TRANSFORMATION OF THE JUDICIAL SYSTEM IN SOUTH AFRICA, 2012-2013: A REGULATORY PERSPECTIVE

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 may 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, and 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.

INTRODUCTION

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 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 stating "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

[1] "Media Statement by the Minister of Justice and Constitutional Development, Jeff Radebe, on the Occasion of Releasing a Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State on 28 February 2012, Cape Town."

[2] "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 AND JURISPRUDENCE."

Constitution."[3] 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. The implementation of these policy initiatives continued through the year following these events, 2013, reaching a stage by the end of the 2013 that presents an opportune moment to reflect on this process and on the resulting policies. It may be particularly important to pause and take stock of these developments at this instant since in different ways each of these policy initiatives continues to be live and continues to hold significant potential for change in the existing South African policy on the judiciary.

The significance of these policy processes is heightened by the amount of shock, awe, smoke and ink spilled over the judiciary and the separation of powers over the prior year as well as the related topic of transformation, in particular transformation of the bench.

When the necessary distinctions are made among these policy initiatives and when their implementation paths are sketched out, a somewhat surprising set of conclusions may be drawn. First, despite formal ANC policy clearly preferring virtually no role for the judiciary in governance, the DOJCD, led by an ANC heavyweight Minister, is engaged in at least two processes (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 currently 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, and 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.

The sum total of the above indicates a policy process that is congested and slow if not stalled, yet 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 paper 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 paper 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.

THE ASSESSMENT

Of these policy initiatives, it was perhaps the external evaluation process that has attracted the most media attention. Indeed, much of the heat of debate is captured in the tussle over whether this initiative was to be labelled an "assessment" or a "review". Part of the salience of this

[3] "AFRICAN NATIONAL CONGRESS 100 YEARS OF SELFLESS STRUGGLE RECOMMENDATIONS FROM THE 4TH NATIONAL POLICY CONFERENCE JUNE 2012."
[4] "No 17: A Constitutional Amendment (almost) Everyone Agrees on."

terminological choice, of course, lies with the significance 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). 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 23 November 2011 and announcing the evaluation used the term "assessment".[5] The statement itself gave a two paragraph description of the intended process.[6] This statement was then reported on in at least some of the media in single quotes.[7] Opposition parties and some civil society pressure groups lost little time in characterizing the exercise as a review and in opposing it.[8]

While not the starting point, a significant characterization of the evaluation as a "review" stems from a candid interview granted by President Zuma to a major Johannesburg newspaper, the Star.[9] The 13 February 2012 news story stated: "President Jacob Zuma sees a need to "review the Constitutional Court's powers". This was part of a democratic process to counterbalance the powers of the three arms of the state. In an interview with The Star yesterday, Zuma reiterated that judges were not "special people" but fallible human beings. The Star understands that the issue of the review of the powers of the Constitutional Court was raised by a deputy minister and ANC leader at the party's national executive committee (NEC) meeting two weeks ago, and also canvassed among cabinet ministers. Two sources in the party and the government confirmed this. But yesterday Zuma said it was "not necessarily members of the NEC of the ANC, it is a general societal issue that is being

[5] "Statement on Cabinet Meeting of 23 November 2011 | Government Communication and Information System (GCIS)."

[6] In relevant and full part, the Cabinet statement stated "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."

[7] "Cabinet to Have Constitutional Court Decisions 'Assessed.'"

[8] "CASAC – Media Statement on Cabinet's Announcement on an 'assessment' of Performance of Constitutional Court"; "DA Questions Cabinet's ConCourt Assessments"; "Ramphele Slams Cabinet's Court Review Decision."

[9] "Zuma Wants Constitutional Court Powers Reviewed."

raised, (it is a) growing view". He questioned the logic of having split judgments among judges, saying "how 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. [I]t 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." He said judges were "influenced by what's happening and influenced by you guys (the media)". As noted above, the context for Zuma's interview was one where the choice of precise term – review or assessment – was already a matter for political debate.

The assessment was contentious from the point of view of at least some former Constitutional Court judges from the beginning. For instance, former Constitutional Court Judge Johann Kriegler called the plan inauspicious according to media reports, saying "[The judiciary] is not a platform in Polokwane. We are not talking politics,".[10] The reference to Polokwane was pointed, referring to the ANC National Policy Conference held in Polokwane, the capital of the Limpopo Province, in 2007 where the ANC adopted several far-reaching resolutions – including some which ultimately led to the resignation of Thabo Mbeki as the President of South Africa -- which were then taken forward to a greater or lesser extent within government.

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).[11] 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."[12] It was open to submit a tender dealing with selected portions only of the assessment and not the whole.[13] 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".[14] The goals of this analysis were (a) "to 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 extent to which

[10] "Judges Question ConCourt Assessment."
[11] "2012 TERMS OF REFERENCE FOR THE ASSESSMENT OF THE IMPACT OF THE DECISIONS OF THE C ONSTITUTIONAL COURT AND THE SUPREME COURT OF APPEAL ON THE SOUTH AFRICAN LAW AND JURISPRUDENCE."
[12] Ibid. S 1. Another section, s 3, used the term "competent research institutions".
[13] Ibid. S 8.2.
[14] Ibid. S 3.1.

South Africa's evolving jurisprudence has transformed and developed the common law and customary law in South Africa as envisaged by the Constitution."[15]

This tender was an open one and occasioned a number of conversations over potential collaboration among individuals and institutions considering making a formal tender. By the closing date of 4 May 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.[16] This initial tender was then cancelled "due to minor changes that had to be effected to the terms of reference."[17]

In the second iteration of the tender in 2013, a closed tender was published on 12 April 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. Perhaps most significantly, the boilerplate language of the standard DOJCD tender process now took up the first 37 pages of the 43 page tender document, with the very slightly revised version of the 2012 ToR now labelled an Annexure.[18] The tender was then awarded to a joint venture between the Human Sciences Research Council (HSRC) and the law faculty of the University of Fort Hare in the amount of R10,324,841.00.[19] The HSRC and Ft Hare aimed to begin the project by mid-September 2013. Even at this stage of implementation, the reaction to the award continued to feature harsh words from opposition parties regarding the purpose and cost of the evaluation.[20]

In the end, whatever the degree of heat 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.[21]

THE DISCUSSION DOCUMENT

While the Cabinet statement regarding its meeting of 23 November 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.[22] 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

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[15] Ibid.
[16] See http://www.justice.gov.za/cfo_tender/tender.htm (last accessed 4 July 2012) (referring to RFB 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 18 months.).
[17] Letter from Director: Supply Chain Management (DOJCD) to Piet Barnard (UCT) (12 April 2013).
[18] "RFB 2013 03 .pdf."
[19] "DOJ&CD: Tenders/Awarded."
[20] "Court Review Assigned to HSRC, Fort Hare - Crime & Courts | IOL News | IOL.co.za"; ibid.; "HSRC"; "HSRC, Fort Hare to Review Court Rulings | News24."
[21] "Assessment of Judiciary Represents a Retreat for Reactionary Forces in Government – Constitutionally Speaking."
[22] "Statement on Cabinet Meeting of 23 November 2011 | Government Communication and Information System (GCIS)."

itself was released in February 2012 by the Minister of Justice and Constitutional Development. In his statement accompanying the release, Minister Radebe framed the discussion paper as part of a fifteen-year anniversary of the Final Constitution:

"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."[23]

According to the Minister: "[T]he 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. The Document, which was considered and adopted by Cabinet on 23 November 2011, is an overview of the protracted debate and negotiations within the judicial sector and the legal profession which spans over a period of 14 years. Time is now opportune to initiate a national dialogue on these fundamental principles of judicial reform which have crystallised over time."[24]

There are substantial and significant linkages between the judicial assessment policy initiative and the Discussion paper. Part of the scope of the judicial assessment is to consider and have regard to the submissions by interested parties on the Discussion Document.[25] Further, the assessment is highlighted by the Minister in his Preface to the Discussion Document.[26] Indeed, in what may be a trace 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.[27] The judicial assessment covers the Constitutional Court and the Supreme Court of Appeal in almost all of its scope: 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 finalised.[28] Only in respect of a comparative study of direct access is solely the Constitutional Court covered.[29] This is appropriate as the Constitution only ensures direct access to the Constitutional Court.[30]

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 bears quotation and close reading:

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[23] "Media Statement by the Minister of Justice and Constitutional Development, Jeff Radebe, on the Occasion of Releasing a Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State on 28 February 2012, Cape Town."
[24] Ibid.
[25] "RFB 2013 03 .pdf," sec. 3.6.
[26] "Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State," V–VI.
[27] Ibid., sec. 5.1.2.
[28] "RFB 2013 03 .pdf," sec. 3.1, 3.2, 3.4, 3.5.
[29] Ibid., sec. 3.3.
[30] "Constitution of the Republic of South Africa (as Amended by 17th Amendment, 23 August 2013)," sec. 167(6)(a).

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

As the Cabinet statement of 23 November 2011 read, Cabinet did not only consider and approve the assessment of the impact of the decisions of the Constitutional Court, but it also considered a package of measures geared to fundamentally reform the administration of justice. Therefore 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."[31] The first paragraph attempts to both draw in and distance the universities and law schools. The second paragraph then attempts to shift the focus from the assessment to the content of the Discussion Document, "a holistic approach." Indeed, both paragraphs of this quote show 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. These two parts are 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."[32] While its coverage is broad, it is nonetheless focused on the judicial system rather than the justice sector as a whole.[33] The first part of the Document is essentially 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).[34] These institutions and policy processes all share their source of legitimacy and institutional location within the Department of Justice and Constitutional Development and represent the fairly concrete ways in which the Department is setting about transforming the judicial system.[35]

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[31] "Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State," V.

[32] "DJCD_Evaluation of Comments on Discussion Doc_Draft 2_2013.pdf," 2.

[33] For a report and a discussion paper on the South African justice sector as a whole, see "South Africa Justice Sector and the Rule of Law: A Discussion Paper"; "Justice Sector and the Rule of Law A Review by AfriMAP and Open Society Foundation for South Africa." Among other topics, this report covers the implementation of laws and access to justice, both of which are topics of the judicial assessment with respect only to the Constitutional Court and the Supreme Court of Appeal.

[34] "Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State," 17–26.

[35] The institutions referred to in the 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 programmes referred to in the 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." Document at 21.

The second part is the remainder of the Discussion Document. These other sections set out 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.[36] 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.[37] The academic work is 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 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."[38] The link between the two parts of the Discussion Document is of course "the process of transforming the superior courts and the entire superior court system."[39]

Another way to get a handle on the Discussion Document is to compare it to its most significant South African antecedent as well as to a follow-up paper commissioned by the Department itself. The most significant antecedent was a research 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.[40] The significant follow-up analysis is the analysis done by a team of legal academics from the University of Ft. Hare contracted to the DOJCD to provide a review of the comments received on the February 2012 discussion paper.[41]

It is actually impossible to draw 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 precocious child – the judicial assessment. Nonetheless, it may be enlightening to examine the content of the Document through both direct and indirect methods.

Read directly and from an appreciative point of view, the Discussion Document has a brief but relatively forthright recognition of the problematic of the judiciary and governance: "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

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[36] "Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State," 10–16.
[37] Ibid., sec. 3.3.12.
[38] Ibid., 14; Simeon's presentation is contained in a 1999 report by the (now defunct) Law Commission of Canada, titled "Setting Judicial Compensation: Multidisciplinary Perspectives". "Setting Judicial Compensation EN.pdf." 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, 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.
[39] "Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State," 18. The Document refers here to the Constitution Seventeenth Amendment Bill and the Superior Courts Bill.
[40] "The Transformation of the Judiciary by Dr Murray Wesson and Professor Max Du Plessis, Fifteen Year Policy Review, South African Presidency"; Wesson and Du Plessis, "Fifteen Years On."
[41] "DJCD_Evaluation of Comments on Discussion Doc_Draft 2_2013.pdf." See pp. 25-26, referring to the Presidency fifteen-year review paper.

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."[42] The Document then goes on to note in what seems to be awkward phrasing 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."[43] The punchline of this discussion does not, however, continue to engage with this theme and instead wanders onto a different theme and is apparently contained in the two sentence conclusion: "The expectation is therefore that the collective mindset of those who function within the whole justice system must be qualitatively 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."[44]

It may also be fruitful to engage in a more indirect analysis by examining the antecedent and follow-up documents to the Discussion Document. These antecedent and follow-up texts demonstrate some similarities but also some differences. Reaching a quite positive conclusion, Wesson & du Plessis identified 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, the need to foster greater judicial accountability [and ethics, and calls for efficiency and access to justice]."[45] The major conclusion of Wesson & du Plessis was 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 …. Ideally, this approach should be replicated in South Africa's next fifteen y ears of constitutional democracy ."[46] Nonetheless, they sounded 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."[47]

The University of Fort Hare team used a different structure in analysing the comments received on the Discussion Document. After identifying a relatively disparate set of non-contentious 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. These were legitimacy issues ("no clear rationale for the assessment"), concerns on the independence of the judiciary, legitimacy issues relating to public participation, research capacity of the institutions, methodology concerns and time period for assessment, concerns on the exclusion of High Courts' decisions from the proposed review, and undefined concepts: transformation and

[42] "Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State," 29.
[43] Ibid., 30.
[44] Ibid., 31.
[45] "The Transformation of the Judiciary by Dr Murray Wesson and Professor Max Du Plessis, Fifteen Year Policy Review, South African Presidency," 2.
[46] Ibid.
[47] Ibid.

developmental state.[48] A further five issues were identified but not contested and essentially taken on board by the Fort Hare team: 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.[49]

There is some common substantive ground between the Wesson & du Plessis and the Fort Hare team. In particular, the Fort Hare team draws upon Wesson & 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.[50] 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."[51] Nonetheless, the documents differ more than they converge. While the Wesson & du Plessis is a constructive criticism, the Fort Hare analysis (perhaps reflecting its Departmental commissioning and terms of reference) is in largest part a defence of the Discussion Document.

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 public publication of a series of discussion documents in March 2012, the month after the release of the DoJCD's Discussion Document.[52] Of the thirteen ANC policy papers, the title most relevant to the DoJCD Document would appear to be "Legislatures and Governance".[53] But this document setting out ANC policy on governance has no apparent place for the judiciary, a point I

[48] The treatment of the first of these issues provides a good example. The Fort Hare team first notes that "[o]ne 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 [comments[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." The comments referred to came from Johannesburg Society of Advocates, Section27, Rhodes University, Stellenbosch, and Eythan Morris. Then the Fort Hare analysis argues "[i]t 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." All references here are to the Discussion Document. "DJCD_Evaluation of Comments on Discussion Doc_Draft 2_2013.pdf," 9–12. 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.

[49] Ibid., 27–32.

[50] Ibid., 25–26.

[51] Ibid., 26.

[52] "The African National Congress Website - Discussion Documents 2012."

[53] "ANC LEGISLATURE AND GOVERNANCE Policy Doc - Legislaturek.pdf."

shall return to below.[54] It is instead within the paper titled "Peace and Stability" where one finds seven pages of material setting up ANC policy on the judiciary.[55]

This policy document's principal theme might be termed an update from Polokwane – since the document reports on process to date on one of the more important and controversial policy resolutions taken at the previous ANC policy conference held in 2007 in Polokwane, that on the Transformation of the Judiciary. At Polokwane, ANC policy was adopted which attempted to give most financial power over the courts to the Minister of Justice rather than to the Chief Justice.[56] In the context of a recent public debate over the Draft Constitutional Fourteenth Amendment Bill (see below), this resolution was 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.[57]

This Polokwane policy on the transformation of the judiciary was effectively reversed two years later.[58] Again, the rationale for the revised position was based on an access to justice rationale.

Thus, the 2012 update was to note and debate upon the progress of the Seventeenth Amendment Bill and the Superior Courts legislation.[59] 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 to Court Administration".[60] The Minister is not displaced entirely from a role in judicial governance but that office is certainly not at the centre, even according to ANC policy where the 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

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[54] Ibid. 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 only in two paragraphs and only indirectly. "THE SECOND TRANSITION? Building a National Democratic Society and the Balance of Forces in 2012."

[55] "ANC Peace and Stablity Policy Doc - 2012," 12–19. This material is organized under the headings: The Polokwane Conference Resolutions on the Judiciary, Judicial Governance, Court Administration, Impact of Court Administration on Rule-Making (rules of court), Aspects for Policy Consideration, and Access to Justice as a Guiding Principle.

[56] Ibid., para. 2.1. Polokwane resolved that "a. The 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. b. the 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"

[57] "The Transformation of the Judiciary by Dr Murray Wesson and Professor Max Du Plessis, Fifteen Year Policy Review, South African Presidency," 19.

[58] "ANC Peace and Stablity Policy Doc - 2012," para. 2.5; "ANC Today, 19 - 25 Nov 2010." As the 2012 ANC policy documents 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.

[59] "ANC Peace and Stablity Policy Doc - 2012," para. 2.6 & 3.

[60] Ibid., para. 3.4.

functions of the Minister responsible for the administration of justice."[61] It is worth quoting paras 3.3 and 3.4 in full, as they give the rationale for a separate piece of legislation:

"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.

3.4 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)."[62]

The key institution running ahead of this proposed legislation is the Office of the Chief Justice. As the ANC Policy document notes: "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. 3.6 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 be informed by clear policies that this document seeks to address."[63]

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 injunction of the Constitution."[64] Perhaps the most bite is in the following: "The current policy and legislative framework in terms of which the administration of processes which are connected with the judicial

[61] Ibid., para. 6.1.ii.
[62] Ibid., para. 3.3 & 3.4.
[63] Ibid., para. 3.5 & 3.6.
[64] Ibid., para. 1.5.

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."[65] The framing of the issue of the judiciary in these ANC policy documents is as much access to justice as it is that of the doctrine of separation of powers. The question that then arises is how to explain the disjuncture between the access to justice talk of this policy paper and the much more prominent engagement by the ANC with separation of powers rhetoric in political discourse. The simplistic explanation is of course 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 bolstering this line of thought, the ANC policy documents show 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.[66]

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 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 theorising 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, Thiruvengadam and Joshi argue that the judiciary can play a positive and constructive role in the elaboration of a regulatory regime.[67] 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."[68] 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."[69] 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 to explore ways in which the judiciary may be able to play a distinctive and crucial role.[70] As part of this school, Morgan and Dubash call for attention to ""the micro-politics through which

[65] Ibid., para. 2.5.
[66] "ANC Peace and Stablity Policy Doc - 2012"; "ANC LEGISLATURE AND GOVERNANCE Policy Doc - Legislaturek.pdf."
[67] "Judiciaries as Crucial Actors in Southern Regulatory Systems: A Case Study of Indian Telecom Regulation - Thiruvengadam - 2012 - Regulation & Governance - Wiley Online Library."
[68] Ibid., 328.
[69] Ibid., 341.
[70] Dubash and Morgan, "Understanding the Rise of the Regulatory State of the South*."

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.[71]

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.[72] The major intervention made by the 17th Amendment is the entrenchment of the Office of the Chief Justice and a consolidation of the claimed jurisdiction of the judiciary. After amendment, the Constitution now reads in a new sub-section, ss 165(6), in the section on Judicial Authority: "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." In addition to this major intervention, the 17th Amendment also merged the inherent jurisdictions of the legacy High Courts -- some leftover from the days of the homelands -- into a single High Court of South Africa, recognized and officially established the Constitutional Court as the highest court in South Africa in all matters.[73]

The Act has a long history, having an earlier life as the Draft Constitution Fourteenth Amendment Bill.[74] In its principal part, the 14th Amendment Bill would have amended section 165 of the Constitution to include two additional sub-sections, reading: (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*." (italics added, indicating language not included in the Seventeenth Amendment).[75]

Comment [w1]: Is there a good source taking the story from the Polokwane resolution of Dec 2007 to the 2009 Durban NGC?

The 14th Amendment Bill itself was a response to criticism of a set of earlier draft legislation.[76] Indeed, in its form as the Draft Fourteenth Amendment, the proposed constitutional change encountered opposition on a scale that had never before been seen for legislation within the legal and justice sector.[77] The Bill was criticised as subjecting the judiciary "to the functional or ethical

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[71] Ibid., 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 on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State," 29–31.

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

[73] "Constitution Seventeenth Amendment Act." The Act also effects consequential amendments and provides for the appointment of an Acting Deputy Chief Justice.

[74] Albertyn, "Judicial Independence and the Constitution Fourteenth Amendment Bill"; "The Transformation of the Judiciary by Dr Murray Wesson and Professor Max Du Plessis, Fifteen Year Policy Review, South African Presidency," 16–17, 17–20.

[75] "Draft Constitution Fourteenth Amendment Bill, 2005."

[76] "The Transformation of the Judiciary by Dr Murray Wesson and Professor Max Du Plessis, Fifteen Year Policy Review, South African Presidency," 16. These bills were the Judicial Service Amendment Bill, the Judicial Services Commission Act Amendment Bill, and the Judicial Conduct Tribunal Bill.

[77] Albertyn, "Judicial Independence and the Constitution Fourteenth Amendment Bill," 126–127.

control of a non-judicial body".[78] President Mbeki withdrew the draft amendment in July 2006 in order to seek greater buy-in from the judiciary.[79] The Discussion Document picks up the history of recent history since May 2010 when the draft Seventeenth Amendment Bill was published for public comment.[80] The publication of this draft Bill occurred during the brief but effective stint of Sandile Ngcobo as Chief Justice.[81]

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 Amendment and of the Superior Courts Act appears to be going fairly smoothly. In the view of the state, "[t]he 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."[82] The Presidency was clear about the message that it was trying to send through the approval of the Seventeenth Amendment Act and this related legislation: "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."[83]

Of particular interest indeed is the place of the Office of the Chief Justice in this process of implementing the arrangement reached with the judiciary. The initial legal status of the OCJ is given by a Presidential Proclamation.[84] In terms of this Public Service Act proclamation, the Office is given the status of a government department within the public administration. As recognized in both the 2012 policy document and the Discussion paper, 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."[85]

In 2012, the current Chief Justice put the establishment and operation of the OCJ in a 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

[78] "The Transformation of the Judiciary by Dr Murray Wesson and Professor Max Du Plessis, Fifteen Year Policy Review, South African Presidency," 16.
[79] Ibid.
[80] "Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State," I & V, 18–19, 25–26.
[81] "The Zuma Years," 273–275.
[82] "President Zuma Signs Superior Courts Bill into Law."
[83] Ibid.
[84] "gg33500_nn44_pg6-1.pdf."
[85] "Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State," 42.

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."[86]

Things appear to have come full circle. In two key speeches, one in Benin and one in London, 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 the majority of our people have had to live with."[87] It is possibly 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 mechanism of choice: performance monitoring. In this vein, he thus reported on the establishment of a National Efficiency Enhancement Committee (chaired by the CJ), five pilot projects on judicial case management, and the intention to put the Office of the Chief Justice on a statutory basis. Further, he stated "[w]e 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."[88]

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 perhaps the appropriate point to reflect upon and explicitly recognize the twist of using regulatory analysis in this context, one dominated instead by rights=thinking. The topic is here of course the regulation of rights – in the sense of holding accountable the rights-determiners, the judicial system. Nonetheless, this is a policy domain like any other. It may be approached using the rights literature or, as is the case here, using the regulatory studies literature.[89]

To go back to the Discussion Document, it notes "the on-going feasibility study on the appropriate model of court administration that is suited to the South African constitutional democracy."[90] In the view of the ANC policy document, the two leading models for the statutory basis of the Office of the Chief Justice are derived from the United States and the United Kingdom.[91] The OCJ will be taking

[86] "Korea-Speech.pdf."
[87] "Speech-by-the-Chief-Justice-Friday-10-May-2013-Benin-as-at-10-May.pdf."
[88] "Chatham-House-Speech.pdf," 8.
[89] Morgan, *The Intersection of Rights and Regulation*.
[90] "Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State," 26.
[91] "ANC Peace and Stablity Policy Doc - 2012," 17. "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 countries where a statutory body which operates within the proximity of the judiciary is

discretionary decisions regarding 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 US or the UK 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 at present 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 of course other ways of approaching this topic. Indeed, it is significant to note what this paper does not attempt to do. First, this paper 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 paper.[92] Second, this paper is not an argument about the content, shape or direction of the separation of powers doctrine in the South African Constitution. Indeed, closely tied in 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.[93] Third (and perhaps still quite close to the second point, particularly in its democracy theme), this paper 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 will be to draw from the above survey of policy initiatives in 2012 a mapping of the legitimation of the task of regulation the judicial system in South Africa – thus sketching "the sorts of reasons that persuade people to accept regulatory decisions."[94] Based on the contextual and empirical material presented above, the direction pursued in the remainder of this paper will be to explore the logics of justification standing behind the 2012 policy initiatives regarding the judicial system in South Africa.

It may be worthwhile to point out here that these logics of justification arguably draw on a different dimension than that of legal correctness, moral reasonableness, or even constitutionality. Baldwin indeed 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."[95] As such, an analysis of these legitimacy claims may attribute and draw at least some its power directly from Mureinik's

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established to assume responsibility for the day-to-day administration the courts and their budgets under the direction of the judiciary."

[92] One may need to go back to 1973 to find such a comprehensive and coherent effort. Sachs, *Justice in South Africa*.

[93] "Seedorf and Sibanda, CLOSA, Chapter 12." See also F Cachalia, 'The Separation of Powers, Active Liberty and the Allocation of Public Resources: The "E Tolling" Case' (unpublished paper).

[94] Morgan and Yeung, *An Introduction to Law and Regulation*, 222.

[95] Baldwin, *Rules and Government*.

central concept of a culture of justification, a concept picked up and carried forward in Klare's work on transformative constitutionalism.[96]

The initial mapping here is taken from Robert Baldwin's identification of five claims that can be used to justify governmental processes as legitimate.[97] First, Baldwin identifies the legislative mandate claim. As he puts it, "[t]he proponent of the claim is in effect stating: 'Support what is done because that is what Parliament, the fountain of democratic authority, has ordered.' 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. A third is the due process claim – respecting fairness or even-handedness. Support is built around consultation with the persons affected by the regulated activity. A fourth is the expertise claim. Here, the claim is that professionals have mastery of some arcane area and may be trusted to exercise that mastery in a positive way. And a final one is the efficiency claim. Baldwin distinguishes here between effectiveness claims – that goals are being achieved – and economic efficiency claims – that efficient results are produced.

Four of these five generic legitimacy claims map relatively easily onto the four policy initiatives identified above.[98] 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.

Comment [w2]: Imagine what would have happened if parliament had a scrutiny of subordinate legislation statute – like Gauteng's – and were examining Proclamation 44 of 2010?

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 also has 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 evidenced in the careful treatment of the comments to the Discussion document, a not-perfect process but nonetheless ahead of the norm in South African policy making. The access to justice language may be a stand in for efficiency. This may be appropriate in this policy domain.

Finally, the judicial assessment draws upon the expertise claim. Here it is academic researchers that have been called upon to deliver a judgment regarding certain aspects of the judicial system.

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[96] Mureinik, "Bridge to Where - Introducing the Interim Bill of Rights, A"; "Klare SAJHR LC and Transformative Constitutionalism."

[97] Baldwin, *Rules and Government*; Baldwin's five logics may be contrasted with the three discourses of Mashaw, which are claimed to be more useful internal to the state: bureaucratic rationality, professional judgment, and moral reasoning. Baldwin's appear to resonate well in the South African context. This is perhaps due to the distinguishing out of the efficiency claim as well as distinguishing between a legislative mandate and the legitimacy claim based on accountability or control. Mashaw, *Bureaucratic Justice*.

[98] The efficiency claim appears not to feature prominently. This may be in part since the regulatory regime for the judicial system remains to be devised and promulgated.

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 interesting to examine the intersections among these policy initiatives. For instance, working within a process that claims legitimacy via expertise, Wesson & du Plessis explicitly warn against the legislative mandate mode of accountability.[99]

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.

CONCLUSION: TOWARDS ACCOUNTABILITY

To conclude and to pick up on the last point, one might look to a further question beyond this one – one of accountability. It would be appropriate here to use Colin Scott's notion of extended accountability.[100] Scott differentiates his concept from the traditional public service model of formally delegated powers and exclusive and direct accountability upwards 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 political responsible Minister as part of the public service. Further, the provision of services in the justice sector does include 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 argued that two models of accountability existed within the UK state: interdependence and redundancy.[101] 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."[102] Interestingly enough, we have interdependence as the explicit logic of the Discussion Paper. Nonetheless, as least as a matter of first impression, particularly 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, redundancy is arguably to be emphasized.

[99] Wesson and Du Plessis, "Fifteen Years On."
[100] Scott, "Accountability in the Regulatory State."
[101] Ibid.
[102] Ibid. 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.