

The transformation of the South African judiciary: A measure to weaken its capacity?

by

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Abstract

The quest for the transformation of the South African judiciary has been a subject of great interest since the attainment of democracy in 1994. Such an interest is borne by the interrelationship that exists in relation to the function the judiciary is expected to perform and the crucial importance of its independence in safeguarding and acting as a gatekeeper in the promotion of the values of the new constitutional dispensation. This role is linked to its transformation, which is meant to remedy specific injustices that originate from socio-political and cultural factors that compromise the process of democratisation and social transformation. The process of the transformation of the judiciary has ignited debates on how it should be undertaken. Some argue that judicial transformation which is meant to address the historic legacy of inequalities which South Africa inherited from its past, is nothing more than reverse discrimination – which weakens the judiciary because of inexperienced officers that may be appointed to the bench. On the other hand, the debates are fuelled by the challenges faced by the Judicial Services Commission (JSC) in the management of the process of judicial appointments, in order to meet its constitutional mandate of transforming the judiciary.

This paper seeks to emphasise the significance of the fundamental value of transforming the judiciary. The objective is to establish the various factors that may have an impact in facilitating or damaging the process of transformation. The intention is not to imbue the process of transformation with gender and racial overtones, but rather to argue for the importance of reflecting South Africa's diversity in the 20 years of constitutionalism in relation to the composition of the judiciary. In essence, it is not argued within the context and framework of 'Africanising' or racialising the institution, but as a form of remedying the

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historic legacy of inequalities and discrimination which continue to manifest themselves today.

1 Introduction

The 20 years of South Africa's constitutionalism provides a fertile ground for the determination of the progress made in eliminating inequalities and discrimination which characterised the country before its transition into the new dispensation.¹ The transition entailed the transformation of state institutions – which included the judiciary.² The quest for the transformation of the judiciary has generated debates which are linked to the function – it is expected to perform as a gatekeeper in the promotion of the values of the new constitutional dispensation, the crucial importance of its independence, and *its reflection of South Africa's diversity*.³ In the context of these factors, the debates include, amongst others, that the process of transformation is nothing more than 'reverse discrimination' that is weakening the judiciary because of inexperienced officers that may be appointed to the bench.⁴ The debates are further fuelled by the challenges faced by the Judicial Services Commission⁵ in the management of the process of judicial appointments, in order to meet its constitutional mandate of transforming the judiciary.

¹ See: Moseneke DCJ in *Minister of Finance v Van Heerden* 2004 (11) BCLR (CC) 1125 – when he stated that 'when our Constitution took root [20 years ago] our society was deeply divided, vastly unequal and uncaring of human worth. Many of these stark social and economic disparities will persist for long to come' at para 23. The impact of the pre-democratic history was earlier characterised in the *Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253, as the Court held that 'from the outset the country maintained a colonial heritage of racial discrimination and in most of the country the franchise was reserved for white males and a rigid system of economic and social segregation was enforced' at para 5. See, also, Hamber B 'Who pays for peace? Implications of the negotiated settlement for reconciliation, transformation and violence in post-apartheid South Africa' (1998), Public Lecture at Annual General Meeting of the Catholic Institute for International Relations London, Voluntary Sector Resource Centre, London, 30 October.

² See: section 165 of the Constitution of the Republic of South Africa 1996, hereinafter referred to as the 'Constitution', which establishes the judiciary as the third branch of the state. The judiciary functions within the broad framework of the doctrine of separation of powers – as an independent branch that should discharge its obligations without interference from the other two branches: the legislature and the executive, as entrenched in section 165(4). See, also, Rickard C 'The South African Judicial Services Commission' Legal Editor, *Sunday Times* (South Africa). She emphasised the role that South Africa had to undertake in transforming its institutions, by holding that: 'at the time of political transformation in South Africa, almost no institution was left untouched; the courts and the judiciary are among those which underwent major changes, one of which was to find a new way of appointing judges'.

³ See the preamble of the Constitution, as it seeks to heal the divisions of the past [Author's emphasis].

⁴ See: Harms LTC 'Transparency and the accountability in the judicial appointment process' (2010) *Forum* at 36-38. He argues that 'there is no doubt that the JSC rejects suitable candidates only because they are white and male ... a 'transformation candidate' will be appointed, even where there is no merit at all, because the alternatives are so mediocre' at 38. [Author's emphasis].

⁵ See: section 178 of the Constitution, which establishes the institution – hereinafter referred to as the 'JSC'.

In light of this background, this paper seeks to emphasise the significance of the fundamental value of transforming the judiciary – as a measure that is designed to and has the potential to affect such a process. The objective is to establish the various factors that may have an impact in facilitating the achievement or in damaging the process of transforming the judiciary. The intention is not to imbue the process of transformation with gender or racial overtones, but rather to argue for the importance of reflecting South Africa's diversity in the 20 years of constitutionalism – in relation to the composition of the judiciary. In essence, it is not argued within the context and framework of 'Africanising' or 'racialising' the institution, but as a form of remedying the historic legacy of inequalities and discrimination which continue to manifest themselves today.

2 Transformation: An unpleasant process needed to confirm the integrity of the judiciary?

2.1 The imperative for judicial transformation

[transformation] is an essential infrastructure of [our constitutional, democratic] and representative democracy.⁶

The transformation of the judiciary is a constitutional imperative which is drawn from section 174(2) of the Constitution, which requires the reflection of South Africa's diversity in the composition of the judiciary. The diversity of the judiciary means consideration of the racial and gender composition of South Africa, when judicial appointments are made. This means the change from the state of affairs that existed before the dawn of democracy. It is constituted by the:

- process of judicial appointments;
- need to diversify the judiciary;
- need to change its attitude;
- need to foster greater judicial accountability;
- need for an efficient judiciary that is responsive to the needs of ordinary South Africans; and
- facilitation of greater access to justice.⁷

⁶ French AC 'Unelected judges in a representative democracy' (2012) St Thomas More Society, Sydney, 22 June at 21.

The above factors are enjoined by Schedule 16(6) that requires the rationalisation of the judiciary, which is best suited to the evolution of the values of the new constitutional dispensation. The rationalisation relates to the structure, composition, functioning, jurisdiction, and all other relevant factors that are essential in giving effect in the administration of justice. These provisions are interdependent and entail the affirmation of the transformation agenda which Olivier contends is a 'general agreement that lies at the heart of the constitutional enterprise, which at its core was designed to facilitate a fundamental change in unjust political, economic and social relations in South Africa'.⁸ This signifies the transformation of the judiciary as:

- an important marker of transformation, as the diversity provision recognises;
- a form of redress to remedy injustices of the past, in particular the absence of black people and women from the judiciary;
- a measure that will enhance a deeper, substantive change, that is not only about its demographics;
- an attitudinal shift away from apartheid-era executive-mindedness – towards transformative, value-laden and constitution-based adjudication.⁹

The transformation is drawn from these principles – that they consolidate and set the framework for the determination of the progress made by South Africa in its 20 years of democracy in '*rescuing people from a caste like status*',¹⁰ in order to give effect to the 'fundamental goals which it has fashioned for itself in the Constitution'.¹¹ The fashioning of such goals entails the affirmation of the process of transformation which enhances the 'inherent quality of the type of the judiciary that is contemplated by the Constitution as a whole'.¹² In essence, it endorses the process of transformation as a measure that is

⁷ See: the Report on the 15-year policy review by Wesson M and Du Plessis M 'The transformation of the judiciary for the Presidency' at 2.

⁸ Olivier M 'A perspective on gender transformation of the South African judiciary' (2013) Volume 130 *South African Law Journal* 448-464 at 449.

⁹ *Ibid* at 451. See, also, the 'Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state' (2012) Department of Justice and Constitutional Development, para 2.4.3 at 17 – accessed at www.justice.gov.za. The document contextualises the principles, as it highlights the values that underpin the transformation project in the context of the judiciary, as being: an affirmation of the supremacy of the Constitution and of the rule of law; equality, human dignity and an open society based on democratic principles; judicial independence and impartiality; access to justice for all; social justice; and social cohesion.

¹⁰ Extracted from Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 at para 129, [Author's emphasis].

¹¹ Extracted from Ngcobo J in *Bato Star v Minister of Environmental Affairs* 2004 (7) BCLR 687 (CC) at para 74.

¹² See: *S v Mamabolo* 2001 (5) BCLR 449 (CC) at para 28.

designed within the framework of the Constitution. It serves as a 'start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework'.¹³ It affirms the interrelationship of section 174(2) and Schedule 16(6), that is particularly drawn from section 9(2), which does not only guarantee the equal enjoyment of all rights and fundamental freedoms – but requires the adoption of legislative and other measures designed to further the advancement of the categories of people previously disadvantaged by unfair discrimination.

Although section 9(2) does not directly deal with the quest for the diversification of the judiciary, it provides lessons that could be drawn through its envisaged objectives of harnessing the promotion of equality by fostering the development of legal and other measures in the facilitation of the achievement of equality. The importance of section 9(2) and its endorsement of measures designed to ensure the achievement of equality were given effect in *South African Police Service v Solidarity obo Barnard*,¹⁴ as the Court held that:

[the Constitution] has a transformative mission. It hopes to have us re-imagine power relations within society. In so many words, it enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination. *This was and continues to be necessary because, whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds.*¹⁵

The transformative vision had been laid down by the Court in *Van Heerden*, as it held that 'the design of such measures is not positive or reverse discrimination as others argue but an integral part to reach the goal of ensuring the achievement of the right to equality'.¹⁶ The principle of whether the measure is designed to fulfil its purpose in line with the requirements of section 9(2), is to establish whether it:

- targets persons or categories of persons who have been disadvantaged by unfair discrimination;
- is designed to protect or advance such persons or categories of persons; and

¹³ See: *Van Heerden* at para 25.

¹⁴ (CCT 01/14) [2014] ZACC 23 (2 September 2014).

¹⁵ *Ibid* at para 29 [Author's emphasis].

¹⁶ See: *Van Heerden* at para 30. See also the Court in *Barnard*, as it also held that the 'ultimate goal of developing the measures is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive', at para 30.

- promotes the achievement of equality.¹⁷

These factors provide an opportunity for the determination of the impact of a particular measure in advancing the process of diversifying the judiciary – as required by section 174(2). Basically, they entail an examination of the progress made and whether a particular measure:

- addresses adequately the legacy of the past that has tainted the image of the judiciary;
- develops working relationships in the present;
- builds a shared vision for the future; and
- supports and sustains nascent democratic structures in the design of the most suitable measures in the advancement of the process of transformation.¹⁸

The above principles endorse the significance of the process of transformation as a measure that necessitates the creation of a society that is reflective of the demographics of the country, and restores the spirit of respect for human rights and democracy and evaluation of the effect of the constitutional approach in relation to the progress made in overcoming the legacy of the past.¹⁹ Transformation will then help to examine and determine whether the judiciary does reflect, and is constituted by, South Africa's diversity.²⁰ The minority judgment held in *Barnard* and affirmed the significance of the process of transformation that it entails:

[being] true to the Constitution [and it is necessary] that we should pause to recognise the perils that may beset affirmative action. Remedial measures may exact a cost our racial history demands we recognise. The Constitution permits us to take past disadvantage into account to achieve substantive equality. But it does so generous-heartedly and ambitiously: it licenses reparative measures designed to protect or advance all persons who have been disadvantaged by any form of unfair discrimination.²¹

¹⁷ See: *Van Heerden* at para 37.

¹⁸ See the preface in Bloomfield D, Barnes T and Huyse L (eds) *Reconciliation after violent conflict: A handbook* (2003) International Institute for Democracy and Electoral Assistance, Stockholm, Sweden, ISBN: 9189098919.

¹⁹ Henrard K 'Post-apartheid South Africa's democratic transformation process: Redress of the past, reconciliation and 'unity in diversity'' (2002) Volume 1 No 3 *The Global Review of Ethnopolitics* 18-38 at 18.

²⁰ See: Du Preez J 'Is the Judicial Services Commission serving the best interests of South Africa, the constitution and an independent judiciary?', accessed at www.fwdeklerk.org (4 August 2014).

²¹ *Barnard* at para 79.

2.2 *The appointment process as an imperative for the transformation of the judiciary*

The whole process of judicial transformation is enforced by the powers that are vested in the JSC – in the fulfilment of its constitutional mandate. The JSC is a unique constitutional body that comprises the Chief Justice, the President of the Constitutional Court, one Judge President, two practising attorneys, two practising advocates, one teacher of law, six members of the National Assembly, four permanent delegates to the National Council of Provinces, four members designated by the President as head of the national executive, and the Minister of Justice.²² It is empowered in terms of section 178 of the Constitution and the Judicial Services Commission Act²³ to advise the national government on any matter pertaining to the administration of justice – except for the appointment of judges where it has to sit without the six members designated by the National Assembly and the four permanent delegates of the National Council of Provinces.²⁴ The importance of the composition of the JSC was given credence in *Judicial Service Commission v Cape Bar Council*,²⁵ as the Court held that:

it has been created in a structured and careful manner to ensure that persons from diverse political, social and cultural backgrounds, representing varying interest groups would participate in its deliberations.²⁶

The composition of the JSC has a direct bearing on the advancement of the transformation agenda of the judiciary. As the Court held in *Cape Bar Council v Judicial Services Commission*,²⁷ the ‘JSC serves a unique and crucial function in the judicial system ... as it has the sole responsibility to decide who should be appointed to the various courts notwithstanding the fact that the President has some form of limited discretion’.²⁸ The envisaged role of the JSC is essential for the enhancement of the transformation project, in order to maintain the credibility of the judiciary as an independent body that reflects South Africa’s diversity.

In furthering its objectives, the JSC adopted the Supplementary Guidelines on 10 September 2010, on the selection process of Judges. The Guidelines complement the transformation

²² See: *Certification* at para 120 and section 178(1) of the Constitution.

²³ No 9 of 1994.

²⁴ See: *Acting Chairperson: Judicial Services Commission v Premier of the Western Cape* 2011 (3) SA 538 (SCA) at para 5 and section 178 (4) & (5) of the Constitution.

²⁵ 2012 (11) BCLR 1239.

²⁶ *Ibid* at para 35.

²⁷ 2012 (4) BCLR 406 (WCC).

²⁸ *Ibid* at para 21.

project – as envisaged in section 174(2) – as they enable the identification of the necessary skills required of a candidate to perform as expected of a judge. The Guidelines seek to determine whether the proposed candidate:

- is a person of integrity.
- is a person with the necessary energy and motivation.
- is technically competent and has the capacity to give expression to the values of the Constitution.
- is technically experienced and has regard to the values and needs of the community.
- has appropriate potential.
- has a profile, such that his appointment will be supported by the community at large.

In the Guidelines the JSC is provided with a measure that is directly linked to the transformation project. This would enable it to identify the capacity of a candidate as a Judge in order ‘to recognise and address the multiplicity of inequalities as well as the development of a transformative jurisprudence’²⁹ that reflects South Africa’s diversity. In essence, the Guidelines have the potential of fostering judicial diversity. As similarly stated in *Democratic Alliance v President of the Republic of South Africa*,³⁰ the measure, which in this instance is the adoption of the Guidelines, entails:

- rational connection to the achievement of the purpose for which the power is conferred;
- inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between the means and ends;
- the means of achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose;
- not only the decision employed to achieve the purpose but also everything done in the process of taking that decision; and
- constitution of the means towards the attainment of the purpose for which the power was conferred.³¹

²⁹ Extracted from Alertyn C ‘Substantive equality and transformation in South Africa’ (2007) Volume 23 *SAJHR* 253-275 at 254.

³⁰ 2012 (12) BCLR 1297 (CC).

³¹ *Ibid* at para 36.

These principles are intertwined with the Guidelines – as they seek to ensure that the JSC’s undertaking of its constitutional role is legitimately related to the purpose of the power conferred on it as an institution that is empowered, not only to appoint Judges, but to advance the credibility of the judiciary in its appointment processes. In this regard, although the Guidelines were only adopted in 2010, since 1994 the JSC has proved to be committed to the transformation of the judiciary. The zeal of the JSC to affirm and adhere to its constitutional responsibilities is actually drawn from the diversification of the judiciary – as indicated in the three tables below:

Table 1: Racial and Gender Profile of Judges in 1994³²

Race	<i>African</i>		<i>White</i>		<i>Total</i>
Gender	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	
Total	0	3	2	160	165

Table 2: Racial and Gender Profile of Judges – 30 November 2009

Race	<i>African</i>		<i>Coloured</i>		<i>Indian</i>		<i>White</i>		<i>Total</i>
Gender	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	
Total	18	66	6	14	10	10	15	77	216

Table 3: Racial and Gender Profile of Judges – 31 July 2014

Race	<i>African</i>		<i>Coloured</i>		<i>Indian</i>		<i>White</i>		<i>Total</i>
Gender	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	
Total	35	71	8	15	12	13	24	65	243
%	14.40	29.22	3.17	6.17	4.94	5.35	9.88	26.75	100%

The statistics reflect the fundamental role that the JSC has undertaken in diversifying the judiciary. They do not mean that the process of appointment of judges who lacked the opportunity in the past is a strategy designed to ‘fight fire with fire that may give rise to inherent tensions. They show the vigilance of the JSC that its processes are not an end but

³² The statistics in the tables herein (1-3) were received from the National Department of Justice and Constitutional Development on 26 August 2014.

a means in themselves'.³³ To date, notwithstanding its 'infancy' in diversifying the judiciary, which is also directly linked to South Africa's new-comer status in fostering the general transformation of its institutions, the statistics show the JSC's focus, in taking into account:

that [the Guidelines] represent [a] brightly flashing red lights warning of a danger if it appoints [anyone to the position of a Judge] and fail to [ensure that the Guidelines are actually translated into substantive reality in the reinforcement] of their rational connection to the purpose of their power, that is to appoint a person with sufficient conscientiousness and credibility.³⁴

The affirmation of the appointment processes has been endorsed by the credibility of the Judges who have been given an opportunity to uphold the values of the new dispensation. This contention is informed by the contribution they have made in the development of South Africa's jurisprudence in the various aspects of the law. The jurisprudence is reflective of adherence to the values of the new constitutional dispensation. It has seen the incorporation of the African value system in the interpretation of the Constitution – which enhances the various legal systems as legitimate choices of law in its application.³⁵ Without a focus on this jurisprudence, it is also worth noting the composition, for example, of the Constitutional Court and the Supreme Court of Appeal (Tables 4.1 and 4.2, below):

*Table 4: Racial and Gender Profile of Judges, as of 31 July 2014*³⁶

4.1 Constitutional Court

Race	<i>African</i>		<i>Coloured</i>		<i>Indian</i>		<i>White</i>		<i>Total</i>
Gender	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	
Total	2	5						3	10

4.2 Supreme Court of Appeal

Race	<i>African</i>		<i>Coloured</i>		<i>Indian</i>		<i>White</i>		<i>Total</i>
Gender	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	

³³ See: *Barnard* at para 93.

³⁴ See: *Democratic Alliance* at para 52.

³⁵ See, for example, section 8(1) of the Constitution.

³⁶ See (note 32 above) the statistics received from the Department of Justice and Constitutional Development.

Total	3	8	1	1	1	4	2	5	25
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This further confirms the fundamental role of the JSC in applying its mind to the appointment of Judges. The JSC has sought to eliminate the general disadvantages of the past. It advances the representativeness of the judiciary in a more meaningful way, and also validates the significance of the JSC’s mandate – so that it becomes a reality and is not merely a principle on paper. In essence, the JSC – as a unique institution entrusted with the obligation of diversifying the judiciary – is giving effect to the constitutional and legal duty to advance the aspirations of the country. This is endorsed in the preamble of the 1996 Constitution, and is emphasised in the *Helen Suzman Foundation v Judicial Services Commission*³⁷ judgment:

the JSC is a *sui generis* entity mandated with the task of the appointment and removal of judges ... [and] is given a certain degree of latitude in terms of s 178(6) of the Constitution in respect of its processes and the determination of its procedures with its decisions that must be supported by a majority of its members.³⁸

3 Transformation: A privilege at the expense of the judiciary’s integrity?

3.1 Diversifying the judiciary: Putting its capacity at risk?

Notwithstanding the general progress made in the 20 years of democracy relating to the transformation of the judiciary, the JSC is facing challenges with the manner in which it exercises its constitutional mandate to give effect to the values of the new democratic dispensation. The Constitutional Court had long predicted the difficulty associated with the process of transformation, particularly for the previously advantaged.³⁹ First, there are commentators – both individuals and institutions – and especially those in position of authority and influence, who are determined to label the whole process of transformation as nothing more than a measure designed to weaken the capacity of the judiciary – because of inexperienced officers that may be appointed to the bench. The comments are directed at compromising the credibility of the JSC in exercising its constitutional mandate. For example, Judge Harms, the former Deputy President of the Supreme Court of Appeal, argues that:

³⁷ (8467/2013)[2014] ZAWCHC 136 (5 September 2014).

³⁸ *Ibid* at para 18.

³⁹ See: Ngcobo J in *Bato Star* at para 76.

the requirement of race and gender composition are currently impossible to meet ... and has led to the unfortunate and often unfair division of judicial appointees between 'transformation judges' and other judges, *ie*, those appointed purely on merit.⁴⁰

He reinforces his argument by making reference to the Chief Justice of Australia, who also contends that 'the appointment of judges who are not highly skilled is more likely to undermine public confidence in the administration of justice than the appointment of an unrepresentative judiciary'.⁴¹ Judge Harms further commented on the non-appointment of Adv. Jeremy Gauntlett – who is highly regarded as a Senior Counsel – when Acting Judge Mokgoatji Dolamo was recommended to the President for a final decision and appointment to the Western Cape Division. He argued that Judge Dolamo was lacking in experience and that Adv. Gauntlett would have been a better candidate, and, therefore the JSC's recommendations were irrational and potentially unconstitutional.⁴² Judge Dolamo was recommended with two others – Owen Rogers SC and Judith Cloete – but Judge Harms singled out Judge Dolamo in his criticism of the JSC's appointment procedures, and did not focus on the qualities of the other two recommended Judges. His critique raises the following questions:

- why was Judge Dolamo given an acting position in the first place?
- does it mean he did not possess the qualities as outlined in the Guidelines?
- did anything happen during Judge Dolamo's tenure as Acting Judge that proved that he was inexperienced and incompetent?
- did Judge Dolamo's race cause Judge Harms to single him for criticism?
- did Judge Dolamo fail to adhere to the oath of office – that he will apply the law without fear or favour?

Adv. Gauntlett is the subject of a failed court *bid* in the *Foundation* judgment. *Foundation* applied for the release of the private recorded deliberations of the JSC when it held the interviews in 2012 for the appointment of judges to the Western Cape Division. The objective of the application was to establish the 'reasons of the JSC on its exercise of its constitutional responsibility in advising the President to appoint certain candidates and not others as the

⁴⁰ Harms (note 4 above) at 38.

⁴¹ Mason A 'The appointment and removal of judges' in Harms (note 4 above) at 38.

⁴² 'Advocate Gauntlett snubbed over the top job again', 26 October 2012, accessed at www.sabc.co.za/news.

applicant contended that such action was unlawful and or irrational and thus invalid'.⁴³ As mentioned above, the Court pointed out that the 'unsuccessful application by Adv Gauntlett SC is largely the underlying subject in the main application'.⁴⁴ Without providing an extensive background on the case, the Court dismissed the application and equated the deliberations of the JSC to those of a magistrate or a judge.⁴⁵ It reasoned that the 'JSC did provide its reasons in the form of the summary compiled by the Chief Justice ... and it is inconceivable that he would have tailored its reflections ... having regard to its composition regulated by section 178(1) of the Constitution'.⁴⁶

The application was nothing more than a racially motivated attack on the appointment of Judge Dolamo. It lacked the sensitivity associated with issues of transformation – and did not acknowledge the reality of the new, democratic dispensation: appointments are not 'done deals' for particular candidates because of their race. The application actually failed to acknowledge the impact of South Africa's history – that disempowered the Africans and conferred privileges on white people.⁴⁷

Kriegler J – a highly respected former Judge of the Constitutional Court – also entered the debate around the 'calibre' of Judges appointed to the judiciary and the 'legitimacy' of the process of transformation itself. Although he acknowledges the constitutional imperatives of section 174, he raises questions on the quest for transformation and on the competence of officers that may be appointed to the bench.⁴⁸ In substantiating his argument, he describes the role of a Judge in executing his/her function as a 'frightening and lonely' position that is not driven by not being filled with the spirit of the Constitution and inspired by the vision of our country'. He questions the credibility of the JSC and asks whether it considered:

- the difficulty of a judge's work.
- the physical, intellectual, and emotional impact on the appointee, even when someone is highly skilled.
- how unfair it was for the appointees, let alone the litigating public, to appoint people of insufficient experience and training?⁴⁹

⁴³ See: *Foundation* at para 2

⁴⁴ *Ibid* at paras 4 and 15.

⁴⁵ *Ibid* at para 29.

⁴⁶ *Ibid* at para 28.

⁴⁷ See: Henrard (note 19 above) at 19.

⁴⁸ Kriegler J 'Can judicial independence survive transformation? (2009), Presentation at the Wits Law School, 18 August at 3.

⁴⁹ *Ibid*.

These questions are actually driven by conceptions of historic superiority, which did not – in any way – accept the competence and suitability of black people. The debate actually brings back the inferiority associated with the segregation policies of the pre-democratic dispensation – that created the ‘great disparities in wealth which continued to exist when the Constitution was adopted’.⁵⁰ The continued side-lining of black people and the questioning of their credibility as potential candidates who can play a fundamental role in rebuilding the society that was previously characterised by inequalities and discrimination – seeks to reinforce the ‘labyrinth’⁵¹ of the apartheid system. In fact, the detractors stifle the progress made as they continue to advance the concept of ‘us and them’, while refusing to acknowledge black people as fully-fledged citizens who can equally contribute to the advancement of the values of the new dispensation.

C Lewis – Judge of the Supreme Court of Appeal – further argues that ‘political loyalty and race must cease to be the criteria for appointment by the JSC’. She questions the legitimacy of the transformation project, because of, first, ‘the financial sacrifice that is being made for an appointment to the bench only to be deprecated as a white, and therefore old-older judge? Second, the possibility of the candidates making themselves available and only to be rejected and humiliated during the JSC proceedings?’⁵²

The argument is very misguided, because the issue is not race – but rather how to diversify the judiciary as required by the Constitution. Since a new generation of judges is starting to develop because of the opportunities presented by the new dispensation – which were not available before the attainment of democracy – the process of diversifying the judiciary is compromised by the questions that create uncertainty about its legitimacy. The argument is proof that the process of transformation is highly problematic for the previously advantaged – as the Constitutional Court had predicted. It actually raises a question about whether the concern is nothing more than about protecting the terrain that was created by the apartheid system.

On the whole, the above arguments undermine the ‘hearts and minds’⁵³ of South Africans in terms of changing attitudes relating to the advancement of diversity in the transformation of

⁵⁰ See: Chaskalson P in *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 at para 8.

⁵¹ Extracted from Henrard (note 19 above) at 19.

⁵² See: Lewis C ‘The troubled state of South Africa’s judiciary’, Presented at the South African Institute of Race Relations briefing, Johannesburg, 14 October 2008.

⁵³ Extracted from Kok A ‘The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court driven or legislature driven social transformation?’ (2008) Volume 12 *Stellenbosch Law Review* 124-125 at 122.

the judiciary. It is deeply troubling that the ‘stones are being thrown’ at the process by people who are in a position of authority and influence. These stones build a bridge that seems unlikely to be crossed as the country moves towards harmonising relations between the diverse groups in South Africa – because of the history that ‘did not only degrade black people but systematically dehumanised them and struck at the core of their human dignity’.⁵⁴

In a nutshell, the quest for transformation does not mean that anyone can be appointed to the bench: their credibility, ability and potential to execute the function as is required of any judge, irrespective of historical background, are all considered. It is *not an entitlement or a privilege* of the categories of persons that suffered discrimination to be appointed to the judiciary. The contention was endorsed by Chief Justice Moegoeng Moegoeng – that the process of transforming the judiciary involves:

- ensuring the demographic representation of the country without sacrificing the quality of justice that has to be delivered,
- taking into account awareness of the injustices that were often meted out by courts to black people during the apartheid era;
- the inaccessibility of the courts and real justice to them;
- our commitment as a nation to make a decisive break from the institutionalised evil of the past and
- to hold to our new constitutional values and the related imperative to bring into being a justice system that South Africans can relate to and proudly call theirs.⁵⁵

These factors were also echoed by the Court in *Barnard*, as it held that:

beneficiaries of affirmative action must be equal to the task at hand. They must be suitably qualified people in order not to sacrifice efficiency and competence at the altar of remedial employment. [The process of transformation] sets itself against the hurtful insinuation that affirmative action measures are a refuge for the mediocre or incompetent. Plainly, a core object of [the transformation project] is to employ and

⁵⁴ See: Mokgoro J in *Van Heerden* at para 71.

⁵⁵ See: Moegoeng M ‘Strengthening access to justice for all: Creating a lasting legacy for the people of South Africa’, Presentation at Black Lawyers Association, KwaZulu-Natal Law Society and the Law Society of the Free State, 2012 Annual General Meetings – quoted in Manyathi N ‘Transformation debate continues at BLA AGM’ (2012) Volume 10 *De Rebus* at 84.

retain people who not only enhance diversity but who are also competent and effective in delivering goods and services to the public.⁵⁶

The above contention gives credence to the argument that the various comments actually undermine and compromise the oath of office undertaken by the so-called 'transformative judges' – that they will 'truly serve in the office of judge and will do right to all manner of people according to law without fear or favour, affection or ill will'.⁵⁷ They actually 'scandalise'⁵⁸ the role these individual Judges may play in advancing the values of the new democratic dispensation. The afore-mentioned comments derail the attempts being made to attract judicial officers to accept nomination to the bench. They undermine a generation of trust and public confidence in the integrity of our judges – and without such confidence, the judiciary cannot function properly, which, in turn, could contribute to the end of the rule of law.⁵⁹ As long as this negative and counter-productive discourse continues, the aspirations of the democracy in ensuring the transformation of the judiciary in a more meaningful way will 'flow into a hollow ring'.⁶⁰

4 Conclusion

The process of transformation – of not only the judiciary, but all other state institutions – is not a process that can be achieved overnight. This paper has attempted to examine the process of transformation, with a view to consolidating its centrality in the needed diversification of the judiciary. Basically, it determined the progress made in the transformation of the South African judiciary in heeding to the new constitutional imperatives of the dawn of democracy.

⁵⁶ *Barnard* at para 41. See, also, Gutto S 'The courts and the judiciary: Challenges for the developmental state and the national democratic revolution' in Edigheji O (ed.) *Rethinking South Africa's development path: Reflections on the ANC's policy conference documents* (2007) Volume 20 No 10 Centre for Policy Studies at 126 -132. He argues that 'the democratic composition of the courts and the judiciary is important ... however, demographics alone are not sufficient criteria for measuring transformation ... [but] ideology, legal culture and intellectual ability are of paramount importance' at 127.

⁵⁷ French AC 'Unelected judges in a representative democracy' (2012) St Thomas More Society, Sydney, 22 June at 3.

⁵⁸ Extracted from *Mamabolo* (note 12 above) at para 25 – which is directed at not only protecting the individual judge, but also the whole process of transformation which is mandated by the Constitution.

⁵⁹ See: Annual Report of the Department of Justice and Constitutional Development, where it points out that 'a transformed judiciary will increase the trust the public has in the discharging of justice without fear or favour and will further affirm the country's commitment to the rule of law', 2012/2013 at 8.

⁶⁰ Extracted from *Soobramoney* (note 50 above) at para 8.

It is acknowledged that since 1994 considerable progress has been made – but it has also proven not be a process that is well received and embraced by all in South Africa. The court challenges and the comments made about the workings of the JSC, which are detailed above, are actually derailing the process of balancing the scales in terms of ensuring the substantive translation of the law into reality. As Henrard so aptly states:

the goals of unity in diversity, redress of the past and nation-building appear highly beneficial towards [transformation], the actual implementation is slow ... in a country that is so deeply scarred and divided by apartheid [but managed] to develop a Constitution [that strives towards] the achievement of a system that is reflective of the diversity of its population.⁶¹

⁶¹ Henrard (note 19 above) at 36.