of Justice and Constitutional Development, guided by the outcome of this ANC policy process, prepares draft legislation that he would submit to Cabinet.

An area that would require careful consideration in relation to the desired policy framework relates to the distinction between the role and powers of the envisaged judicial governance structure and that of the Minister of Justice and Constitutional Development concerning policy formulation of certain aspects of the administration of justice. Of significance would be the oversight role of Parliament in relation to policy pertaining to the courts and the judiciary. This area constitute the nucleus of the South African model of separation of powers which would require an intelligible reflection in the final policy framework and the legislation that will be promoted through Cabinet to give effect to the desired policy. In view of the anticipated public interest and rigorous debate that this particular aspect is likely to generate during the consultation and Parliamentary hearings stages, it appears ideal and logical to develop a separate legislation on the judicial regulatory framework from the Superior Courts Bill. The latter Bill will, in the main, deal with the courts (the structure, composition, jurisdiction and functioning thereof), while the regulatory aspects relating to the Judicial Council and Court Administration may be dealt with effectively in a separate legislation in the form of the Judicial Authority Act (JAA).⁷¹

One of the institutions which would play a critical role in the management of this proposed legislation is the Office of the Chief Justice. The ANC Policy document notes this as follows:

Pending the enactment of [the Seventeenth Amendment Bill and the Superior Court legislation] an institution of the Office of the Chief Justice has been established through a Presidential Proclamation to provide capacity for the Chief Justice to perform his or her judicial leadership role. Although the Office of the Chief Justice functions independently from the Department of Justice and Constitutional Development, it is a government department which is answerable to the Minister of Justice and Constitutional Development and Cabinet. The Office of the Chief Justice is therefore not an independent institution outside Executive. It is for that reason that the measures implemented through the Presidential Proclamation are perceived to be temporary in nature, pending the enactment of legislation that will

71. *Id.* §§ 3.3, 3.4.

be informed by clear policies that this document seeks to address.⁷²

If one scrutinizes this Policy Document to discern its position on the usually controversial topic of separation of powers, one finds statements that are by no means unsettling:

The independence of the judiciary and the rule of law are the pillars on which the constitutional order is anchored. The separation of powers embodied in the Constitution provides checks and balances to safeguard these values The courts must exercise their judicial authority in line with the . . . Constitution.⁷³

However, the Policy Document also finds that:

The current policy and legislative framework in terms of which the administration of processes which are connected with the judicial functions of the courts are the responsibility of the Minister do not promote an efficient and accountable judicial system that is consonant with the ideal of an accessible justice system.⁷⁴

The framing of the issue of the judiciary in these ANC policy documents raises concerns regarding both access to justice and the doctrine of separation of powers.

The question that then arises is how to explain the disjuncture between the access to justice language of this policy paper and the much more prominent engagement by the ANC with separation of powers rhetoric in political discourse. One simple explanation is that access to justice is an issue with a technocratic policy register while separation of powers is more suited to media and national politics. Continuing with and supporting this line of thought, the ANC policy documents reveal a sharp disjuncture between the judiciary and governance. In terms of ANC policy, the judiciary does not appear as an independent actor within the governance discussion.⁷⁵

It is arguable that the ANC policy documents thus have a gap that ought to be filled. In the current world of regulatory capitalism, formulating a policy to deal with the juncture between the judiciary and governance is crucial. To mention but one example, the continuing saga of e-tolling provides a clear example of the linkage between the judiciary and governance. This linkage is unexamined in these policy documents. It is one thing to investigate and set policy on matters such as the compensation of the

72. *Id.* §§ 3.5, 3.6.

73. *Id.* § 1.5.

74. *Id.* § 2.5.

75. *See id.* at 12–19.

judiciary; it is quite another to look into the judiciary's role in regulation and governance.

The juncture between the judiciary and governance has increasingly attracted legal academic writing. In particular, a small set of scholars are increasingly theorizing the rise of the regulatory state in the Global South and doing so with attention to the crucial role of the judiciary in the rise of that state. For instance, in their examination of the telecommunications regime in India, Arun Thiruvengadam and Piyush Joshi argue that the judiciary can play a positive and constructive role in the elaboration of a regulatory regime.⁷⁶ In their view, "when confronted with a series of disputes relating to the nascent telecom regulatory landscape, the Supreme Court of India sought to make a constructive contribution to both the actual disputes as well as the overall regulatory framework."⁷⁷ For these two Indian regulation scholars, "the regulatory institutions in Indian telecom owe their creation in part to the judiciary, which sought to 'fill out' over a period of time, the 'norms of institutional practice and operational rules and culture' in relation to the regulation of Indian telecom."⁷⁸ Thiruvengadam and Joshi's study is part of the work of a set of scholars beginning to focus on the specific politics and development of regulatory institutions and regimes in the Global South and exploring ways in which the judiciary may be able to play a distinctive and crucial role.⁷⁹ As part of this school, Bronwen Morgan and Navroz Dubash call for attention to "the micro-politics through which the regulatory state emerges and is filled out" and the need for research to be focused on "an expanded array of relevant actors" including that of an active civil society and judiciary.⁸⁰

76. See Arun K. Thiruvengadam & Piyush Joshi, *Judiciaries as Crucial Actors in Southern Regulatory Systems: A Case Study of Indian Telecom Regulation*, 2012 REG. & GOVERNANCE 327, 327 (2012).

77. *Id.* at 328.

78. *Id.* at 341.

79. See generally Navroz K. Dubash & Bronwen Morgan, *Understanding the Rise of the Regulatory State of the South*, 2012 REG. & GOVERNANCE 261, 261–81 (2012).

80. *E.g.*, *id.* at 270. Here there is a conceptual overlap with one of the principal themes of the Discussion Document, a theme encapsulated in one of the section titles—'The Exercise of Judicial Restraint as an Important Element of Constitutionalism'; DISCUSSION DOCUMENT, *supra* note 34, at 29–31.

V. THE CONSTITUTIONAL SEVENTEENTH AMENDMENT ACT, THE
SUPERIOR COURTS ACT, AND THE OFFICE
OF THE CHIEF JUSTICE

Without a doubt, the Seventeenth Amendment to the South African Constitution is an important one, arguably the most important amendment to the South African Constitution to date.⁸¹ The Seventeenth Amendment established the Office of the Chief Justice and further clarified the jurisdiction of the judiciary. After the amendment, the Constitution now reads in a new subsection, § 165(6): “The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.”⁸² In addition to this major intervention, the Seventeenth Amendment also created a single High Court of South Africa, recognized and officially established the Constitutional Court as the highest court in the land, in all matters.⁸³

Much of the language of the Seventeenth Amendment appears to have been derived from a draft version of a bill establishing the South African Constitution’s Fourteenth Amendment.⁸⁴ In its principal part, the Fourteenth Amendment bill would have amended Section 165 of the Constitution to include two additional subsections, reading as follows:

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. The Cabinet member responsible for the administration of justice exercises authority over the administration and budget of all courts.*⁸⁵

The Fourteenth Amendment Bill itself found life as a response to criticism of a set of earlier draft legislation.⁸⁶ In its earliest iteration, the proposed constitutional change encountered opposition

81. The chief competitor for the title of most significant amendment is probably the set of floor-crossing amendments.

82. S. AFR. CONST., Seventeenth Amendment Act of 2012.

83. *See id.* The Act also effects consequential amendments and provides for the appointment of an Acting Deputy Chief Justice. *See id.*

84. *See* WESSON & DU PLESSIS, TRANSFORMATION OF THE JUDICIARY, *supra* note 49, at 16–20; Catherine Albertyn, *Judicial Independence and the Constitution Fourteenth Amendment Bill*, 22 S. AFR. J. HUM. RTS. 126, 132–43 (2006).

85. Constitution Fourteenth Amendment Bill, 2005, Draft Bill (S. Afr.) (emphasis added).

86. *See* WESSON & DU PLESSIS, TRANSFORMATION OF THE JUDICIARY, *supra* note 49, at 16. These bills were the Judicial Service Amendment Bill, the Judicial Services Commission Act Amendment Bill, and the Judicial Conduct Tribunal Bill. *See id.*

on a scale not seen before for legislation within the legal and justice sector.⁸⁷ The draft amendment faced criticism for subjecting the judiciary “to the functional or ethical control of a non-judicial body.”⁸⁸ President Mbeki withdrew the draft amendment in July 2006 in order to seek a greater buy-in from the judiciary.⁸⁹ Nevertheless, the Discussion Document details the manner in which the initial language of the Fourteenth Amendment subsequently found new life in the form of the Seventeenth Amendment.

The Seventeenth Amendment was passed by Parliament in November 2012 and, after signature by President Zuma, came into effect in August 2013—together with the Superior Courts Act. By and large, the implementation of the Seventeenth Amendment and of the Superior Courts Act has gone fairly smoothly. In the view of the state:

The Act heralds a new chapter in our Superior Courts which are still largely structured in accordance with the Supreme Court Act of 1959 passed early on during apartheid rule. The Superior Courts Act now provides a legislative framework for the re-organisation and rationalisation of the structures of the High Court and their jurisdictional areas with a view primarily to enhance equal access to justice. Through the Act’s implementation, the current 13 High Courts which included High Courts inherited from the former “self-governing” apartheid homelands of Transkei, Bophuthatswana, Ciskei and Venda, will be rationalised into a single High Court with a fully functional Division of the Court established in each Province.⁹⁰

The Presidency’s approval of the Seventeenth Amendment Act and its related legislation sent a clear message that “the [Superior Court] Act assigns powers and functions to the newly established Office of the Chief Justice which was established a separate state institution equivalent to a state department by a Presidential Proclamation in 2010. This affirms the Government’s commitment to the independence of the Judiciary.”⁹¹

Of particular interest is the place of the Office of the Chief Justice (OCJ) in this process of implementing the arrangement reached with the judiciary. The initial legal status of the OCJ was

87. See Albertyn, *supra* note 84, at 126–27.

88. WESSON & DU PLESSIS, TRANSFORMATION OF THE JUDICIARY, *supra* note 49, at 16.

89. See *id.*

90. Press Release, The Presidency: Republic of South Africa, President Zuma Signs Superior Courts Bill into Law (Aug. 13, 2012), available at http://www.justice.gov.za/m_statements/2013/20130813-supcourts-bill.pdf.

91. *Id.*

given by a Presidential Proclamation.⁹² In terms of this Public Service Act proclamation, the OCJ has the status of a government department within the public administration. As recognized in both the 2012 policy document and the Discussion Document, this is a temporary situation. As the Discussion Document states: “[t]he location of the Office of the Chief Justice under the public administration framework, which is directly accountable to Cabinet, appears incompatible with the independent character of the Judiciary.”⁹³

In 2012, the current Chief Justice, Mogoeng Mogoeng, put the establishment and operation of the OCJ in the following long-term perspective:

South Africa has gone further to establish a national Department known as the Office of the Chief Justice to ensure the independence of the judiciary. This Office has been established to allow for a transition from an executive-controlled court system to one that is controlled by the Judiciary. This should be accomplished within the next ten years. This will ensure that the Judiciary is not reliant on the executive to fund and run its programmes so as to be effective.⁹⁴

Things appear to have come full circle. The Chief Justice has been articulating the need for a capable and independent judiciary as a necessary but not sufficient condition for development in Africa: “I am not saying that the Judiciary alone can turn things around in a country. But I am saying that the Judiciary that is left to do its job well without fear, favour or prejudice has the capacity to significantly change the deplorable conditions that . . . our people . . . live with.”⁹⁵ It is potentially significant that the Chief Justice has been willing to frame the issue of a capable and independent judiciary in terms of efficiency and the current regulatory mecha-

92. See Proc 44 in GG33500 of 3 Sept. 2010 (S. Afr.); *The Office of the Chief Justice*, S. Afr. JUDICIARY, <http://www.judiciary.org.za/about-the-ocj.html> (last visited Mar. 30, 2015).

93. DISCUSSION DOCUMENT, *supra* note 34, § 4.3.6.2.

94. Mogoeng Mogoeng, Chief Justice of the Republic of S. Afr., Inaugural Cong. of the Ass'n of Asian Constitutional Courts & Equivalent Insts., *The Promotion of Democracy and Constitutional Justice* (May 2012), available at <http://judiciary.org.za/backup/speeches/201205-Korea.pdf>; *Mogoeng Calls for More Judicial Independence*, IOL NEWS (June 20, 2014, 6:33 AM), <http://www.iol.co.za/news/crime-courts/mogoeng-calls-for-more-judicial-independence-1.1706765>; *Speeches by the Chief Justice*, S. Afr. JUDICIARY, <http://www.judiciary.org.za/chief-justice.html> (last visited Mar. 30, 2015).

95. Mogoeng Mogoeng, Chief Justice of the Republic of S. Afr., Address at the Conference of Constitutional Jurisdictions of Africa: The Role of the Judiciary in Promoting Peace, Good Governance and Sustainable Economic Development (May 10, 2013), available at <http://www.constitutionalcourt.org.za/site/judges/justicemogoengmogoeng/Speech-by-the-Chief-Justice-Friday-10-May-2013-Benin-as-at-10-May.pdf>; *Speeches by the Chief Justice*, *supra* note 94.

nism of choice: performance monitoring. In this vein, he thus reported on the establishment of a National Efficiency Enhancement Committee (chaired by the Chief Justice), five pilot projects on judicial case management, and the intention to put the OCJ on a statutory basis. Further, he stated as follows:

We are also in the process of developing norms and standards and our own capacity to harvest statistics to help us identify performance-related challenges in our courts, timeously, so that we can address them without undue delay The South African judiciary is thus doing everything within its power to promote and enforce the observance of the rule of law by developing performance monitoring and evaluation standards and ensuring that they are met.⁹⁶

VI. CONTESTING JUSTIFICATIONS FOR REGULATING THE JUDICIARY

So what? The above is a dense contextual and empirical description of policy initiatives over a significant year relevant to the transformation of the judicial system in contemporary South Africa. What does it all mean, and what lessons, if any, should we draw?

This is the appropriate point to reflect upon and explicitly recognize the twist of using regulatory analysis in this context, one dominated by rights thinking. The topic is here of course the regulation of rights—in the sense of holding accountable the rights-determiners (i.e., the judicial system). Nonetheless, this is a policy domain like any other. The subject may be approached using the rights literature or, as is the case here, using the regulatory studies literature.⁹⁷

The Discussion Document notes “the on-going feasibility study on the appropriate model of court administration that is suited to the South African constitutional democracy.”⁹⁸ In the view of the ANC policy document, the two leading models for the statutory basis of the OCJ are derived from the United States and the United Kingdom.⁹⁹ The OCJ will be taking discretionary decisions regard-

96. Mogoeng Mogoeng, Chief Justice of the Republic of S. Afr., Speech from the Rule of Law in South America 8 (June 25, 2013), available at <http://www.constitutionalcourt.org.za/site/judges/justicemogoengmogoeng/Chatham-House-Speech.pdf>.

97. See BRONWEN MORGAN, *THE INTERSECTION OF RIGHTS AND REGULATION: NEW DIRECTIONS IN SOCIOLEGAL SCHOLARSHIP* 12 (2013).

98. DISCUSSION DOCUMENT, *supra* note 34, § 4.3.6.2.

99. The African National Congress explains the following:

In designing the court administration system or model suited to the South African Constitution, it will be important to compare and adopt best practices from the models which have been adopted by the different jurisdictions in various democracies. A distinction is usually drawn between the United States' model that places court administration under the judiciary and Commonwealth coun-

ing court administration. Can Small Claims courts and Magistrates' courts share the same premises and administrative structures? Can such premises and structures be shared with High Courts? The questions here are to whom is the OCJ accountable and for what? Whatever the answers, these questions are regulatory in nature. Indeed, the regulatory space to be occupied by the OCJ when it is put on statutory basis (on either the U.S. or the U.K. model) is only emphasized by its current legal status as a creature of a Presidential Proclamation under the Public Service Act. The current irony is that the OCJ—the judiciary's hard-fought preferred solution to the executive's perceived threats to judicial independence—is presently a creature not even of statute but of regulation.

Before drawing a set of conclusions from this material, it is perhaps best to pause and note the obvious—there are other ways of approaching this topic. Indeed, it is significant to note what this Article does not attempt to do. First, this Article is not an organizational analysis of the DOJCD or the justice sector. Such an effort would be worthwhile but lies beyond the scope of this Article.¹⁰⁰ Second, this Article is not an argument about the content, shape, or direction of the separation of powers doctrine in the South African Constitution.¹⁰¹ Indeed, closely tied with the separation of powers doctrine is the question of what vision of democracy lies behind different conceptions of the judicial system in South Africa.¹⁰² Third, this Article is not an argument in terms of moral reasoning about the regulation of the judiciary. While both these efforts would also be worthwhile, the aim here is more limited.

The attempt here is to draw from the above survey of policy initiatives in 2012 a mapping of the legitimization of the task of regu-

tries where a statutory body which operates within the proximity of the judiciary is established to assume responsibility for the day-to-day administration the courts and their budgets under the direction of the judiciary.

PEACE AND STABILITY, *supra* note 64, § 4.2.

100. One must go back to 1973 to find such a comprehensive and coherent effort. *See* ALBIE SACHS, *JUSTICE IN SOUTH AFRICA* 11 (1973).

101. For a recent article employing a comparative perspective, noting the controversy regarding the assessment exercise, and discussing a number of recent Constitutional Court and Supreme Court of Appeals cases rejecting or curtailing executive power, see Mark Kende, *Enforcing the South African Constitution: The Fight for Judicial Independence and Separation of Powers*, 23 *TRANSNAT'L L. & CONTEMP. PROBS.* 35 (2014).

102. *See, e.g.*, SEBASTIAN SEEDORF & SANELE SIBANDA, *CONSTITUTIONAL LAW OF SOUTH AFRICA* § 12.1 (2008); Firoz Cachalia, *The Separation of Powers, Active Liberty and the Allocation of Public Resources: The 'E Tolling' Case 6-13* (unpublished manuscript) (on file with author) (providing an overview of the separation of powers doctrine in South Africa).

lating the judicial system in South Africa—thereby sketching “the sorts of reasons that persuade people to accept regulatory decisions.”¹⁰³ Based on the contextual and empirical material presented above, the direction pursued in the remainder of this Article will be to explore the logics of justification standing behind the 2012 policy initiatives regarding the judicial system in South Africa.

It is worthwhile to point out that these logics of justification arguably draw on a different dimension than that of legal correctness, moral reasonableness, or even constitutionality. Robert Baldwin makes this precise point: “Language users, on this view, distinguish between claims that bureaucratic processes are justifiable or appropriate (let us call these ‘legitimacy claims’) and claims that processes are constitutionally correct, legal, or morally praiseworthy.”¹⁰⁴ As such, an analysis of these legitimacy claims may attribute and draw at least some of its power directly from Etienne Mureinik’s central concept of a culture of justification, a concept picked up and carried forward in Karl Klare’s work on transformative constitutionalism.¹⁰⁵

The initial mapping here is taken from Baldwin’s identification of five claims that can be used to justify governmental processes as legitimate.¹⁰⁶ First, Baldwin identifies the legislative mandate claim. As he puts it, “[t]he proponent of the claim is in effect stating: ‘Support what is being done because that is what Parliament, the fountain of democratic authority, has ordered.’”¹⁰⁷ A second legitimacy claim is that of accountability or control. This claim is like the legislative mandate claim relying on the voice of the people but through bureaucratic accountability to democratic or representative bodies.¹⁰⁸ A third claim is the due process claim—respecting fairness or even-handedness. Support is built around consultation with the persons affected by the regulated activity.¹⁰⁹ A fourth claim is the expertise claim. Here, the claim is that professionals have mastery of some arcane area and may be trusted to

103. BRONWEN MORGAN & KAREN YEUNG, AN INTRODUCTION TO LAW AND REGULATION: TEXT AND MATERIALS 222 (2007).

104. ROBERT BALDWIN, RULES AND GOVERNMENT 42 (1995).

105. See Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 148–50 (1998); Etienne Mureinik, *Bridge to Where—Introducing the Interim Bill of Rights*, 10 S. AFR. J. HUM. RTS. 31, 31 (1994).

106. See BALDWIN, *supra* note 104, at 41–46.

107. *Id.* at 43.

108. See *id.* at 43–44.

109. *Id.* at 44.

exercise that mastery in a positive way. Finally, Baldwin addresses the efficiency claim. In this regard, he distinguishes here between effectiveness claims—that goals are being achieved—and economic efficiency claims—that efficient results are produced.¹¹⁰

Four of these five generic legitimacy claims map relatively easily onto the four policy initiatives identified above.¹¹¹ First, the ANC policy document draws upon a legislative mandate. As the ruling party, the ANC has exercised this majority power since the advent of constitutional democracy. Of course, Parliament as a location for the articulation of this claim is to some extent bypassed by the ANC conferences.

Second, the OCJ draws upon the logic of accountability or control. In a negative sense, the OCJ represents the battle lines successfully defended by the judiciary in its struggle for control. In a positive sense, the OCJ as a body owes its existence to its claim to the capacity to hold the judicial system accountable. This claim to legitimacy has yet to be assessed and yet to be given precise institutional shape, although the broad institutional parameters are already emerging.

Third, the Discussion Document draws upon two further legitimacy claims in nearly equal part: the due process claim and the efficiency claim. The due process claim is embodied in the styling of the Discussion Document as a discussion document. This is evinced by the careful treatment of comments on the Discussion Document, an imperfect process—but nonetheless ahead of the norm in South African policymaking. The access to justice language may be a stand in for efficiency.¹¹² This may be appropriate in this policy domain.

Finally, the judicial assessment draws upon the expertise claim. Academic researchers have been called upon to deliver a judgment regarding certain aspects of the judicial system.

In any case, these legitimacy claims are not exclusive. There may well be overlaps. For instance, the Discussion Document may gain in persuasiveness to the extent it is drawing on both accountability and efficiency. Likewise, one might add the legislative mandate claim—particularly through the passage of the Seventeenth Amendment—to the OCJ's claim to control legitimacy. It is also

110. *See id.* at 46.

111. The efficiency claim appears not to feature prominently. This may be because the regulatory regime for the judicial system remains to be devised and promulgated.

112. For a discussion of current access to justice issues in South Africa, see Jonathan Klaaren, *The Cost of Justice 1* (unpublished manuscript) (Mar. 24, 2014).

interesting to examine the intersections among these policy initiatives. For instance, working within a process that claims legitimacy via expertise, Wesson and du Plessis warn against the legislative mandate mode of accountability.¹¹³

The value of the above analysis is: (a) to clarify and describe the policy initiatives to change the judicial system in South Africa, (b) to identify the underlying logics of justification aligned with these policy initiatives distinct from constitutionality, legality, and morality, and (c) to enable the assessment and facilitation of appropriate interventions as the process of transforming and regulating the judicial system continues.

VI. CONCLUSION: TOWARD ACCOUNTABILITY

To conclude and build upon this last point, one might look to the question of accountability using Colin Scott's notion of extended accountability.¹¹⁴ Scott differentiates his concept from the traditional public service model of formally delegated powers as well as exclusive and direct accountability upward to an elected politician. Certainly, the network of accountability standing behind the judicial system in South Africa is not the formal legal logic of reporting to a politically responsible minister as part of the public service. Further, the provision of services in the justice sector includes a growing component of services delivered by the private sector—arbitration and mediation—and in this way, this domain parallels other domains of the new state that steers more and rows less. Employing his notion of extended accountability, Scott argues that two models of accountability existed within the United Kingdom: interdependence and redundancy.¹¹⁵ For him, “[t]he challenge for public lawyers is to know when, where, and how to make appropriate strategic interventions in complex accountability networks to secure appropriate normative structures and outcomes.”¹¹⁶ Interestingly enough, explicit interdependence logic serves as a centerpiece of the Discussion Document.

In Scott's account, the extended accountability on the logic of interdependence is accountability that derives its operative force

113. See WESSON & DU PLESSIS, TRANSFORMATION OF THE JUDICIARY, *supra* note 49.

114. See Colin Scott, *Accountability in the Regulatory State*, 27 J.L. Soc'y 38, 38–60 (2000).

115. See *id.* at 50.

116. *Id.* at 57. For instance, Scott's article presents empirical material and an analysis that could be used to critique the current accountability regime in private contracted-out prisons and detention facilities in South Africa.

from the dispersal of legitimacy and authority.¹¹⁷ For instance, consumer committees that organize and provide feedback to the telecommunications industry and its regulator would be one type of institutions operating on the logic of interdependence. The extended accountability on the logic of redundancy is accountability that derives its efficacy from providing two independent systems of accountability, with the logic of one operating even if the other fails.¹¹⁸ At least in the context of an emerging economy and where the capability of the state is also still emerging as is the case in South Africa, the extended accountability logic of redundancy is to be emphasized.

117. *Id.* at 50–52.

118. *Id.* at 53.