

Hlophe JP and the Current Politics of the South African Judiciary

Paper for presentation at School of Social Studies, University of the Witwatersrand, Johannesburg, 5 October 2009, version 1. This version is not for quotation or citation; a revised version will be available from the author; comments are welcome.

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Introduction

Clearly, something is going on with the current politics of the South African judiciary. There is a frequency and a depth to the current political maneuvering and events that make it at least clear that something is happening. But what? The events of the past couple of years have nearly overcome the language of the classic metaphor of the forest and trees, perhaps adding a structural dimension akin to the phenomenon of climate change.

This paper has two principal aims. The first aim of this paper is simply to sketch an overview of these events of judicial politics. This will include a brief overview of the still current challenges and initiatives, such as the Freedom Under Law challenge to the JSC's dismissal of the Constitutional Court complaint regarding Hlophe. This sketch should be of particular value to those observers of the politics of the judiciary not fluent in the language of appeals and reviews.¹ But of course even to those persons trained in the law and following the turns day by day the politics became so complex that it was easy to lose track of the thrust of events and remains. The second aim of the paper is to advance the current understanding of these politics. That should be of value in itself, at least to students of society. Such an understanding may also be of assistance in providing critical support to the project of constitutional democracy, should one wish to engage in that effort. However, this second aim is limited to advancement rather than achievement of understanding. In that vein, the advancement offered here is largely methodological and tentative rather than conclusive.

The working title of this research is Hlophe JP and the Current Politics of the South African Judiciary. And indeed some of the most dramatic events have occurred around the person of John Hlophe, the current Judge President of the Western Cape High Court.² Nonetheless, as should become

¹ In pursuit of interpreting events and concepts within the legal field to a broader audience, this paper will explain some concepts and terms in footnotes that are taken for granted within the legal profession.

² The court that Hlophe JP is the head of has been known in the past as the Cape High Court or the Cape Provincial Division. In terms of a recent law of Parliament, the XXX, this court was renamed along the lines of the provinces as XXXX. This same development occurred elsewhere. Thus, for instance, the WLD, the High Court of the Witwatersrand Local Division has now become the High Court (South Gauteng). For the arcane distinction between local divisions and provincial divisions, see XXX.

clear relatively quickly, it is the more ambiguous second half of this working title that more accurately describes its contents and arguments. This is because the recent, current and, as of this writing, undoubtedly future events concerning Hlophe JP are not the sum total of the interesting and significant politics of the judiciary. But at the same time, they do illuminate and are intimately linked with those other dimensions.

The first substantive section of this paper (Part One) takes a step back toward theory and briefly states three methodological presuppositions of this research. The following section (Part Two) then returns the lens to the newspaper and politics and puts forward an overview of the current and recent politics of the judiciary. The politics of Hlophe JP from early 2005 to the present provides convenient periodisation to this analysis. Indeed, the first incident of the three act Hlophe saga was arguably the most revealing in terms of the foundations of the politics of the judiciary. The following analytical sections (Part Three and Conclusion) will briefly draw several themes out of the preceding section and turn towards the future.

Part One: Three Points of Method and Theory

The first point of method is really two points in one. The first aspect is that this paper does not approach its topic from the viewpoint internal to the legal profession. Simply put, this paper is written from the perspective of those who have been trained to or have learned to ‘think like a lawyer’. In particular, it does not primarily engage in the doctrinal aspects of the current debates. Rather than speaking to an audience of lawyers or speaking as a lawyer to a lay audience, this paper instead attempts to take on a non-doctrinal and even sociological view on the politics of the judiciary. While it may be of interest and value to some lawyers and legal academics, this is less a Faculty of Commerce, Law and Management paper and more one of the Faculty of Arts and Humanities. Perhaps then intertwined with that non-doctrinal standpoint is a linked preference for an interdisciplinary method. As is heralded by this non-doctrinal standpoint, I argue that a persuasive understanding of the politics of the judiciary can best be achieved by an interdisciplinary method that is (a) at the same time fluent in the doctrinal understandings of the judiciary yet independent from that analytical method and (b) open to the broad range of cultural and other analyses of society and its politics, in this case its judicial politics. While (a) might be no more than a restatement of Weber’s *verstehen* method, (b) does indicate openness at least in principle to a broad variety of methods, including but not limited to those of sociology.

A second methodological preference adopted in this paper is a transnational perspective. The addition of a transnational dimension is currently in vogue in a number of disciplines and fields. This is true even in the case of doctrinal law. In public international law, Alex Aleinikoff has recently pushed beyond the transnational paradigm of Harold Koh.³ More pertinent for this paper, recent sociolegal work in transformations of the state has argued for the significance of transnational organizational fields and regulation, as Greg Shaffer has recent termed the phenomenon.⁴ While the adoption of a transnational perspective might be initially thought to be irrelevant (a good lawyerly term) to the topic

³ Citation needed. See also the announcement of new journal entitled Transnational Legal Theory.

⁴ Citation needed.

at hand, that of course is that point about method – it can show reality in different ways. Root concepts such as that of judicial independence have their transnational dimensions.⁵ And so do particular practices and politics of the current judiciary. In this respect, see for instance the statement of former Chief Justice Arthur Chaskalson in respect of the Constitutional Fourteenth Amendment Bill or one of the tactical forays made by Paul Ngobeni on behalf of Hlophe JP by reference to the Basic Principles of the Independence of the Judiciary.

A third and final methodological commitment of this paper is to analysis of the politics of the judiciary in the tradition of Pierre Bourdieu. Bourdieu's works such as *Distinction and Difference* melded a structural and sociological understanding of society with an appreciation of the autonomy of cultures.⁶ Most generally, this sort of analysis might be termed field analysis.⁷ Bourdieu himself applied his mind to the judiciary and the legal profession, identifying there what he termed 'the juridical field'.⁸ A field in the tradition of Bourdieu will have an external face (such as a commitment to the social norm of equality) and a contradictory internal normalcy (such as a binary hierarchy of which matters are worth judicial attention and which are not).⁹ It will also be characterized in part by internal struggle. Carrying on that tradition, one or two recent works have explored a number of topics within legal politics in South African society.¹⁰

While a full exploration must wait for another time, it may be worth briefly exploring here the similarities and differences of this habitus analysis with the common South African analytic of 'site of struggle'. This analytic tradition has a long and distinguished (albeit mostly white) lineage in South Africa, where figures such as Dennis Davis, Raymond Suttner, and Albie Sachs come most quickly to mind. To its credit, this tradition was intertwined with critical yet also active opposition to the apartheid state. Other scholarly work by others within this mode might be thought to include Steve Robins' recent work and perhaps particularly Rick Abel's.¹¹ To take Abel's work as an exemplar, his relatively rough working concept is pretty well summed up in his title. Law was an arena in which and a means by which anti-apartheid politics could be pursued for the most part without exposure to the risk of extreme violence. As employed here Bourdieu's analysis adds two emphases to this site of struggle analysis, one of general import and the second arguably particularly significant to studies of practices of the judiciary. First, Bourdieu pays particular attention to questions of cultural understanding and meaning. The notion of a habitus indeed includes a component of cultural practice. Second, analysis in the Bourdieu tradition pays further particular attention to the ways in which distinction and difference is generated and maintained. Class can become as much about who invites whom to which parties as it is about how many figures are in one's bank account(s). This focus on distinction is apt for studies of the judiciary,

⁵ Heniz Klug *Constituting Democracy* (Cambridge University Press).

⁶ P Bourdieu *Distinction and Difference*

⁷ I leave aside the linkage between this sort of field analysis according to Bourdieu and the use made within organizational sociology of the field concept.

⁸ Pierre Bourdieu *The Force of Law: Toward a Sociology of the Juridical Field* 38 *Hastings L.J.* 814 (Richard Tediman trans., 1987).

⁹ P Pether *Soccerers Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law* 39 *Arizona State Law Journal* 1 (2007).

¹⁰ Citation needed for study of SA post-apartheid land law politics.

¹¹ S Robins; *Politics by Other Means*.

where elaborate recognition and deference rituals are hardly confined to the four walls of the courtroom.¹² They extend instead into the tearooms, other behind the scenes venues and indeed to the social lives of the judges and other figures of the judiciary.

Part Two: What Happened? The Three Dimensions of Current Judicial Politics in South Africa

The first dimension of judicial politics. The most reported and remarked upon facet of current judicial politics in South Africa undoubtedly is that concerned with the potential prosecution of Jacob Zuma. Zuma of course was elected the President of the African National Congress at a momentous party congress in Polokwane in December 2007 and elected South Africa's President in May 2009, following the ANC's victory in the regular five-year elections.¹³ In the view of Adam Dodek and others, the saga of the charges laid against Zuma and related litigation before his election as President took on the character of a constitutional crisis. Writing for a North American audience, Dodek observed: "the challenge that South Africa now faces a mere 15 years after that transformation is greater than a comparable event like Watergate where the American system had two centuries of established constitutional traditions to rely upon. In short, the current crisis involves the ongoing five-year prosecutorial pursuit of ANC President, presidential candidate and presumptive South African president Jacob Zuma on charges relating to corruption and bribery. During this period, charges against Zuma were not laid, then laid, then dropped, then re-filed and constantly challenged in court. Zuma was fired by Thabo Mbeki as South Africa's Deputy President in 2005, became the President of the ANC in 2007 and had Mbeki unceremoniously replaced as President in September 2008 before his term of office expired. This all took place during the course of many court battles, which appear to have come to an end with a dramatic decision during the first week of April 2009 by the National Prosecuting Authority to drop all charges against Zuma." Overlapping with this direct line of cases was the eventually unsuccessful prosecution of Zuma on charges of rape, a matter as newsworthy as the corruption cases.¹⁴ Perhaps the most dramatic episode in this line of case occurred on 12 September 2008, when a High Court judge, Nicholson J, not only quashed the then-pending charges against Zuma but also delivered a judgment concluding that then-President Thabo Mbeki and others had interfered in the prosecution of the case.¹⁵ Within a week, Mbeki had been forced to resign by the African National Congress and was replaced as President by an interim figure, Kgalema Molanthe, who then gave way to Zuma's accession

¹² For some examples of formalized recognition and deference rituals, one might examine the rules of practice of some of the South African courts. Example. Indeed, the Constitutional Court has made a particular intervention contrary to these practices in its rules, for instance in the way in which judges are seated in the Court. Example.

¹³ A recent article by Adam Dodek gives in part a useful description of this chain of events and the remainder of this paragraph draws directly upon that work. Adam Dodek *Litigation and Jurisprudence: State v Zuma: The Future of Constitutional Democracy in South Africa* 3 *Journal of Parliamentary and Political Law* 121 (2009).

¹⁴ *State v. Zuma* (8 May 2006), [2006] ZAGPHC 45, 2006 (2) SACR 191 (W), 2006 (7) BCLR 790 (W).

¹⁵ See J Klaaren and T Roux *The Nicholson Judgment: An Exercise in Law and Politics* 54(1) *Journal of African Law* ___ (forthcoming, 2010).

to the President in May 2009. The Nicholson judgment was reversed in the Supreme Court of Appeal in January 2009 but that was effectively overtaken by the decision of the Director of National Prosecutions to drop the charges a short while later.

Zuma's court appearances were the most prominent strain of this type of judicial politics. This is where political actors (the non-legal professionals and actors of 'party politics') use or attempt to use the courts to sideline their opponents or to create opportunities for themselves. Of course, the Zuma litigation was not the sole activity to take place on this judicial terrain. Of the additional matters, most prominently, charges were laid against Billy Masetlha, the former Director-General of the National Intelligence Agency and, eventually, against Jackie Selebi, the National Commissioner of Police.

The second dimension of judicial politics. The second and nearly as media-profiled aspect of current judicial politics is that of judicial personnel. And here the undoubted story has been that of Judge President John Hlophe. John Hlophe was a relatively uncontroversial member of the Bench for some time into his tenure as Judge President of the Cape Provincial Division. It was in the course of exercising this authority that he came to particular national light. For several reasons, the job of a Judge President is not the easiest one. Most evidently, the demands of access to justice and the need for increased judicial capacity are intense at the moment and are easily focused upon the JP as the chief administrative officer of a division of the first-instance general jurisdiction courts, the High Court. Furthermore, there is a considerable amount of discretion that is called for in the South African system. For instance, case allocation – which judges hear which matters – is a matter ultimately within the authority of the Judge President. As for instance happened to a lesser degree in the Zuma prosecution line of matters, the exercise of this authority can be significant and controversial.¹⁶ Finally, the Judge President plays a leading role in dealing with the transformation of the courts. This role is both informal and formal, as for instance where the Judge President of the specific High Court is to join the Judicial Service Commission when the JSC is "considering matters" relating to that court.¹⁷

Appointed as Judge President on [date], Hlophe JP's first controversy stemmed from the operation of his High Court. Members of the Bar and he clashed regarding matters of administration and of transformation. In terms of continuity with the previous white-dominated judiciary, it may be fair to say that the Cape High Court is least transformed High Court. One particular result of this Cape clash was a report written by Hlophe and submitted to the then Minister of Justice. In Hlophe's framing, this report was an expose of racism in the judiciary, as well as an accounting of particular slights directed at him. One substantive matter raised by the report was the issue of retired (nearly necessarily white) judges hearing complex commercial matters as arbitration matters and thereby both enriching themselves and arguably impoverishing the official judicial system of the experience of and capacity to

¹⁶ The Judge President of the KwaZulu-Natal Provincial Division, Vusi Tshabalala, faced some criticism regarding his choice of a semi-retired ex-Rhodesian white judge to hear the corruption case against Schabir Shaik. For a discussion of the use of the allocation of judges under apartheid, see Stephen Ellmann *In a Time of Trouble*.

¹⁷ S. Afr. Const. 1996. section 178(1)(k).

be dealing with such matters.¹⁸ In the end, the Minister took no effective action regarding the report and the associated complaints, from either side.

The second episode regarding Hlophe occurred against a less salubrious background. In brief, he was accused by another judge, Siraj Desai, of accepting payments from a private company and failing to either disclose this fact or to recuse himself when called upon, as part of his Judge President duties, to decide whether an action for defamation against that company brought by Desai should proceed.¹⁹ The outcry against Hlophe was intense and became even more so when Hlophe's defence was articulated – Hlophe not denying that he received the monies but claiming that he had sought and had been granted verbal permission to receive the funds from the by-this-point deceased Minister of Justice, Dullah Omar. Considering the matter, an apparently divided JSC decided, likely on the casting vote of then Chief Justice Pius Langa, and with an articulated basis of lack of evidence, to let the matter pass with only a light censure of Hlophe's action. In a widely noted newspaper article, Judge Kriegler, a former Constitutional Court judge, called upon Hlophe to resign as a matter of the ethics of the legal profession, a call supported by inter alia a letter from the UCT Law Faculty. A prominent member of the Black Lawyers' Association, Dumisa Ntsebeza, publicly differed with Kriegler, claiming that the decisions of the JSC deserved some measure of deference as it was a constitutionally ordained deliberative body.

The third and most recent episode regarding Hlophe JP began with a bang on [date] when the Constitutional Court issued a media statement stating that the judges of the Court would be laying a complaint before the JSC on the basis that Hlophe had apparently attempted to influence two judges then sitting on the Constitutional to vote a particular way in a particular matter.²⁰ The matter was the more explosive for the content of that matter – a review involving the dismissal of the charges against now President Jacob Zuma, then an ascendant but by no means certain candidate for the Presidency. Hlophe counter-complained to the JSC that the judges of the Constitutional Court had violated his right to dignity by announcing their complaint in the glare of public light. Hlophe then advanced the same case in front of the South Gauteng High Court, winning an injunction against the JSC by a judicial count of three to two, a ratio that coincided with the racial demographics of the five-judge panel (three black persons and two white persons).²¹ The JSC itself stopped and started with its process of considering the complaints. While the complaint was laid in June 2008, an actual hearing did not take place until April 2008. Moreover, the process was complicated by the pending change in some of the membership of the JSC, broadly consequent upon the May 2009 elections, which were won by the African National Congress, with Jacob Zuma as its announced Presidential candidate. While several Constitutional Court judges gave evidence in the course of the hearings, Hlophe himself did not, stating through his legal

¹⁸ Of course, the issue of the place of arbitration within the judicial system is a larger and more complex one than is indicated here. See, for instance, the particular politics around the draft International Arbitration Act.

¹⁹ Footnote needed.

²⁰ As Dodek notes, the Constitutional Court's complaint against Judge Hlophe is contained in the decision of the High Court in a court challenge launched by Judge Hlophe against the Constitutional Court judges: *Hlophe v. Constitutional Court of South Africa & Others* (25 September 2008), [2008] ZAGPHC 289.

²¹ This High Court decision was later overturned by the Supreme Court of Appeal, a review in turn appealed to the Constitutional Court and discussed further below.

representatives that he was ill.²² Subsequent to the elections, the occupants of a number of the seats on the JSC indeed changed hands.²³ Among other persons, Ntsebeza now joined the JSC. When the reconstituted JSC considered the matter again, the ten members deciding upon the issue split six to four, in favour of dropping the matter.²⁴ Outraged by this decision and professing concern for the rule of law, Kriegler announced a review of the JSC decision to be led by a public interest law group, the Freedom Under Law (FUL) Foundation. This itself occasioned a host of controversy.²⁵ The FUL Board immediately suffered the public resignation of three prominent black persons: Ntsebeza, Cyril Ramphosa, and Kgomotso Moroka.²⁶ Hlophe's third episode had topped his previous two in terms of at least publicity and overlap with significant national politics.

The third dimension of judicial politics. Much less in the public eye but to a great extent contemporaneous with the events of both the Zuma and the Hlophe matters, is the third aspect of current judicial politics: where the judiciary as an institution fits within the dynamic understanding of South African constitutional democracy. Since at least around 2003, the judiciary and the government had been engaged in seriously negotiating a set of rules and principles regarding the institution of the judiciary. As Cathi Albertyn has pointed out, this negotiation was however largely behind closed doors.²⁷ This was the case at least until late 2005 and 2006, when the issue spilled into public debate.

²² This incongruous justification occasioned a riposte by a white judge in the course of a later associated judgment. See XX.

²³ One colourful suggestion was that the overall motive of this reconstitution on the part of government was that Minister of Justice Radebe and President Zuma were motivated in order to 'ingratiate themselves with the poisonous and unrepresentative little cabal of the Black Lawyers' Association.' Face Off, Khela Shubane vs RW Johnson: Case of extensive damage the future of SA's judiciary. Business Day, 9 September 2009, at 11 (RW Johnson). While both Shubane and Johnson expressed support for Kriegler's Freedom Under Law review application, according to Johnson, this was a battle over "literate legal culture." "The reason why the JSC ruling was disgraceful was that Hlophe's supporters on it had reached a point where they couldn't really face the open presentation of evidence, let alone Hlophe's cross-examination. So they simply changed the rules and moved the goalposts, deciding that the case could just be dropped. No society bound by a literate legal culture could have done that. That's what this row is about. People such as Radebe and the University Cape Town's deputy registrar for legal services, Paul Ngobeni, have no difficulty in dispensing with due process if it suits their short-term ends. Kriegler belongs to the tradition of a literate legal culture and wants to perpetuate that. Hlophe himself has already said he wants to move the court away from such concerns and towards more traditional African norms. If you take that seriously, it means a chiefly authority – a political executive – deciding all judicial matters. And since such a system is preliterate it will not be bound by precedent or, indeed, by any written law or judgment. In a word, the law of the madhouse." Ibid.

²⁴ Citing a conflict of interest since he had briefly acted for Hlophe J, Ntsebeza recused himself and did not participate in the JSC's decision.

²⁵ See e.g. Ngoako Ramatlodi, Chairman of the Justice and Constitutional Development Portfolio Committee, National Assembly Rule of Law Deployed as Sword to Decapitate the JSC Sunday Times, 13 September 2009, p. 12. ("If one must be blunt, the learned judge is fundamentally opposed to the transformation that is taking place. He wants transformation that is created in his own image.")

²⁶ Ntsebeza explained his resignation in terms of two reasons: his perception that Kriegler's language was intemperate and in some cases 'ad hominem (personal)' and his perception that Kriegler's statement that Ntsebeza's interpretation of the Constitution was incorrect was a 'thinly disguised attack on my performance in the last sitting of the JSC'. Chris Barron, So Many Questions: Interview with Dumisa Ntsebeza, Sunday Times, 13 September 2009, p. 13.

²⁷ C Albertyn 'Judicial Independence and the Constitution Fourteenth Amendment Bill' 22 SAJHR 126 (2006).

The heart of the matter was around the Constitutional Fourteenth Amendment Bill. This legislation would have carved out an 'administrative' role in the functioning of courts and given this role to the Minister of Justice. The Bill further would have innovated by inserting a Presidential role in the selection of Judges President and given the President sole discretion to appoint acting judges to the Constitutional Court. Provocatively put, these changes raised the prospect of the executive determining fairly directly who the judges would be and what particular cases they would hear. Among sober analysts, these changes were criticized as reversing direction from the viewpoint of an evolving model of judicial independence. For instance, Albertyn's conclusion was that the Bill evinced 'a pattern of executive power encroaching upon the judiciary's role'.²⁸

Of course, there were other significant elements to the package of judicial legislation that was being mooted. Another two bills proposed changes to the structure of the courts. This would for instance give each province a High Court and rationalize the old homeland court structures. Another two bills would have introduced a system of judicial discipline centred around Tribunals considering judicial conduct. A final bill introduced the idea of a National Judicial Training Institute. To a great extent, government and the judiciary considered these elements as a coherent and unified package, to be taken or left.

That choice and the fight were by no means decided once the Bills came out into the open. Yet, the tide did seem to turn soon thereafter. A series of statement and events closely bunched together appeared to be particularly effective. The General Council of the Bar organized a colloquium on 17 February 2006. On the same day, George Bizos gave a hard-hitting speech at an event held on Constitutional Hill. He stated that while he hoped that was not to be the case, that day might be the one where the road towards constitutional democracy began to be turned from. Chaskalson is reported to have said that when he travels to meet other judges, he would like to be able to say that South Africa's judiciary is an independent one.

Publicly declared shelved by President Mbeki later in 2006, the Constitution Fourteenth Amendment and related Bills never completely went away. Indeed, with revisions, three legislative initiatives have now passed Parliament, with relatively little controversy, relating to court naming (but not structure), judicial education, and judicial conduct and discipline. For the first, see the Renaming of High Courts Act 30 of 2008 which came into effect on 1 March 2009. What was not tackled is the revision to the current jurisdiction structure of two apex courts, the Supreme Court of Appeal (for non-constitutional matters) and the Constitutional Court (for constitutional matters). For the second, see the South African Judicial Education Institute Act 14 of 2008 (commenced January 2009). For the third, see the Judicial Services Commission Amendment Act 20 of 2008 (date of commencement pending). This legislation will (1) establish a Judicial Conduct Committee to receive and deal with complaints about judges; (2) provide for a Code of Judicial Conduct for judges; (3) put into place a register of judges' registrable interests; (4) set up procedures for dealing with complaints about judges; and (5) set up Judicial Conduct Tribunals to inquire into and report on allegations of incapacity, gross incompetence or gross misconduct against judges.

²⁸ Albertyn, 127.

In terms of what is yet to come, there are thus four major legislative changes outstanding in any sense. Three are likely; the last would be highly controversial. One is the JSC Amendment, which must still be brought into operation. The second is the Legal Practice Bill. This would comprehensively regulate the legal profession and has been discussed but delayed for many years. The third is the change from two apex courts to one. The fourth is the potential inclusion (in this third change of two apex courts to one) of elements of the Constitutional Fourteenth Amendment Bill discussed above.

The lack of controversy over these institutional changes contrasts sharply with the level of rhetoric regarding the judiciary from the time of Polokwane to the resignation of Mbeki and beyond. The stakes were perhaps heightened to the participants due to the turnover within the space of 12 months of nearly half the membership of the Constitutional Court.²⁹ In particular, all recognized as significant the expected but nonetheless coordinated resignations of four of the judges of the Court who were well-regarded within the profession and had sat since its inauguration.³⁰ The disjuncture indeed seems to illustrate Bourdieu's point that structural miscognition is necessary for the reproduction of institutions.

Part Three: Themes and Analysis

This section explores and explains the empirical material of the previous section by developing several analytical themes, particularly the faultlines within and around the field of judicial politics as well as identifying three underlying sociological processes driving the current judicial politics: race tensions within the legal profession, regulatory failure with respect to professional judicial discipline, and the politicization of judicial politics.

In terms of the faultlines within the field of judicial politics, as described above, I would argue that there are three dimensions to this field. First, judicial politics is a place for political forces to prevent and forestall (rather than promote) prospective political opponents. Think Zuma. Second, judicial politics is a sector within constitutional politics more substantively understood; here the judiciary may or may not operate as relatively cohesive bloc. Think Chaskalson/Langa. Third and most narrowly and inwardly focused, judicial politics is a place of upwards mobility and of contesting factions and candidates for leadership. Think Hlophe.

Beyond the empirical accuracy of my placement of the faultlines as described above, I would like to advance a second proposition. It often seemed that the most powerful interventions or discourses within judicial politics over the recent term were those that managed persuasively (yet somewhat

²⁹ Edwin Cameron joined the Constitutional Court in January 2009 following the resignation of Thole Madala J.

³⁰ The number rises to five when these four are considered together with the Cameron appointment. The Constitutional Court consists of eleven judges. S. Afr. Const. 1996. Section 167(1) ("The Constitutional Court consists of the Chief Justice, the Deputy Chief Justice and nine other judges."). For an overview of the situation just prior to the JSC interviews of the then 23 candidates for appointment, see Franny Rabkin How We Choose Judges: Question of Representivity Looms as JSC Interviews Candidates for the Constitutional Court The Weekender 12-13 September 2009, p. 4.

paradoxically in light of the very character of a faultline) to link the different dimensions of judicial politics. As could be explored more fully, the epitome of this tendency was the apparent intervention of Hlophe JP at the Constitutional Court. As alleged, this intervention touched upon the first dimension of judicial politics given that the underlying matter was one of the litigation cases of the Zuma prosecution. And further, it touched upon the second dimension as well, in particular through the alleged statement that members of the national intelligence were in touch with Hlophe JP and were in receipt of information regarding the Constitutional Court. Indeed, it may well have been that this aspect drove the members of the Court to make public their complaint, a course of action much debated and criticized since then. In any event, that episode can be seen as a potent crossfire of three dimensions of judicial politics.

Race and the Legal Profession. In terms of the first of the three underlying societal processes, the judiciary cannot be seen separate from the broader legal profession and the racial tensions currently at play within the South African legal profession. The issue of race and racial tensions within the legal profession has been remarkably unremarked upon – with newsworthy events such as the near collapse of the JHB bar several years ago little reported upon.³¹ Indeed, there are certain signs that the processes of institutional transformation within the legal profession are currently exacerbating rather than eradicating the degree of inequality within the profession – see the growth of large firms via merger and the current lack of a large black-identified firm. The profession has also been able to stall transnational change via opposition to registration of foreign lawyers – admittedly a complex issue of international trade in services. And perhaps more to the point, government has been unable to progress the Legal Practice Bill for years bordering onto now a decade – despite some progress on the less important Legal Services Charter. The debate has conventionally been understood as one of merit versus racial transformation.³² While the legal profession has been relatively little understood, there have been two good recent studies done. In addition to a study done by the attorneys’ profession itself, Department of Labour commissioned research into professions with potentially scarce skills.³³ This study has concluded that “... there is not an absolute scarcity of law professionals but ... African attorneys and advocates are relatively scarce.”³⁴

Neither the degree nor the pace of racial transformation within the judiciary is matched within the legal profession more generally. Measured against the transformation of the legal profession, the transformation of the judiciary has been extraordinary. The Godfrey explanation is that, while there are

³¹ Some quick reasons for this lack of attention could be the symbolic and unifying place of the Constitution in the current national ideology and the role of the legal profession as its most immediate custodian, the relative success of Arthur Chaskalson and others in maintaining the unity of the judiciary during its significant transformation of the period from 1994 to 2009, and the competition for attention by other judicial political events.

³² S. Afr. Const. 1996. Section 176 (1)-(2) provide “(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen. (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.” See Franny Rabkin, *supra* note ____.

³³ Shane Godfrey ‘The Legal Profession: Transformation and Skills’ 126 SALJ 91 (2009); see also Shane Godfrey ‘Law Professionals’ in Skills Shortages in South Africa: Case Studies of Key Professions (Johan Erasmus and Mignon Breier eds., 2009).

³⁴ Godfrey at 122.

a significant number of Africans graduating with an LLB, the demand for African attorneys is weak. In 2007, the attorneys' profession consisted of about 11 000 white attorneys, nearly 3000 Africans, less than 1000 Asians and few coloureds. While these figures are rough, 11 000 of 15000 is about 73 or 74% white. This compares with the judiciary and its figures of (97 out of 218) whites in 2009.³⁵ To compare the movement in the judiciary from 2003 to 2007 with the movement within the advocates profession is revealing. The percentage of African black advocates went from 12.2 percent to 12.8 percent during this time, while the percentage of African judges (cannot exactly be determined from available statistics) but likely increased by 25% percentage points.³⁶

In terms of this underlying factor, part of Hlophe's enduring political strength has been the degree of racial truth he told in his report of his first episode.³⁷ It is still to some extent ironic that the most public debate over transformation in the legal profession occurs in one of its most transformed sectors.

A Failure of Regulation. In terms of the second of the three underlying societal processes, the Hlophe JP chain of events in particular may be regarded as an instance of regulatory failure. Whether understood narrowly as a failure to regulate the discipline of the judiciary (as will be limited perspective adopted here) or broadly as a failure to regulate the legal profession, there was by the end of the Hlophe JP saga a manifest failure of regulation. This was particularly in relation to the discipline of judges. At the least, a part of the rationale of the majority judgment in dropping the complaint depended on the notion that gross misconduct was not shown or was not likely to be shown. This left the implication that misconduct may well have been demonstrated. Why could the JSC not deal with such a lower instance arguably calling for judicial discipline? This puzzled some close observers such as Carmel Rickard who noted the contradiction between one clear theme of the rationale for the August 2009 majority with the past practice of the JSC. While the majority stressed that "... as the law currently stands the commission does not have the jurisdiction to hear a matter where a judge is guilty of conduct not amounting to gross misconduct[,]” the JSC has in the past purported to exercise such a jurisdiction, earlier reprimanding not only Hlophe J but also Judge Gerhardus Hattingh in a separate matter.³⁸

³⁵ Mail and Guardian 24 Sept to 1 Oct 2009, 'Race by Numbers', p. 23. In 2003, whites were (142 of 214) a significantly higher percentage.

³⁶ Mail and Guardian.

³⁷ See Mondli M in Sunday Times for reference back to the first episode. For the strength of the racial perception, one manifestation came in the reaction to the FUL legal review announcement. In the cynical view of a former editor of the Sunday Times: "Judge Kriegler's problem is that his critics attribute to him their own motives; he is perceived to be fighting a conservative rearguard action against "transformation" in order to retain jobs, status and power for whites. So most black people, even moderates and sympathizers with his cause, feel compelled to gang up against him. His very intervention, because he is a distrusted white man, racialises the issue. It does more harm than good. I suspect that if whites retired from this battle they would find many black lawyers to be much closer to Judge Kriegler than they now think. If the training of black lawyers at our major universities, by some of our leading jurists, has not imbued them with respect for the rule of law, for the dignity of the judiciary, and for the integrity of the law, it is pointless to try now to instill these values in them. They will shape the law as they see fit. Let them get on with it, and let the future judge them.' Letter to the Editor, Ken Owen, Business Day, 9 September 2009, p. 12.

³⁸ Carmel Rickard When Did the JSC's Powers Diminish? The Weekender 12-13 September 2009, p. 8.

Regardless of the precise jurisdictional and competence doctrinal answer, part of the explanation of this failure conceived of a failure of regulation is the late arrival of the still pending clear and comprehensive judicial disciplinary power that is contained in the Judicial Services Commission Amendment Act (see above), which remains pending.

The Proceduralization of (Judicial) Politics.

It is of course generally considered as good, from the point of view of constitutionalism, to proceduralize politics. Nonetheless, a sociological trend of proceduralization might be seen as negative. There were indications of this with the criticisms of for instance the explicit Hlophe JP for Chief Justice campaign. The criticism was really directed at the form of politicking and campaigning. And whether this is normative seen as good or bad, appropriate or inappropriate, it is to be remarked that these judicial politics is becoming more explicit. The nomination of candidates for the Constitutional Court was another example. Further, the Chief Justiceship dispute between Zuma and the opposition parties can be seen as part of this as well. The proceduralization of (judicial) politics is a long-term process.³⁹

Conclusion and the New Way Forward: ‘See You In Court’

Above I have mentioned several matters that are currently pending before the courts. As of the end of September 2009, four are particularly significant. For what it is worth, I venture here some views, albeit necessarily only partially formed and informed, on the substance and likely outcome, of those cases. Vusi Piloki seems likely to prevail in his matter against Presidency. The DA’s review of the dropping of the charges against Zuma is a closer call. Here the constitutional degree of independence cuts in favour of the action taken and it may well be upheld. Indeed, the closest call may whether this is a matter of legality or of PAJA, a distinction that matters some but perhaps not a determinative amount in this instance. The review by FUL of the JSC decision is more clearly one to be determined under PAJA but also is one that is likely to face an uphill battle. Lastly, there remains at least one of the Zuma cases still pending (the one most overlapping with Hlophe): still on the CC roll is the review brought by Hlophe J against the SCA decision to overturn

Appendix: Representative Episodes⁴⁰

Episode One

On Sunday 20 September 2009, the JSC interviewed Judge Sandile Ngcobo, then the nominee for the position of Chief Justice, for the post. There were no other interviewees. The questioning was as revealing of the broader politics regarding the judiciary as it was of Judge Ngcobo, whom most observers agreed gave thoughtful and cogent answers to the questions posed to him.⁴¹ At one point, Judge Mpati asked him what his view was towards a bill that might or might not be before a justice minister, a bill

³⁹ Only in shorthand can it be equated with the lawfare concept of the Comaroffs.

⁴⁰ Visual Matter: Judgewash, Business Day 9 September 2009, p. 12. Zapiro?

⁴¹ Ngcobo also discussed when his term would come to an end.

with the effect of changing the power to allocate judges to matters, a power currently with the Judge Presidents, to the Chief Justice. Noting humourously that he was always welcome to increased power, Ngcobo nonetheless clearly stated that he did not see the proposal as practical and that he would be reluctant to exercise those powers. Perhaps the more significant answer came from the Minister of Justice, Jeff Radebe, who was of course present, as noted by Judge Mpati, since he sits on the JSC. At the conclusion of Ngcobo's answer, Radebe was quick to add that there was no such bill in front of him at the moment, defusing the moment and signaling his intention not to propose such a change. It was another aspect (beyond the nomination/appointments politics with Zuma and the opposition parties) of the proceduralization of the politics of the Chief Justiceship, where the interview process was used for negotiation and confirmation of the current borderline between the judiciary and the executive.

Episode Two

The nominations to the JSC compared with the *Collins/Harris* cases.