
REASSESSING JUDICIAL INDEPENDENCE AND IMPARTIALITY AGAINST THE BACKDROP OF JUDICIAL APPOINTMENTS IN SOUTH AFRICA

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SUMMARY

The South African Judicial Service Commission (JSC), considered to be exemplary for its independence, plays a pivotal part in judicial appointments. Yet the Commission has long been marred by tensions that have lately erupted into a full-blown conflict between those who could here be referred to as the transformationists, on the one hand, and the liberals, on the other. The transformationists, who may generally be regarded as falling within the sphere of influence of the ruling elite under the African National Congress (ANC), are bent on pursuing the policy of transformation. Hence they insist that the composition of the bench must reflect the national population profile and on individual judges' pursuing the ruling party's ideological goals. The liberals reject this as a threat to judicial independence and the professional competence of the judiciary. On close analysis the clash is based on incompatible interpretations of judicial independence and impartiality. This article is a critique of these interpretations against the backdrop of an assessment of what these notions can reasonably be expected to achieve.

It is argued that the liberals are harbouring unrealistic views about judiciaries, believing them to wield power which may even extend over matters of political significance, powers on a par with or even outweighing those of the political branches. However, on proper analysis it is clear that the judiciary is in fact, firstly, inherently weak and dependent on the support of the political branches; and, secondly, it is integrated into the ruling elite with whom they share the same ideological assumptions without any inclination to oppose them. Hence, the impartiality of the courts, when it comes to politically sensitive issues, is distinctively politically (regime) relative and ideologically conditioned.

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Ironically the transformationists have bought into the liberals' erroneous belief in the potency of the courts (in the above-mentioned sense) and they fear, without foundation, for the political risks the courts might be posing to the ruling elite. This fear is based on an exaggerated vision of the far-reaching consequences that they ascribe to judicial independence and impartiality, believing it to render the judiciary a formidable political force on a par with the political branches. The transformationists would therefore go to extreme lengths to secure an amenable judiciary. This is exemplified by their rather improper insistence that the best candidates need not be appointed, thus compromising even the (limited) independence and impartiality which courts, on a realistic assessment, should have. In doing this the transformationists show a serious lack of appreciation of the distinctive professional nature of the judiciary, whose independence, impartiality and effectiveness are rooted not in political might but in the exceptional professional competence of the incumbents on the bench, who should be drawn from the best candidates the legal professional can produce.

KEYWORDS: dominant/ruling (political) elite; ideological assumptions; judicial appointments; judicial independence; judicial impartiality; judicial service commission; liberals; liberal constitutionalism; party detachment (of the judiciary); political insularity (of the judiciary); pure legal reasoning; representivity; separation of powers; transformation(ist/s).