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# A Judiciary under Siege - Reflections on the Judicial Service Commission 2021 Judges' Interviews

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## Introduction

Despite the ravages of COVID-19, the year 2021 is special in the calendar of South Africa's democratic project. This is because the country celebrates 27 years after attaining democratic rule. Twenty-seven is a magic number in South Africa. It reflects the number of years that the country's founding father, Nelson Mandela, spent incarcerated for fighting apartheid rule. In addition, the country's globally acclaimed Constitution is turning 25. The Constitution of the Republic of South Africa (Act 108) was adopted in 1996 when then Deputy President Thabo Mbeki made the now infamous 'I am an African' speech.[1] These milestones offer South Africa an opportunity to pause and reflect on the country's democratic project thus far. There are various lenses through which such an audit can be undertaken. These include processes such as the Judicial Commission of Inquiry into Allegations of State Capture (Zondo Commission)[2] and an economic lens as adopted by Brian Levy and colleagues at the University of Cape Town.[3] This paper seeks to add to the discourse on gauging the state of South Africa's democratic project by using a judicial-political approach. The Judicial Service Commission (JSC) interviews for judges held in April 2021 is used as a case study to analyse and reflect on the tensions between the judiciary and the other two arms of government – the executive and the legislature.[4]

What emerges from the JSC judges' interviews is that over the last few years the judiciary has had to assume the role of defending the country's democratic project due to the dysfunction mainly in the executive branch but also in the legislature. This was a direct result of the other two arms of government not upholding their function in the country's democratic project. Theunis Roux writes that during the first decade of democracy the Constitutional Court and judiciary in general treated the two arms of government as 'partners'.[5] However, the courts have now assumed a vanguard role to protect the democratic project against subversion from the other two branches of government. The interviews therefore offer a condensed sense of what has essentially been a systematic attack on the judiciary since the Jacob Zuma era.

## Structure

The paper traces the history of relations between the judiciary and other arms of government from the Mandela era in 1994 through to the presidential terms of Thabo Mbeki, Jacob Zuma and Cyril Ramaphosa. Focus then shifts to the themes emerging in the interviews. These themes are reflective of the challenges that the judiciary has experienced in recent times. In order to flesh out the narratives

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[1] Thabo Mbeki, 'I am an African', Parliament of the Republic of South Africa, Cape Town, 8 May 1996, http://afrikatanulmanyok.hu/userfiles/File/beszedek/Thabo%20Mbeki_Iam%20an%20African.pdf.
[2] See Ivor Chipkin, 'Making Sense of State Capture in South Africa', Submission to the State Capture Commission,
4 May 2021, https://www.scribd.com/document/506612384/2021-Making-Sense-of-State-Capture#download.
[3] See Brian Levy, Alan Hirsch, Vinothan Naidoo and Musa Nxele, 'South Africa: When Strong Institutions and Massive Inequality Collide', Carnegie Endowment for International Peace, 18 March 2021, https://carnegieendowment.org/2021/03/18/south-africa-when-strong-institutions-and-massive-inequalities-collide-pub-84063.
[4] For a list of interviewees and a record of proceedings, see 'JSC Candidates April 2021 and April 2020', Judges Matter, https://www.judgesmatter.co.za/jsc-candidates-april-2021-and-april-2020/.
[5] See Theunis Roux, 'The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?' *Constitutional Court Review* 10(1), 2020, p. 6.

and themes relevant for the assessment, the paper confines itself to the interviews for Supreme Court of Appeal and Constitutional Court candidates. This is because the candidates in these two courts are already sitting judges.

The paper notes that the civil society organisation, the Council for the Advancement of the South African Constitution (CASAC), had taken the JSC to court regarding the interviews. CASAC was challenging the way commissioners, especially those drawn from political parties, conducted the interviews.[6] The court challenge argued that the interviews were politicised and that commissioners should instead act in a neutral way that is not aligned to political affiliations. In this regard, CASAC sought that the interviews be annulled and set aside. In a welcome development, the JSC has set down the interview dates for October 2021 after a settlement was reached between the JSC and CASAC to have the interviews annulled and rerun.[7]

The Helen Suzman Foundation (HSF) has made a submission to the National Assembly, independent of the CASAC court application, recommending that the JSC composition be changed.[8] The HSF submits that the JSC must publish and make publicly available criteria with which judges are selected. This is an important point considering that it has since transpired in the CASAC application that the outgoing Chief Justice Mogoeng Mogoeng may have had a predetermined list of preferred candidates for the Constitutional Court vacancies. CASAC has managed to have the JSC interviews record released as part of the court process. The JSC's non-consideration for Judge David Unterhalter does not appear to have been informed by any sensible criteria, for example. Over and above, the HSF has requested that the National Assembly consider amending the Constitution in a way that will reduce the number of commissioners on the JSC. This reduction must be mainly aimed at the commissioners who are drawn from political parties.

Judicial Service Commission interviews as an audit tool for judicial versus executive and legislative relations. On the face of it, the JSC interviews may seem like an odd choice for a tool to gauge the country's democratic project, particularly with regard to the relations between the judiciary and the other arms of government. However, when one looks deeper, it becomes apparent why the JSC could be a useful mechanism for gauging the level of South Africa's democratic journey. This is because the JSC is composed of all three branches of government. However, as the executive and legislature became overbearing in general, there is a sense that the JSC is politically heavy. As indicated, the HSF has made a submission with regard to changing the composition of the JSC.

The JSC is a constitutional body established through Section 178 of the Constitution. Its mandate includes advising the government on matters relating to the judiciary and administration of justice. In this regard, the JSC meets twice a year for a period of a week in each session. The JSC is also mandated with conducting interviews of candidates intending to join or be elevated on the bench. After conducting interviews, the JSC recommends certain candidates to the president of the

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[6] See 'CASAC Challenges JSC Interviews for Constitutional Court', Media Statement, 3 June 2021, http://casac.org.za/wp-content/uploads/2021/07/CASAC-Media-Statement-CASAC-challenges-JSC-Interviews-for-the-Constitutional-Court.pdf. See also the Notice of Motion filed at the Johannesburg High Court, http://casac.org.za/wp-content/uploads/2021/07/2021-06-01-Notice-of-Motion_final_signed16645546.1.pdf.
[7] Judicial Service Commission, 'Shortlisted Candidates for Judicial Positions', 12 August 2021, https://www.judiciary.org.za/images/news/2021/JSC_Shortlisted_Candidates_for_Judicial_Positions_-_October_2021.pdf.
[8] Helen Suzman Foundation, 'Submission in Response to the Call for Comments on the Annual Review of the Constitution', 30 June 2021, https://hsf.org.za/publications/submissions/hsf-submission-annual-review-of-the-constitution.pdf.

country for a final selection. Further, the JSC conducts inquiries when allegations of misconduct are levelled against members of the judiciary.

In terms of its composition, the JSC is made up of the chief justice, a judge president, a representative from legal academia, six members of parliament, four members from the National Council of Provinces, the minister of justice and constitutional development and four persons designated by the president. Generally, the JSC's work is done quietly without controversy. On rare occasions when the JSC convenes to interview potential judges, the body assumes a unique and insightful position in the South African body politic. It is unique because it constitutes all three arms of government, meeting at the same time, in the presence of each other. This set-up is not intended to be controversial. However, due to the erosion of trust between the executive, legislature and the judiciary, the JSC lends itself to manifestations of the systemic tension in the country's democracy.

## JSC: An umbrella of the three arms of government

South Africa's constitutionalism is anchored on the trias politica doctrine. In its narrow terms and as propounded by Montesquieu, the doctrine mandates that the different arms of government must remain separate: law-making (legislature), enforcement (executive) and adjudication (judiciary).[9] This is with regards to scope and mission as well as in practical, even physical, terms. Historically, the separation was based on an understanding that the political, executive and judicial branches were separate. However, over time, as the British parliamentary system evolved and became dominated by political parties, it became clear that the legislative and executive arms' separation was academic.

The framing and application of the separation of powers doctrine is unique in the South African context. In the First Certification Judgment, it was stated that the separation of powers doctrine arises out of 'a concern for both the over-concentration of power and the requirement of an energetic and effective, yet answerable, executive'.[10] Here, the court refused to endorse a Montesquian approach to the separation of powers. In De Lange v Smuts, the courts further emphasised the fluidity of the separation of powers doctrine in South Africa. The court thus restated that 'there is … no universal model of separation of powers … there is no separation that is absolute'.[11]

One can argue that the physical separation is demonstrated by the three capitals of Pretoria, Cape Town and Bloemfontein/Braamfontein. Former Chief Justice Sandile Ngcobo reflects at length on the doctrine of separation of powers in South Africa and its relevance today: 'The Constitution does not tell us where and how to draw the line between the legitimate exercise of the power [of judicial review] and the impermissible intrusion into the domains of other branches of government.'[12] In this regard, the former chief justice was indeed reflecting the reality of the South

[9] See also Lauren Kohn, 'The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?' *South African Law Journal* 130, 2013, pp. 810–36.
[10] Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26, para 112.
[11] De Lange v Smuts, 1996 (10) BCLR 125, para 60.
[12] Chief Justice Sandile Ngcobo, 'Why Does the Constitution Matter?' Public Lecture Series, Human Sciences Research Council, Gallagher Estate, 30 June 2016, p. 2,

African constitutional framework. Needless to say that Section 165 expressly provides for the independence of the judiciary and the need for other arms of government to support the institution. In State v Mamabolo, Justice Johann Kriegler, among other things, eloquently explained the separation of powers with regards to the courts and the critical role of public confidence in the judiciary as a legitimising factor.

While at an administrative level the JSC plays an advisory role to government, acting as a unitary structure, it is when interviewing judges that various commissioners revert to their original positions in the different arms of government. This is usually by default and is exhibited mostly when they deal with interviewees, but on the odd occasion when they engage with fellow commissioners. It was through observation of the unique, dynamic moments of members of the judiciary, executive and legislature engaging with each other directly and indirectly that it became clear that this is an often-overlooked notable moment for South Africa. Indeed, Lawson Naidoo had rightly argued in his case to review the interviews that commissioners must lose their political identities while performing their duties.[13] The politicisation of the JSC interviews is reflective of the judicialisation of political disputes and process over the last decade. It is this phenomenon that this paper focuses on, as well as the attendant consequences for South Africa's constitutional project. Finally, the paper suggests solutions that can be adopted and applied to rescue the country's judicial system.

## The political economy of the separation of powers doctrine in South Africa

The 2021 JSC interviews reflect the tensions currently obtaining in the South African body politic, especially among the three arms of government. These tensions can be traced to the genesis of the country's democratic and constitutional project in 1994. What was clear from the JSC interviews is how the relations among the three arms of government have deteriorated from the creative tension of the Mandela and Mbeki eras to the almost toxic and destructive conflict of the Zuma era. The media, which is often referred to as the fourth estate, features in the matrix of the conflict among the various arms of government. Further, civil society shoulders some of the blame in exacerbating or neglecting its duty in policing the various branches of government and not empowering citizens through civic education.

## Salient issues arising from the JSC interviews

If the JSC interviews are viewed as a mirror of South African society, some themes arising from the interviews deserve mention and subsequent analysis. The interviews deal with a concern for access to justice by the majority of South Africans who suffer from a wide range of exclusions. This concern is more systemic and can be linked to the general import of South Africa's Constitution. It is related to the broader theme of transformation and reconciliation. Interviewees were subjected to allegations of an elite pact arising out of the Congress for a Democratic South Africa (CODESA) negotiations. Judicial capture was another theme of concern for the JSC. This was an allegation made mostly from outside the JSC by commissioners with a political background. In its simplest terms, judges and the judiciary as a whole were accused of being in the pockets of certain politicians and big business. The notion of 'prepaid' judges was a key feature of the JSC interviews.

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http://www.hsrc.ac.za/uploads/pageContent/7058/HSRC%20Public%20Lecture%20(FINAL)%20-%20Why%20The%20Constitution%20Matters%20(v%2020%20July%202016).pdf.

[13] See CASAC's Founding Affidavit in Council for the Advancement of the South African Constitution v the Judicial Service Commission and Others (later settled out of court with the JSC acquiescing to CASAC's reservations), http://casac.org.za/wp-content/uploads/2021/08/Founding-affidavit.pdf.

Relatedly, the JSC also referred to juristocracy or a judicial dictatorship. This allegation was couched in terms that sought to suggest that the judiciary had amassed itself immense powers that went beyond those anticipated in the separation of powers doctrine. There was an insinuation in the interviews that the judiciary was furthering its nefarious agenda by working in cahoots with the media and sections of civil society. In this regard, the role of the media in reporting on the tensions among the various arms of government was also discussed. Similarly, civil society and its role in driving class interests was engaged with. If the JSC interviews are used as a gauge for the state of South African democracy, the overall sense is that over the past 27 years the executive and legislative excesses have had a negative impact on the judiciary. It is therefore trite to engage with the main issues that affect the equilibrium envisaged in the trias politica doctrine.

## Evolution of tension between the two arms of government and the judiciary

The JSC interviews reflected that after 27 years of democracy, tension has been growing in the various arms of government. What is apparent is that the judicial arm is at the receiving end of this tension. The genesis of the tension between the two branches of government and the judiciary predates the constitutional dispensation. During the apartheid era, the majority of judges supported the regime, compounded by the parliamentary supremacy system that existed at the time.[14] However, there were some activist judges who opposed the system through their judgments.

While the doctrine of separation of powers is embedded in South Africa's legal-political psyche, the country's Constitution does not make an explicit provision for it. The separation of powers is implied through explicit enumeration of responsibilities for various arms of government.[15] Chapters 4, 5 and 8 of the Constitution respectively establish detailed frameworks on the legislative, executive and judicial arms of government. Indeed, Aziz Z. Huq argues that this approach reflected an appreciation for an implied separation of powers doctrine. Huq therefore states that 'separation of powers … must also be agile, responsive, and provisional, rather than a matter of static relations calibrated by a prior theory'.[16] This suggested that South Africa has a living separation of powers that responds to
contemporary challenges.

## Mandela presidency

The Mandela presidency emerged at the tail end if not almost out of the CODESA negotiations, which had spanned almost four years. This is when one discounts the talks about talks and the secret talks between the African National Congress (ANC) and the apartheid government that began in the mid- to late 1980s. The transition from a parliamentary to a constitutional system placed the judiciary at the centre of the separation of powers. This is because the judiciary has an implied role to play in an oversight function on the other two branches. In a parliamentary system, the legislature could always legislate itself out of controversies. As Chief Justice Ngcobo remarked (quoting the Collins v Minister of the Interior and Another judgment),[17] during apartheid,

[14] See, for instance, Collins v Minister of the Interior [1957] 1 SA 552 AD, paras 567–8. In this case, parliament changed rules around the composition of the Senate in order to create laws that resulted in disenfranchisement of certain communities.
[15] Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26, paras 108–13.
[16] Aziz Z. Huq, 'A Tactical Separation of Powers Doctrine', *Constitutional Court Review* 9, 2019, p. 44.
[17] See Collins v Minister of Interior and Another.

parliament enjoyed a discretion to exercise its plenary powers in any way that pleased the institution; its motive or purpose in such an exercise were irrelevant in law.[18] Much of the tension experienced today between the judiciary and other arms of government stem from the fact that the former has review powers over other branches of government. Roux rightly notes that the power of judicial review links politics and the law.[19] The South African Constitution was certified and adopted under the Mandela administration.[20] Due to the transitional nature of the time when Mandela came to power, there are almost no incidents of a rift between the various arms of government.

## Testing the waters: SARFU v President of the Republic of South Africa

The closest that South Africa came to witness a direct 'confrontation' between the judiciary and the executive under the Mandela administration was in the SARFU matter.[21] In that case, a seemingly hostile High Court judge, Willem de Villiers, subpoenaed then President Mandela to give evidence in person. Later, the judge found against President Mandela and in his judgment used language that sought to throw aspersions on his credibility. When the matter was taken for review at the then relatively new Constitutional Court, the respondent applied that five out of the eleven judges recuse themselves. The grounds for recusal were based on alleged proximity to President Mandela and the governing ANC. While this case may have appeared as a nuisance and contrarian, if not disrespectful to the executive, the stature of Mandela and even the then delicate democratic project, some of its nuances have remained, if not been amplified.

However, President Mandela's appearance in person set a precedent that no one was above the law. His appearance further reinforced a then nascent principle of separation of powers. The refusal of President Zuma to appear before the Zondo Commission or make submissions to the Constitutional Court reflects a chasm between his era and that of President Mandela. It can be argued that Mandela's appearance before the Constitutional Court laid a legal and moral ground for the court's decision to adopt a strong stance in Zuma's contempt of court, which subsequently led to his incarceration.

## Mbeki era: Planting seeds of tension

## Liberation movement ethos versus constitutionalism

It can be argued that the seeds of the current tensions between the two arms of government and the judiciary were planted during the Mbeki years, albeit in his second term. The development of a healthy tension and robust relationship between the judiciary and the executive occurred when cases of a political nature were brought before the courts. This is a phenomenon that has plagued most post-colonial and liberation movement-ruled societies, especially in southern Africa. Many of the liberation movements in the region have roots and affiliations with undemocratic societies, such as China, Cuba and Russia.

As a result, these liberation movements-cum-governing parties treat the judiciary as a junior partner in the three arms of government. The juniorisation of the judicial arm comes more from

[18] See Ngcobo, 'Why Does the Constitution Matter?', pp. 11–12.
[19] Roux, 'The Constitutional Court's 2018 Term', p. 6.
[20] For Certification Judgments, see Certification of the Constitution of the Republic of South Africa, 1996 (CCT23/96) [1994] ZACC 26, http://www.saflii.org/za/cases/ZACC/1996/26.pdf.
[21] President of the Republic of South Africa and Others v South African Rugby Union and Others, 1999 (4) SA 147 (CC), http://www.saflii.org/za/cases/ZACC/1999/9.pdf.

a legitimacy perspective. The judiciary is seen as lacking a popular mandate and, unlike the executive and legislature, would, in terms of composition, not necessarily be made up of 'comrades'. It is this rationale that inform persons like President Zuma, in an act of cognitive dissonance, favouring a parliamentary democracy in which the party's view will not be challenged in the courts.

These governing parties dominate parliament, rendering the legislative arm benign. The judiciary can then choose to remain independent and isolated or acquiesce to the demands of both the executive and legislature. For instance, the juniorisation of the judiciary was reflected in the JSC interviews through an almost disdainful approach to judges by some of the commissioners who are parliamentarians. In addition, there was a closing-of-rank approach by ANC and Economic Freedom Fighters (EFF) commissioners against judges. This was manifested in certain lines of questioning and innuendos. However, the courts' ability to withstand the pressure and act as a bulwark in defence of the constitutional democratic project has shown that it is a strong institution. In this regard, Sandile Ngcobo underscores this point in his observation: 'When political branches of government and opposition parties resort to the judicial process to resolve their differences, this is a vindication of the Constitution.'[22]

## State v JG Zuma (Khwezi case): Beginning of lawfare

It is within this framework that the beginning of tension can be understood during the Mbeki period. The ANC as a liberation movement does not show conformity to a democratic constitutionalism as envisaged in the country's Constitution. Like most liberation movements, a parliamentary democracy would have been more consonant with the ANC's idea of democracy. It was during the Mbeki era that the arms deal-related corruption was first reported. This was followed by a fallout between President Mbeki and his then deputy, Jacob Zuma. After Zuma was sacked from his position as deputy head of state, he was charged with rape in a case that came to be known as the Khwezi case.[23] Zuma was accused of rape that was alleged to have taken place at his Forest Town residence. While he admitted that he had sex with the complainant, Zuma argued that it was consensual.

This case was seen as politically motivated and attracted thousands of Zuma's supporters. In a way, this became the first case in which ANC issues were brought to the democratic courts, albeit indirectly. Zuma was controversially acquitted. Among his supporters, the victory was political. In addition, Zuma used the court platforms to launch his political comeback. It can be argued that this case opened the use of courts as political battlegrounds. This was mainly for the ANC, but later other political parties joined. While the cases, in and of themselves, have had no bearing on the relations between the judiciary and other arms of government, it is the criticism they draw from political parties that has the effect of straining relations. This is more so when the ANC as a governing party openly criticises the judiciary.

## Schabir Shaik case

Besides the Khwezi case, which on the face of it was essentially a rape charge that Zuma supporters politicised, the Mbeki era presented two other politically charged cases. These were

[22] Ngcobo, 'Why Does the Constitution Matter?', p. 16.
[23] See State v Jacob Gedleyihlekisa Zuma, High Court of South Africa, Witwatersrand Local Division, 8/5/2006, http://www.saflii.org/za/cases/ZAGPHC/2006/45.pdf.

the Shabir Shaik case[24] and the Nicholson judgment[25] relating to the withdrawal of charges against Zuma. The Shabir Shaik case centred around allegations of corruption against Zuma and Shaik. Whereas in the ordinary course of events, allegations of corruption are apolitical, the Zuma-Shaik matter was seen as a political strategy to get rid of the former. It has remained a mystery as to why Zuma was not charged and prosecuted at the same time as Shaik. In any event, Zuma has continued to argue that President Mbeki was using state institutions to undermine his political ambitions. Then National Director of Public Prosecutions Bulelani Ngcuka's decision not to charge Zuma, while pronouncing that he had a prima facie case, further fuelled the conspiracy theories around the invisible hand of Mbeki.

## Nicholson judgment

While the Khwezi and Shaik cases indirectly brought the executive into the courts, it was the Nicholson judgment that brought ANC politics and the executive into the judicial arena. Judge Nicholson was asked to rule on whether charges against Zuma should be withdrawn. The political climate favoured that the charges be dropped. There was a groundswell of support for Zuma in the ANC and in the country generally. Judge Nicholson adopted an approach that seemed to defer to the executive and the ANC as a dominant political force in the country. Jonathan Klaaren and Theunis Roux have argued that Nicholson sought to legitimise the judiciary by making a decision that would prove popular with the dominant political elite.[26] Judge Dennis Davis and Advocate Michelle le Roux described the Nicholson judgment as the beginning of lawfare.[27] The Nicholson judgment was later set aside by the Supreme Court of Appeal. However, the judgment had already fulfilled its political purpose, including setting the scene for a lasting tap dance between the executive (ANC) and the judiciary.

Indeed, the Nicholson judgment, coupled with the Shaik and Khwezi cases, introduced enduringly complex and lately toxic dynamics between the executive and the judiciary. This culminated in the heads of arms of government meeting convened by President Zuma. Retired Deputy Chief Justice Dikgang Moseneke describes in detail how the meeting itself was a rehash of public criticism that the judiciary endures from the executive.[28] Indeed, the JSC 2021 interviews reflected challenges beyond the ANC; however, the commissioners who are judges made reference to judicial criticism overall. Accusations of judicial dictatorship, juristocracy and judicial populism would in the main have stemmed from the ANC during the Zuma years.

These issues have deepened and were reflected in the 2021 JSC interviews. The interviews have shown that the attack on the judiciary goes beyond the ANC to include other members of the legislature, especially the EFF, led by Julius Malema. Indeed, the judiciary has become an arena for multi-party and intra-party factional interests.[29] The judiciary is not only caught up with an overbearing executive, dominated by a single party, but finds itself being dragged into factional politics within the governing ANC. However, if the scene of the tension between the judiciary and the executive was set during the Mbeki years, it was during the Zuma years that the theatre of lawfare was played out.

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[24] See State v Shaik and Others, 2007 3 All SA 9 (SCA).
[25] See Zuma v National Director of Public Prosecutions (2009) 1 All SA 54 (N).
[26] Jonathan Klaaren and Theunis Roux, 'The Nicholson Judgment: An Exercise in Law and Politics', *Journal of African Law* 54(1), 2010, pp. 143–55, esp. pp. 150–3.
[27] Dennis Davis and Michelle le Roux, *Precedent & Possibility: The (Ab)use of Law in South Africa*. Cape Town: Double Storey Books, 2009, pp. 190–3.
[28] Dikgang Moseneke, *All Rise: A Judicial Memoir*. Johannesburg: Picador Africa, 2020, p. 264.
[29] See Ramakatsa and Others v Magashule and Others (CCT109/12) [2012] ZACC 31.

## Zuma era: Executive dominance and judicialisation of politics

The tensions exhibited by various commissioners towards judges at the 2021 JSC interviews and the attendant themes emerging therefrom can be viewed as an audit of the Zuma presidency. While there has been considerable focus on the impact of the Zuma presidency on the economy and the element of state capture, not enough attention has been paid to the corrosive impact of this presidency on relations between the various arms of government. The Zuma years were characterised by an intensive war between the executive and legislature on the one side and civil society and opposition political parties on the other. The battle ground for this war was the judiciary. One constant institution during the Zuma years was the Public Protector. Under the leadership of Advocate Thuli Madonsela, this institution stayed loyal to the Constitution and the democratic project. However, this has since changed under the Ramaphosa administration when Busisiwe Mkhwebane was appointed. The current Public Protector has aligned the institution with a faction of the ANC. In the true meaning of the African proverb about the grass being the ultimate victim of two elephants fighting, the judiciary was the grass in this instance. Some of the key cases reflecting the judicialisation of politics during the Zuma era included the so-called Nkandla matter[30] and the 'secret ballot' case,[31] among others.

These cases and many others indirectly pulled the judiciary into the political arena. The result was a growing perception that the judiciary had become too involved in law-making in a way that usurps the legislative function and policy role of the executive. Therefore, the JSC interviews of 2021 and their related controversies are reflective of the tensions arising from the general escalation of resolving controversies of a political nature through the courts. However, it was the failure of legislative oversight that forced matters that would ordinarily be solved politically being brought to the courts. While the resort to judicial process for resolution of political disputes is not inherently problematic, it is the high frequency of asking the courts to address these systemic problems that gives rise to institutional tension between branches and a general public perception that the courts have become embroiled in politics.

## Failure of legislative oversight

The three arms of government have jurisdiction in their different domains. Their interactions are usually for an oversight or clarificatory purpose. In principle, the three arms of government are equal; however, in practice, the executive has access to real power in that it has command of the state, including its resources, such as the military, intelligence services and the police service. While the legislature lacks such access, it has a symbiotic political relationship with the executive due to South Africa's hydbrid presidential, constitutional and parliamentary democracy. Moreover, the ANC's electoral dominance has resulted in a legislature that defers to the executive, as evidenced by a weakened legislative oversight during the Zuma years. The judiciary, on the other hand, does not enjoy a similar proximity to the executive as the legislature. In this regard, the other two arms, being the judiciary and the legislature, have an oversight role over the executive. However, as noted in the Mamabolo decision, the judiciary is the weakest of these branches as it has 'no constituency, no purse and no sword'.[32]

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[30] See Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11.
[31] See United Democratic Movement v Speaker of the National Assembly and Others (CCT89/17) [2017] ZACC 21.
[32] State v Russel Mamabolo (CCT 44/00) [2001] ZACC 17, para 16.

In this regard, South Africa has a bi-pronged dilemma. The first concerns the one-party dominance, which leads to the legislature and executive experiencing a relationship that is prone to a conflict of interest. For instance, during Thandi Modise's testimony at the Zondo Commission, it emerged that there are study groups in which senior government officials, together with ministers, brief ANC MPs. This structure runs parallel to the formal parliamentary process and no doubt solifies the conflict of interest between the executive and parliamentary members of the ANC. The second challenge is the conflation of party and state. These challenges, combined with a strong and unaccountable executive, led to the legislature playing a rubber-stamping role during the Zuma administration. At the Zondo Commission, Speaker of Parliament Thandi Modise acknowledged that parliament had reneged on its duty to hold the executive accountable during much of the Zuma era.[33]

Most of President Zuma's indiscretions, such as the Nkandla matter and other excesses relating to state capture and the Gupta family, were never subjected to requisite parliamentary scrutiny. Parliament's failure to exercise its oversight role on the executive led to opposition parties and civil society outsourcing that role to the judiciary. This led to the judiciary having to find against the legislature. Over time, this created tension between the two arms of government. Such tension was evident during the JSC interviews when some of the commissioners who were drawn from the legislature adopted a hostile posture towards the judiciary, based on cases that the latter had to adjudicate relating to the former. The oversight vacuum created by a pliant legislature gave rise to an even more activist civil society and media. Moseneke lists more than a dozen cases that he attributes to having contributed to heightened tension (albeit healthy and desirable) between the judiciary and the executive.[34]

## Civil society in the thick of things

The JSC interviews revealed how the tensions that have rocked the three arms of government, and particularly the judiciary, have not spared civil society. During interviews, commissioners made innuendos and implicitly cast aspersions towards civil society organisations. For instance, Judge David Unterhalter, who had sat on the board of the South African Jewish Board of Deputies (SAJBD), a reputable NGO that represents the interests of the Jewish community, was asked questions about his board membership. His board membership was used to make political insinuations relating to the state of Israel that have nothing to do with the candidate's fitness to be a Constitutional Court judge. Such an attitude towards the SAJBD by commissioners drawn from political parties reflects a culture that set in during the Zuma era, in which civil society organisations are viewed with suspicion, almost as enemies of the state.

The Zuma administration had a generally unfavourable approach to civil society. It adopted an antagonistic attitude that is usually found in undemocratic systems of governance. Civil society organisations, such as the HSF, Freedom Under Law and CASAC, were viewed with suspicion as advancing particular class, if not demographic, interests. It was not surprising when it emerged that they had been subjected to state security surveillance and sometimes mysterious burglaries in their workplaces. The Zuma administration also viewed civil society with suspicion as being fronts for foreign powers. It suffices to mention that the civil society organisations that have been

[33] See Marianne Merten, 'Speaker Thandi Modise Does Damage Control – Apologises for Parliament Seeming to be "Sleepist" and Pleads for More Resources', *Daily Maverick*, 19 April 2021, https://www.dailymaverick.co.za/article/2021-04-19-speaker-thandi-modise-does-damage-control-apologises-for-parliament-seeming-to-be-sleepist-and-pleads-for-more-resources/.
[34] Moseneke, *All Rise*, pp. 251–65.

singled out have been mostly, if not entirely, involved in high-level political cases. The argument advanced by some commissioners is that these organisations are either proxies of political parties or pursuing an elite interest. These assertions require reflection by civil society organisations themselves. A robust civil society enhances democracy in a way that an alert and free press contributes to holding the three arms of government to account. The media shadow loomed large in the JSC interviews, most of it through innuendo.

## The fourth estate: Fuelling or abetting the tension?

The JSC interviews also revealed the extent to which the media has found itself playing a much bigger role to defend the country's democracy. However, this was not without risk and complications. Whereas the media's role is inherently antagonistic to governing elites, this is more defined in the polarised society that is South Africa. Commissioner Malema suggested that the media was biased. He asserted that the media did not give requisite coverage to the so-called top six in the Supreme Court of Appeal. Further, Commissioner Malema argued that the media accorded judges disparate treatment. He went further to state that some judges are media darlings, whereas justices such as Chief Justice Mogoeng Mogoeng are unfairly targeted by the media. The crux of Commissioner Malema's argument was that it is only when particular judges and divisions are criticised by political party litigants that the media characterises the criticism as unfair and an attack on the whole institution of the judiciary.

Commissioner Malema's views seemed to enjoy support from fellow panelists drawn from political parties. This alleged bias led the media to unfavourably shield sections of the judicial community from scrutiny. According to Commissioner Malema, skewed media coverage created a public perception that the legislature and executive were at war with the judiciary. Commissioner Malema further insinuated that this media bias was racially motivated. Indeed, this narrative is in consonance with the white monopoly capital narrative that emerged and was entrenched during the Zuma years. Besides the institutional relationship issues that emerged during the JSC interviews, as discussed above, there were substantive themes that came to the fore. These issues are similarly reflective of the state of democracy. Issues that warrant analysis include judicial dictatorship, judicial capture, judicial populism, classism, judicial attack and fair criticism, and judicial review.

## Judicial dictatorship

The accusation of judicial dictatorship came out strongly during the JSC interviews. It is important to note that this suggestion had been made several times over the years, especially during the second term of the Zuma presidency. As the judiciary adjudicated over more cases with a political and executive dimension, its decisions were frowned upon as being acts of judicial overreach.

Indeed, Justice Moseneke points out in his book All Rise that issues that led to judicialisation of politics included presiding on cases relating to execution of presidential powers, exercise of public executive power and disputes relating to political disagreements.[35] During the interviews, there was a suggestion by Commissioner Ronald Lamola that South Africa had fallen under a judicial dictatorship. Commissioner Lamola described a judicial dictatorship or juristocracy as a situation in which the judiciary made decisions that should ordinarily be taken by the executive. This characterisation is in line with Ran Hirschl's definition of juristocracy as 'instances where courts decide on watershed political questions that face the nation, despite the fact that the constitution

[35] Moseneke, *All Rise*.

of that nation does not speak to the contested issues directly, and despite the obvious recognition of the very high political stakes for the nation'.[36] The insinuation of a judicial dictatorship was mainly directed towards the Constitutional Court. There is no doubt that this suggestion is borne out by what some members of the executive and legislature feel towards some of the judgments coming out of the Constitutional Court. However, in defence of the judiciary, fellow Commissioner Dunstan Mlambo, who is also a judge, indicated that judges have no choice on which cases to preside over. Commissioner Mlambo countered the accusation of judicial dictatorship by reminding fellow commisisoners of the judiciary's reliance on those cases brought before it for adjudication as it controls neither the purse nor the sword. While Commissioner Mlambo may have been echoing Justice Kriegler in Mamabolo, this assertion was to be more strongly echoed by Justice Sisi Khampepe in the Zuma contempt of court case.[37] The court has had to adjudicate over political controversies that are couched in legal terms, drawing the ire of losing litigants. Perceptions of a judicial dictatorship arise from the increase in political cases that have been referred to the courts during the Zuma years. This was a result of the legislature being delinquent in its duty to hold the executive to account. What is referred to as a judicial dictatorship arose when the institution had to act as a bulwark against a total onslaught on the country's constitution and democracy. Related to judicial dictatorship was an allegation of judicial capture.

## Judicial capture

While South Africans have become familiar with the concept of state capture, this concept is distinct from judicial capture. The former is a concept that was first identified by the World Bank in the former Soviet bloc countries in the 1990s.[38] South Africa has experienced its own version. State capture essentially involves the outsourcing of state functions to private individuals. Opponents of state capture within the governing ANC and the EFF have argued that the real state capture is one perpetrated by so-called white monopoly capital. However, the judiciary was a last line of defence during the state capture years. It was one of the few institutions that survived the onslaught and the attendant hollowing-out of institutions. While the judiciary has inherent institutional independence and strength, it also has an inherent fragility. Unlike most institutions of governance, the judiciary is to a large degree perception-dependant. This aspect makes the judiciary delicate in that the institution is not immune to outside forces that may intend undermining it. This can be done by tampering with the judiciary's public perception. There are no better merchants of perception than politicians. They would rather undermine judicial independence from a perception perspective. This is because the judiciary, besides its institutional independence, relies on a public perception that it is above reproach for its legitimacy. The dependence of the judiciary on public perception has been emphasised in the Mamabolo and Zuma contempt of court cases. Whereas in mature democracies it may take effort to erode the public's confidence in the judiciary, South Africa's nascent constitutional framework requires a much more measured judicial criticism.

The issue of judicial capture came out strongly during the JSC interviews. Again, it was Commissioner Malema, as well as Commissioner Singh, who made allegations that certain judges are perceived to be working in cahoots with politicians within the governing party. Commissioner

[36] Ran Hirschl, 'The Judicialization of Politics', *The Oxford Handbook of Political Science*, July 2011, 10.1093/oxfordhb/9780199208425.003.0008.
[37] See Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector and Other Organs of State v Zuma and Others CCT 52/21 [2021] ZACC 18, para 87.
[38] See Joel S. Hellman, Geraint Jones, Daniel Kaufmann and Mark Schankerman, 'Measuring Governance, Corruption, and State Capture', Policy Research Working Paper 2312, World Bank, 2000, https://documents1.worldbank.org/curated/en/241911468765617541/pdf/multi-page.pdf.

Malema suggested that the North Gauteng High Court had some of its judges acting on the whims and dictates of the Ramaphosa faction of the ANC. Commissioner Singh suggested that Judge Dhaya Pillay was too close to Pravin Gordhan in a way that may compromise her judicial independence. This view was further supported by Commissioner Malema. More disturbing was that Chief Justice Mogoeng Mogoeng, who chairs the JSC, made similar innuendos. The North Gauteng High Court was said to be captured based on a string of judgments the court has made against Public Protector Busisiwe Mkhwebane's office over the years in which she has generally lost. Moreover, the recent decision to seal President Ramaphosa's CR17 bank statements seem to have drawn the ire of some members of the legislature. Judge Dhaya Pillay was said to be pro-Gordhan and anti-Zuma based on a judgment she made against Zuma in the Pietermaritzburg High Court.

## Judicial populism

Judicial populism was loosely described in the JSC interviews as a phenomenon in which the judiciary makes decisions that reflect popular sentiment. The popularity of the sentiment does not necessarily have to be one based on numbers but could be among a small albeit powerful elite. There is an irony in this assertion. The paradox is that the influx of politically inclined cases to the courts forces judges to engage in a balancing act, consciously and sometimes unwittingly. This is something that Judge Nicholson had to contend with in his controversial judgment against the National Prosecuting Authority. The judiciary has had to endure an unfair burden of having to resolve political disputes due to the collapse of legislative oversight. Such unfairness arises in that South Africa is still a society in transition. As such, there is an inherent duty among the organs of state not to place undue burdens on any arm of government. It seems to be lost on the JSC commissioners, who are drawn from political parties and the legislature, that they place the judiciary in an invidious position. A particularly striking aspect was the suggestion of classism among the judiciary.

## Classism

It was argued that judges have a class interest that they should guard against. This class interest is based on their economic and educational backgrounds. In a South African context, the history of apartheid and exclusion has lent a political and antagonistic angle to classism in the judiciary. The discussion was conducted in a manner that sought to estrange white members of the judiciary and those aspiring to join the bench. There was a realisation that while inequality was one of South Africa's structural challenges,[39] the Constitutional Court did not receive proportionate cases related to the issue. Instead, most of the cases that the Constitutional Court had to deal with had a political focus. In other words, the Constitutional Court had been turned into a battleground for political and economic elite interests.

This observation tallies with the concern about civil society organisations mainly becoming involved in political- and elite-driven cases instead of socio-economic rights and racism issues. Such a focus undermines the reconciliation and transformation objectives of the Constitution as enshrined in the preamble and other provisions. Commissioner Malema took judges David Unterhalter and Dhaya Pillay to task for owning shares in private firms, including Standard Bank. This was deemed to have the potential to undermine their independence when adjudicating cases involving firms in which they were shareholders. The subtext in this assertion was that certain judges were part of white monopoly capital through shareholdings in listed firms. While the JSC

[39] See Levy et al., 'South Africa'.

interviews of 2021 may be viewed as having been used as a platform for judicial attacks, much time was dedicated to trying to analyse what distinguished such from fair criticism.

## Judicial attack and fair criticism

There is no doubt that the experience was unpleasant for candidates appearing before the JSC in 2021. This was more so for those candidates who were already serving on the bench in one form or the other. It was agreed that the judiciary occupies a space in society that warranted scrutiny. There was, however, a sense that the judiciary has come under attack from the executive and legislature. The discussion revolved around what constituted the best way to engage the judiciary without attacking and undermining the institution. Commissioner Mlambo and some candidates used the test in Mamabolo, which provided that 'the legal imperative to protect courts from slanderous public statements has little to do with protecting the feelings and reputations of Judges, and everything to do with preserving their ability and power to perform their constitutional duties'.[40] Indeed, the discussions at the JSC expressed a fear that unlimited judicial criticism may lead to the institution losing credibility in the public eye in a way that may undermine its ability to perform its functions. One of the candidates, Advocate Nxumalo, explained at length the checks and balances inherent in the judiciary that firewalls the institution from capture. This is because much of the criticism suggests that the institution is losing independence. In the Zuma contempt of court case, delivered some weeks after the JSC interviews, Justice Sisi Khampepe had the following to say about judicial criticism:

I must acknowledge and lament the evident rise in a casual and reckless attitude being adopted by many litigants who see it fit to level unsubstantiated accusations against the judiciary, both in the public and their pleadings before the courts. This inexplicable state of affairs cannot be tolerated or encouraged. It is not permissible for a disgruntled litigant to besmirch the reputation of the judiciary or its members without fear of consequence.[41]

What was ironic was that the manner of questioning around judicial attacks almost constituted an attack on its own. It was also striking that those commissioners drawn especially from the legislature took judges to task about decisions they have made in the past. These would be cases in which the losing litigants would have attacked the judges for decisions. The attacks seemed to continue within the JSC platform. Worryingly, Chief Justice Mogoeng Mogoeng was uncharacteristically silent when there was a heated debate around judicial criticism, even failing to rein in Commissioner Malema when the latter was engaged in what amounted to an attack on candidates and the judiciary in general. For instance, Commissioner Malema put Judge Ledwaba in a very uncomfortable position when he wanted the judge to explain some of his decisions, including the sealing of the CR17 documents. One would have wished that the attacks displayed at the JSC interviews were showmanship on the part of the commissioners. However, in his memoir, Moseneke offers a chilling narration of an 8 July 2015 meeting between the executive and the judiciary. The meeting was ostensibly aimed at analysing areas of concern, finding common ground and working towards an amicable solution. Moseneke states: 'The executive rolled out afresh the usual and … tired accusations of judicial bias against the government and of judicial overreach.'[42] Then Deputy President Cyril Ramaphosa is said to have been part of the meeting, albeit silent. This could explain President Ramaphosa's deliberate efforts to assure the judiciary of the executive's confidence in the institution.

[40] State v Russel Mamabolo (CCT 44/00) [2001] ZACC 17, para 24.
[41] Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector and Other Organs of State v Zuma and Others CCT 52/21 [2021] ZACC 18, para 136.
[42] Moseneke, *All Rise*, p. 264.

## Judicial review

Some scholars have argued that the increase in the powers of the Constitutional Court that came with the Constitution Seventeenth Amendment Act of 2012 resulted in the judiciary playing even more of an oversight role over the executive and legislature. Section 167(3)(b)(ii) amendment widened the jurisdiction of the Constitutional Court to include 'any other matter … of general public importance'. This widened ambit has led to the Constitutional Court conducting judicial reviews into areas that are not explicitly mandated by the Constitution. This is in contrast with National Treasury v OUTA, in which the court cautioned that '… the courts must refrain from entering the exclusive terrain of the Executive and Legislature unless the intrusion is mandated by the Constitution itself'.[43] Stephen Gardbaum notes that since 2017, the Constitutional Court has been involved in what he terms 'judicial supervision' of the legislative arm of government. Gardbaum cites inter alia the following instances as examples of judicial supervision:[44]

- Oriani Ambrosini case concerning private members bill;[45]
- Mazibuko v Sisulu case dealing with a vote of no confidence in the president;[46]
- EFF v the Speaker, also known as the Nkandla case,[47] which found that President Zuma had unduly benefited from upgrades at his home; and
- United Democratic Movement (UDM) case on the secret ballot.[48]

These cases resulted in the Constitutional Court engaging in legal creativity as the issues raised are not expressly provided for in the Constitution. Aziz Huq refers to this creativity as 'tactical attempts to safeguard the democratic process'.[49] His focus is mostly on the 'trilogy' of these cases: Democratic Alliance v Speaker of the National Assembly & Others,[50] dealing with the ejection of the EFF from parliament using the police (EFF I); Economic Freedom Fighters v Speaker of the National Assembly & Others (EFF II)[51] and United Democratic Movement v Speaker of the National Assembly & Others.[52] These three cases effectively meant the judiciary dictated what the legislature should do and which internal rules to use. This was unprecedented and highly intrusive. For instance, in the UDM case, wherein the Speaker of the National Assembly had indicated that she lacked the power to determine if the ballot had to be held in secret, and where the Constitution was silent, the Constitutional Court ruled that she had the power and went on to dictate the rules in conducting the ballot.

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[43] National Treasury and Others v Opposition to Urban Tolling Alliance and Others (CCT 38/12) [2012] ZACC 18.
[44] Stephen Gardbaum, 'Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa', *Constitutional Court Review* 9, 2019, pp. 1–18.
[45] Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly (CCT 16/12) [2012] ZACC 27.
[46] Mazibuko, Leader of the Opposition in the National Assembly v Sisulu MP, Speaker of the National Assembly and Others.
[47] Economic Freedom Fighters and Others v Speaker of the National Assembly and Another (CCT76/17) [2017] ZACC 47.
[48] United Democratic Movement v Speaker of the National Assembly and Others (CCT 89/17) [2017] ZACC 21.
[49] Huq, 'A Tactical Separation of Powers Doctrine', pp. 19–44.
[50] Democratic Alliance v Speaker of the National Assembly & Others [2016] ZACC 8, 2016 (3) SA.
[51] Economic Freedom Fighters v Speaker of the National Assembly & Others [2016] ZACC 11, (3) SA 580 (CC).
[52] United Democratic Movement v Speaker of the National Assembly & Others [2017] ZACC 21.

Huq is generally critical of the intrusive nature of the Constitutional Court's review process in these three cases, although he ultimately argues that the cases were necessitated by a general decline in executive and legislative accountability. He therefore adopts that the end justifies the means approach, while appreciating the review process did intrude into the internal legislative processes. Relatedly, Firoz Cachalia propounds a theory of 'democratic process-reinforcing' review to explain the necessity of what would ordinarily be viewed as intrusive judicial reviews of another arm of government. Indeed, Cachalia outlines some of the main excesses of the governing ANC elite, which necessitated the judiciary having to assume its 'responsibility of protecting the democratic character of representational institutions' to ensure accountability.[53] It is Gardbaum who surmises the general sense of those who view the judiciary as having engaged in overreach in the recent past when he laments: 'One would be hard-pressed to state precisely what remains of the authority of Parliament vis the courts … apart from the contours of judicially approved procedures'.[54]

The foregoing views on how the Constitutional Court has exercised its expanded judicial review powers are evidence that the separation of powers may indeed have become blurred. While this was to defend the democratic project, there is no doubt that the current tensions between the judiciary and the two arms of government have a genesis in how some of the review functions may have had an effect akin to judicial overreach.

## Conclusion

The JSC interviews of 2021 were unique in how the tensions that have been building over the years between the various arms of government played themselves out. However, it cannot be argued that the forum provided an even playing field. The stacks were much against the judiciary. This is because ultimately it may have been inappropriate for judges to publicly engage on such sensitive issues. Members of the judiciary were therefore forced to roll with the punches, as they have done in the last decade. However, on a positive note, the JSC interviews could be used to reflect on how far South Africa has travelled as a democracy.

One of the points that came out of the JSC interviews of 2021 was that the three arms of government must be driven by a common purpose, which, in turn, should be driven by the values of the Constitution. The JSC alluded to a meeting of the various arms of government that was initiated to help narrow the widening gap among the various institutions. This was an initiative that started under the Zuma era. However, it does seem the initiative was stealthily utilised to try to undermine the independence of the judiciary. This occurred through an apparently unconstitutional directive to reduce judges benefits under the guise of cost-cutting measures.

Indeed, the 2021 JSC candidates provided a crucible in which the tensions that have been brewing among the various arms of government, particularly against the judiciary, were engaged with. There is a need for a suitable platform to be provided for the three arms of government, civil society and the media to engage on how best to preserve the trias politica and, most importantly, protect the judiciary. In a twist of irony, one of the members of the civil society organisation CASAC took the JSC to court. This may further strain the relationship between the judiciary, civil society and the other branches of government, including the EFF.

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[53] Firoz Cachalia, 'Precautioning Constitutionalisms, Representative Democracy and Political Corruption', *Constitutional Court Review* 9, 2019, pp. 45–79.
[54] Gardbaum, 'Pushing the Boundaries', p. 11.

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