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Judicial Independence and the Office of the Chief Justice

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ABSTRACT: This article investigates the extent to which the Office of the Chief Justice (OCJ) promotes the independence of the judiciary in South Africa. Judicial independence is widely understood to be protected by security of tenure, financial independence and administrative independence, three characteristics which are meant to support the judiciary as an institution, as well as the independence of individual judges. However, current jurisprudence and scholarship fail to engage with the relationship between individual and institutional independence, and to identify mechanisms of protection for the institution as such. The factors which have received the most emphasis are the financial independence of the judiciary and the judiciary's control over its own administration. The article reveals that the OCJ has taken over broad areas of the administration of the judiciary, but questions whether the increased control enjoyed by the *leadership* of the judiciary has translated into improved control for *individual* judges. It draws on the legal philosophy of Lon L Fuller to suggest how the independence of individual judges relates to the independence of the institution. In particular, it applies Fuller's theory of 'interactional law' to suggest that a process of mutual engagement is needed within those institutions which have to uphold the rule of law. From this perspective, it appears that the OCJ may not be in a position to protect the *institutional* independence of the judiciary, because it does not contain the mechanisms to accommodate the input of *individual* judges on the best conditions for effective and independent work.

KEYWORDS: judicial independence; Fuller; rule of law; interactional law; judicial self-governance; culture of justification.

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I INTRODUCTION

This article explores the extent to which the Office of the Chief Justice (the OCJ) achieves one of its central goals: the constitutionally mandated promotion of judicial independence in South Africa.[1]

The OCJ is a fairly new creation and, as the discussion below will demonstrate, relatively opaque in its workings. Given this lack of clarity, part II begins with a brief account of the origins of the OCJ, the form that it currently takes, and how its mission is conceived. Part III reviews South African jurisprudence and scholarship on the notion of judicial independence. It offers a brief exegesis on Canadian law on the subject, as that country's jurisprudence has informed South Africa's view of what independence means. Part III sets out South Africa's current approach to judicial independence and identifies some of the theoretical weaknesses in this approach. It covers the various characteristics that are understood to support judicial independence but focuses on the somewhat chimerical concept of institutional independence. While numerous cases emphasise the importance of institutional independence, there is a dearth of coherent theory to explain what specific factors serve to protect the judiciary as an *institution* as distinct from the factors that are needed to protect individual judges.

Nonetheless, two criteria do emerge from the current literature for institutional independence, and I apply these in part IV to establish an interim 'score-card' for the extent to which the OCJ protects judicial independence in South Africa. Part IV's investigation focuses on the two issues highlighted in South African jurisprudence and scholarship thus far: control over the funds awarded to the judiciary; and control over administration of the judiciary.[2] Applying these criteria leads to an inconclusive result, however, and I go on to argue that the unsatisfactory nature of this result bears out some of the critiques of current conceptions of judicial independence.

Part V then takes a step back to sketch an alternative framework for the concept of judicial independence. The alternative framework is rooted in Lon L Fuller's theory of the rule of law. I focus, in particular, on Fuller's account of how a society needs to operate under the rule of law and suggest that the particular process which Fuller considers necessary – what has been called 'interactional law' – needs to be found within the judiciary as an institution before the judiciary will be able to uphold the rule of law in its dealings with litigants, other branches of government and the society which it is meant to serve. This discussion connects the rule of law to judicial independence, arguing that we cannot hold the judiciary to be truly independent unless it promotes interactional law in its internal processes and maintains transparent communication with those outside the institution.

To investigate whether the requirements of 'interactional law' are met on the ground, I then examine two events within the work of the CJ and the OCJ – the drafting of the Norms and Standards and the Case Flow Management projects – which suggest where the OCJ may be

[1] Constitution of the Republic of South Africa, 1996 (Constitution) s 165; Office of the Chief Justice Annual Performance Plan 2018/2019 (undated), available at https://www.judiciary.org.za/index.php/documents/annual-performance-plans?download=189:annual-performance-plan-2018-19 (OCJ Annual Performance Plan 2018/2019) 12; The Establishment of the Office of the Chief Justice 2010-2013 (undated), available at https://www.judiciary.org.za/images/establishment/Establishment-of-the-OCJ-2010-2013.pdf 1

[2] I have deliberately omitted a detailed discussion of the third main aspect of judicial independence, namely, security of tenure. The main reason for this is that the Office of the Chief Justice ('OCJ') has a limited role to play in protecting it. Not only is it guaranteed by the Constitution, but judges can be removed only through a process run by the Judicial Service Commission (JSC). As such, security of tenure falls outside the ambit of this article.

failing to promote the rule of law within its own governance structures, and thereby weaken the independence, not only of individual judges, but of the judiciary as an institution.

II THE ORIGINS AND MISSION OF THE OCJ

The OCJ was established in 2010 by a proclamation under the Public Service Act 103 of 1994.[3] The decision to establish such an office had been reached by agreement between the then Minister of Justice, Jeff Radebe, and the incumbent Chief Justice, Sandile Ngcobo, but the actual form that the office should take was still undecided. At the request of Chief Justice Ngcobo, former Chief Justices Arthur Chaskalson and Pius Langa headed a 'Committee on Institutional Models' to suggest the appropriate form which such an office should take, how it should relate to other branches of government, and what the governance structure of the judiciary as a whole should entail. The report, produced on 22 September 2011,[4] was later taken up to a limited extent by the current Chief Justice, Mogoeng Mogoeng. The 2013 document produced by the OCJ on its own establishment sets out the function of the institution as 'capacitating' the Chief Justice to execute his functions adequately without relying on the Executive. According to the report, this would allow for reforms which would improve service delivery, address the administrative challenges facing the judiciary, improve access to justice, and promote judicial independence and the doctrine of separation of powers.[5]

The OCJ presents its own vision as a '[a] single, transformed and independent Judicial system that guarantees access to justice for all'[6] and describes its mission as being to 'provide support to the judicial system to ensure effective and efficient court administration services'.[7] It undertakes to uphold the values of respect for, and protection of, the Constitution, honesty and integrity, openness and transparency, and professionalism and excellence. These values will ensure 'accountability of the Judicial branch of the State to the people of South Africa … public confidence in the Judiciary; and respect for the rule of law'.[8]

There are significant differences between the Chaskalson/Langa vision of the OCJ and the institution as it is constituted today. These will be discussed in more detail below, but two points should be noted at the outset. The first is that Chaskalson and Langa saw the OCJ being set up through three phases. The first was to be the establishment of the 'OCJ as a national department located within the public service to support the Chief Justice as the head of the Judiciary and the head of the Constitutional Court'.[9] The second phase was meant to set up the OCJ as an independent entity and the third to establish a structure to provide for 'judicially-led

[3] Proc 44 *GG* 335500 of 23 August 2010.

[4] Committee on Institutional Models Report *Capacitating the Office of the Chief Justice and Laying Foundations for Judicial Independence: The next Frontier in our Constitutional Democracy: Judicial Independence* (September 2011)(on file with the author)('Chaskalson/Langa Report').

[5] The Establishment of the Office of the Chief Justice 2010–2013 (note 1 above) at 1.

[6] Office of the Chief Justice Strategic Plan 2015/16 – 2018/19 (undated), available at https://www.judiciary.org.za/index.php/documents/strategic-plan?download=190:strategic-plan-2015 (OCJ Strategic Plan 2015/16 – 2018/19) 10.

[7] Ibid.

[8] Ibid.

[9] The Establishment of the Office of the Chief Justice 2010–2013 (note 1 above) at 1.

court administration'.[10] The three-stage vision is still contained in the 2013 report, but, as will be noted below, the OCJ has not yet moved beyond phase one.[11]

The second major difference concerns the governance structure of the judiciary and the OCJ's role within it. The Chaskalson/Langa report recommended the establishment of a 'Judicial Council', which would have formed a second governing body within the judiciary. Amongst its other functions, it would have exercised oversight over the OCJ.[12] Although consisting mostly of judges, it would also have included a broader cross-section of representatives of the legal profession, academia, Parliament and the executive.[13] However, this vision has not been realised. The Superior Courts Act 10 of 2013 failed to mention a Judicial Council at all. Mogoeng CJ's final recommendation for the OCJ, currently before the executive, retained the notion of a Judicial Council, but reduced it to the Heads of Court.[14] This is a pre-existing institution described by the Chaskalson/Langa report as an 'informal body consisting of the heads of all superior courts that for many years have been a sounding board for the Chief Justice'.[15]

III INSTITUTIONAL INDEPENDENCE IN CASE LAW AND COMMENTARIES

Determining whether the OCJ has the capacity to protect judicial independence, and whether it is doing so in fact, requires a clear conception of what judicial independence means. The aim of this part is both to give as detailed a picture as possible of how judicial independence is understood in the South African discourse and to point to some flaws in the theory underlying this conception.

In 2002, the Constitutional Court had to assess the independence of the magistracy in the case of *Van Rooyen*.[16] It relied on the Canadian case of *Valente v The Queen*.[17] *Valente* attributed an internal, or subjective, as well as an external, or objective, facet to independence. This conception of independence requires that the judicial officers themselves are impartial in their state of mind and also that there is 'a status or relationship to others, particularly to the executive

[10] Ibid.

[11] See the discussion in Part IV *C*.

[12] Chaskalson/Langa report (note 4 above) at paras 4.1.1–4.1.2.

[13] Ibid at para 4.2.6.

[14] F Rabkin 'Judiciary on Trial: Draft Rules Aimed at Tackling Inefficiencies in the Judiciary Have Caused a Stir and Have Been Slated by Critics as Inimical to Judicial Independence' *Financial Mail* (7 March 2014).

[15] Chaskalson/Langa report (note 4 above) at para 3.2.1.6. The report pointed out that this body has no formal powers, no infrastructure and no budget. It usually meets two or three times a year to debate matters of concern to the judiciary, to advance their interests in dealings with the executive which has been responsible for all aspects of court administration, and in formulating policies for the judiciary. Interestingly, while implying that the position of the Heads of Court has changed where formal powers, infrastructure and budget are concerned, the recommendation currently before the executive repeats the Chaskalson/Langa description of how often it meets and what it does. See Committee on Institutional Models Report *Capacitating the Office of the Chief Justice and Laying Foundations for Judicial Independence: The next Frontier in our Constitutional Democracy: Judicial Independence* (subsequent version) (undated, subsequent to Chaskalson/Langa report (note 4 above) September 2011) (on file with the author) (Later Version Committee on Institutional Models Report) at para 4.2.1.6. For further discussion of the powers and functions of the Heads of Court under the 2013 Act, see the discussion below at part VI B.

[16] *S &Others v Van Rooyen & Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8, 2002 (5) SA 246 (CC)('*Van Rooyen*').

[17] *Valente v The Queen* (1986) 24 DLR (4th) 161 (SCC)('*Valente*').

branch of government, that rests on objective conditions or guarantees.'[18] *Valente* identified three specific elements which together guarantee external independence, namely, security of tenure, financial security and the independence of the institution to which the judicial officers belong.[19] The court in *Valente* saw security of tenure and financial security together as safeguards of the *individual* judge's freedom from outside influence, whereas institutional independence protects the judges as a *collective*. Distinguishing broadly between individual and collective independence, the court emphasised that the latter aspect was indispensable:

> The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.[20]

In *Valente*, collective, institutional independence related to the control which judges have over the job they have to do. The court described it as the facet of independence concerned with 'matters of administration bearing directly on the exercise of [the court's] judicial function'.[21] However, it then distinguished further between the *adjudicative* and the purely *administrative* judicial functions, according decisive importance only to the adjudicative aspect. This aspect, according to *Valente*, involves the 'assignment of judges, sittings of the court and court lists – as well as related matters of allocation of court-rooms and direction of the administrative staff engaged in carrying out these functions.'[22] The purely administrative aspect of the judicial function, on the other hand, was seen in terms of various financial and discretionary benefits enjoyed by the judges, the control exercised by the executive over these benefits and the recruitment and control over support staff within the court.[23]

In *Van Rooyen*, the Court took its cue from *Valente*, which meant it distinguished between adjudicative aspects of the judicial function and other administration, and required institutional independence only where the former was concerned. But the judgment does not explain what these adjudicative aspects are. As in *Valente*, the relevant aspects were defined in general terms as administrative decisions bearing 'directly and immediately on the existence of the judicial function'[24] and as 'matters that relate directly to the exercise of the judicial function'.[25] There has been no guidance from subsequent case law on the dividing line between administration which is essential to the judicial function and 'merely administrative' functions that can be handled by the executive.

A later Canadian case critiqued *Valente* for not clearly defining institutional (collective) independence.[26] In *Reference re Public Sector Pay Reduction Act*,[27] Lamer CJC[28] suggested that

[18] Ibid at 170 (as cited in *Van Rooyen* (note 16 above) at footnote 22.)

[19] Ibid at 176–190 (as cited in *Van Rooyen* (note 16 above) at para 29.)

[20] Ibid at 171.

[21] Ibid at 187.

[22] Ibid at 188.

[23] Ibid at 188–190.

[24] *Van Rooyen* (note 16 above) at para 29.

[25] Ibid.

[26] *Reference re: Public Sector Pay Reduction Act (P.E.I.), s10; Attorney-General of Canada et al Intervenors: Reference re: Independence of Judges of Provincial Court, Prince Edward Island, Provincial Court Act and Public Sector Pay Reduction Act; Attorney-General of Canada et al, Intervenors* (1997) 150 DLR (4th) 577 (SCC) (*Reference re Public Sector Pay Reduction Act*) at para 123.

[27] Ibid.

[28] The acronym stands for 'Chief Justice of Canada'.

Valente's theoretical framework was inadequate and proposed that security of tenure, financial security and what he termed administrative independence may each protect *both* individual and institutional independence. Individual and institutional independence, in Lamer CJC's view, were *dimensions* of an independence protected by its 'core characteristics' of security of tenure, financial security and administrative independence.[29] Lamer CJC stated that these three characteristics –

> [c]ome together to constitute judicial independence. By contrast, the dimensions of judicial independence indicate which entity – the individual judge or the court or tribunal to which he or she belongs – is protected by a particular core characteristic.[30]

Having noted that *Valente* does not provide a specific vision of institutional independence,[31] Lamer CJC suggested his own version in *Reference re: Public Sector Pay Reduction Act*. The case before him dealt exclusively with the remuneration of judges, but Lamer framed the issue of judicial independence more broadly by linking it to the doctrine of separation of powers.[32] The 'core aspect' in issue here was, clearly, financial independence, and Lamer CJC had to find a way in which the judicial institution as such could be protected in this regard. He held that the doctrine of separation of powers requires that the courts both be, and appear to be, free from political interference through economic manipulation, and that they not become involved in the 'politics of remuneration'.[33] The only means to achieve this, in his opinion, was by interposing an independent body between the judiciary and other branches of government.[34] Although Lamer CJC did not insist that the body's views be binding on the Executive, he did require that the body itself be independent, effective and objective.[35] Its members themselves must have security of tenure[36] and the body should not be controlled by any of the branches of government.[37]

In South Africa, the ideas that emerge from policy frameworks, proposals and discussions echo those underlying *Van Rooyen* and the Canadian jurisprudence. The trio of security of tenure, financial independence and administrative independence are emphasised, there is a strong stand against any form of pressure being brought to bear against individual judges, and the importance of the judiciary's independence is emphasised in the abstract.[38] But this is a far cry from explaining quite how judges as a collective, or the judiciary as an institution, are to be protected. As noted above, the Court largely took its cue from *Valente* and limited institutional independence specifically to adjudicative aspects of the judicial function, without defining what

[29] *Reference re Public Sector Pay Reduction Act* (note 26 above) at para 118.
[30] Ibid at para 119.
[31] Ibid at para 123.
[32] Ibid at para 125.
[33] Ibid at para 131.
[34] Ibid at paras 133 and 166.
[35] Ibid at paras 170–175.
[36] Ibid at para 171.
[37] Ibid at para 172.
[38] *Justice Alliance of South Africa v President of Republic of South Africa & Others, Freedom Under Law v President of Republic of South Africa & Others, Centre for Applied Legal Studies & Another v President of Republic of South Africa & Others* [2011] ZACC 23, 2011 (5) SA 388 (CC) at para 66. See also *De Lange v Smuts NO & Others* [1998] ZACC 6, 1998 (3) SA 785 (CC) at para 59 and *Van Rooyen* (note 16 above).

these are.[39] In various proposals by, among others, the Department of Justice,[40] Ngcobo J,[41] the Chaskalson/Langa proposal for an Office of the Chief Justice,[42] and UCT's Democratic Governance and Rights Unit,[43] there is still a sense that only some aspects of administration 'bear directly on the exercise of the judicial function'[44] but there is little clarity on where the boundaries of this administration lie. For his part, Ngcobo J suggested that case-flow management and records, statistics and information management is so closely connected to the judicial function that it can be handled only by the judiciary. However, at this stage, he did not consider the executive handling of budgetary and financial management, space and equipment management and other administrative functions as 'incompatible with judicial independence'.[45] He noted, in addition, that the government has to provide buildings and funding for the judicial project.[46]

From a practical perspective, the exact dividing line between 'adjudicative' and 'purely administrative' functions may appear almost irrelevant. As will be seen in part IV below, the OCJ has in fact taken on such a wide swathe of administrative functions that it is easy to argue that the 'purely adjudicative' aspects of that administration must be under its control as well. But, from another perspective, this wrangling about the distinction between adjudicative and purely administrative administration is important, because it demonstrates how unclear the theoretical basis is for a coherent picture of institutional independence. A good example can be found in *Valente.* As seen above, *Valente* equated institutional independence with administrative independence, while seeing financial security and security of tenure as guarantees of the independence of individual judges. But this leads to anomalies. The case appears to slot control over administrative personnel into both the adjudicative and administrative aspect of institutional independence. It categorises as *adjudicative* the direction of the administrative staff engaged in carrying out the court's functions and as *administrative* the control over support staff within the court.[47] Furthermore, the case sees discretionary benefits as an issue under the peripheral, 'purely administrative' aspect of *institutional* independence. But discretionary benefits affect the individual, not the institution. *Valente* appears to be ignoring its own main distinction between the independence of the *individual* and the independence of the *institution*.

Lamer CJC's subsequent refinement of the *Valente* idea accepts that the 'core characteristics' of security of tenure, financial security and administrative control can affect both individual judges and the judiciary as an institution.[48] Thus 'institutional independence' consists of something more than mere administrative independence. But this refinement has not assisted the South African discussion to flesh out what the 'value added' of institutional independence might be. Thus, in *Van Rooyen,* the Court did suggest additional conceptions of institutional

[39] *Van Rooyen* (note 16 above) at para 29.

[40] Department of Justice Policy Framework (2010)(on file with author)('DOJ Policy Framework').

[41] S Ngcobo 'Delivery of Justice: Agenda for Change' 120(4) (2003) *South African Law Journal* 688, 691–692. The article (and the talk upon which it was based) was published before Justice Ngcobo took on the role of Chief Justice in 2009.

[42] Chaskalson/Langa report (note 4 above).

[43] Much of this research was undertaken to support the Chaskalson/Langa report (note 4 above).

[44] DOJ Policy Framework (note 40 above) at para 71 and Ngcobo (note 41 above).

[45] Ngcobo (note 41 above).

[46] DOJ Policy Framework (note 40 above) at paras 78 and 80; Ngcobo (note 41 above).

[47] *Valente* (note 17 above) at 188.

[48] DOJ Policy Framework (note 40 above) at para 71.

independence over and above administrative independence. One of these is that institutional independence is the independence of the courts from other arms of government.[49] But it did not build on this conception because it provided no tools to 'protect courts and judicial officers from external interference'.[50] This is because it saw appeal and review procedures by *other* courts[51] as a mechanism of institutional independence of the magistracy.[52] This is problematic because, even in the case of the magistracy, it provides merely a remedy after the interference has taken place rather than structural protection against the interference taking place at all. But, transferred to the judiciary as a whole, the idea that judicial review can protect the independence of the judiciary is meaningless. Its reliance on the judicial hierarchy for protection means that there is no remedy if it is the top court itself which lacks independence.[53] In effect, calling on judicial review to protect judicial independence requires the judiciary to provide the very guarantees without which it cannot function in the first place, a circular and self-defeating notion.

For its part, the OCJ has not engaged with the conceptual problem that emerges from this survey. Instead, it focuses strongly on 'a system of court administration based in the judiciary' when it envisages judicial independence,[54] and, as we will see below, it has taken over control of large sections of this administration.

IV INTERIM SCORE-CARD: THE OCJ FROM THE PERSPECTIVE OF BUDGET NEGOTIATIONS AND ADMINISTRATIVE CONTROL

At this stage, we have extracted two main markers of independence from the confusion of case law and legal discussion: non-political control over the budget of the judiciary, and judicial control over the administration of the courts. I have suggested that these markers are inadequate and unclear, but in this part I nonetheless evaluate the achievements of the OCJ against them in detail. The in-depth discussion, will, I hope, achieve three main objectives. First, it will suggest something of an interim assessment of the OCJ's achievements in promoting judicial independence as hitherto conceived, although the evidence does not lead to a clear result. Second, and more importantly, it will underscore my theoretical critique of the current independence criteria by demonstrating the vague and inconclusive results they achieve when applied to facts on the ground. Thirdly, the factual description set out here will serve as a starting point for an alternative evaluation of the OCJ's role in protecting institutional independence, one which is explored in more detail in part V.

A Budget

The *Reference re Public Sector Pay Reduction Act* case suggests that a separate body be set up to mediate between the judiciary and the government to address the remuneration of judges. The case does not require that this separate body have binding powers; merely that its members

[49] *Van Rooyen* (note 16 above) at paras 18–19.
[50] Ibid at para 19.
[51] Ibid at para 24.
[52] Ibid at para 18.
[53] I am grateful to one of my anonymous reviewers for this point.
[54] H Ebrahim 'Governance and Administration of the Judicial System' in C Hoexter & M Olivier (eds) *The Judiciary in South Africa* (2014) 99, 113.

themselves have sufficient independence from the other branches of government.[55] Later Canadian case law requires that the government justify departures from the recommendations of this body.[56]

The financing model proposed in the Langa/Chaskalson report would have had a separate committee within Parliament to which the OCJ would have accounted directly and to which it would have made budgetary requests. This committee would then have handled financial and budget requests in much the same way as the Auditor-General's finances are handled. That was, however, planned for phase two of the development of the OCJ.[57] It has not been adopted by the current model. The place of the OCJ within the executive structures is clearly demonstrated by the procedure whereby its budget is determined. Two bodies play a role in assisting the President to determine judges' salaries: the Independent Commission for the Remuneration of Public Office Bearers[58] and the OCJ itself. The Independent Commission for the Remuneration of Public Office Bearers draws up recommendations which the President considers when he determines the salaries, allowances and benefits of judges.[59] However, the President is not bound by the recommendations. The OCJ plays a role in the determination of salaries to the extent that the Chief Justice is consulted by the Commission during its deliberations.[60]

Where the rest of the budget for the judiciary is concerned, s 54 of the Superior Courts Act 10 of 2013 requires the Minister to consider requests for funds needed for the functioning and administration of the Superior Courts, as determined by the Chief Justice in consultation with the Heads of Court. The Minister must consider these requests 'in the manner prescribed for the budgetary processes in the departments of state'. Since 2015, the OCJ budget request has

[55] Despite the tension between the two cases, both *Valente* (note 17 above) and *Reference re Public Sector Pay Reduction Act* (note 26 above) have been confirmed in subsequent Canadian cases: *Therrien (Re)* [2001] 2 SCR 3, 2001 SCC 35; *Moreau-Bérubé v New Brunswick* (Judicial Council) [2002] 1 SCR 249, 2002 SCC 11; *Mackin v New Brunswick (Minister of Finance) Rice v New Brunswick* [2002] 1 SCR 405, 2002 SCC 13; *Babcock v Canada (Attorney General)* [2002] 3 SCR 3, 2002 SCC 57; *Ell v Alberta* [2003] 1 SCR 857, 2003 SCC 35; *Application under s. 83.28 of the Criminal Code (Re)* [2004] 2 SCR 248, 2004 SCC 42 at paras 80–81; *Provincial Court Judges' Assn. of New Brunswick v New Brunswick (Minister of Justice); Ontario Judges' Assn. v Ontario (Management Board); Bodner v Alberta; Conférence des juges du Québec v Quebec (Attorney General); Minc v Quebec (Attorney General)* [2005] 2 SCR 286, 2005 SCC 44; and *British Columbia v Imperial Tobacco Canada Ltd.* [2005] 2 SCR 473, 2005 SCC 49.

[56] The Supreme Court of Canada has held that governments have a constitutional duty to use an independent, effective and objective body for recommendations on salary reductions, increases or freezes for judges. Furthermore, if these recommendations are ignored, then that decision must be justified, if necessary in a court of law, on the basis of a simple rationality test. *Mackin v New Brunswick (Minister of Finance) Rice v New Brunswick* (note 55 above).

[57] Chaskalson/Langa report (note 4 above) at para 3.2.1.3.

[58] The Independent Commission for the Remuneration of Public Office Bearers was established in terms of Constitution s 219 and the Independent Commission for the Remuneration of Public Office Bearers Act 92 of 1997.

[59] Judges Remuneration and Conditions of Employment Act 47 of 2001, s 2.

[60] *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa & Others* [2013] ZACC 13, 2013 (7) BCLR 762 (CC) at para 61(The Constitutional Court rejected a claim that broader consultation was required, holding that the Chief Justice 'represents the entire Judiciary in such consultations').

been presented as a separate vote to Parliament.[61] This may have largely symbolic significance, as there is little indication that the separation of the OCJ budget from the two other budgets presented by the Department of Justice and Constitutional Development has reduced the influence of the executive over the budget which is awarded.[62] The budget debates, portfolio committee meetings and reports by the Secretary-General of the OCJ show that, while the OCJ puts its own proposal forward, the final product requires the buy-in of the Ministry of Justice and Constitutional Development[63] and the Treasury,[64] and it is the Minister himself who presents the OCJ budget to Parliament.[65]

In the OCJ's own description, it presents its case for funds to the National Treasury 'as with any other [government] Department'.[66] The Secretary-General explained the process in the following terms:

> Treasury requested each department to identify the impact that the department would make with the funding that it received. Any additional funds that a department required, had to come from the funding of [its] cluster or functional group. The Minister was ultimately accountable for all funding provided to the departments for which he was responsible.[67]

It is thus fairly clear that the executive currently retains a strong grip on the allocation of funds to the judiciary, which suggests that the OCJ has not, at this stage, helped to improve the independence of the judiciary in this respect. The judiciary's functioning is affected on an ongoing basis by a shortage of resources and it is not clear what difference the presence of the OCJ has made to this long-standing problem.[68] Indeed, it is possible that the OCJ is taking up money needed elsewhere.

[61] Report of the Portfolio Committee on Justice and Correctional Services on Budget Vote 22: Office of the Chief Justice and Judicial Administration (14 April 2016), available at https://pmg.org.za/tabled-committee-report/2711/. See also the Meeting Report of the Office of the Chief Justice and Judicial Administration on the Annual Performance Plan and Budget (3 May 2017), available at https://pmg.org.za/committee-meeting/24270/ for the OCJ's budget request for 2017/2018.

[62] These are the DOJ's own budget, and that of Correctional Services. See, for example, Committee Report on Department of Justice, Correctional Services & Office of Chief Justice Budgets (16 May 2017), available at https://pmg.org.za/committee-meeting/24368/.

[63] Note, however, that the OCJ remains within the DOJ. As a result, the Minister of Justice who presents the OCJ budget to Parliament. See the Address by Minister TM Masutha, MP (Adv) at the occasion of the budget debate of the Office of the Chief Justice, National Assembly, Cape Town (17 May 2017), available at http://www.gov.za/speeches/minister-michael-masutha-office-chief-justice-budget-vote-201718-17-may-2017-0000 ('Minister Masutha Budget Debate Address May 2017). Note further that the magistracy is still falls under the DOJ.

[64] In his budget speech of May 2017, the Minister of Justice notes the 'the difficult decisions that the National Treasury needs to make to divide the limited resources against competing priorities of the government'. Minister Masutha budget debate address May 2017 (note 63 above).

[65] Minister Masutha Budget Debate Address May 2017 (note 63 above).

[66] Committee Meeting Report on the Office of the Chief Justice Annual Performance Plan (25 April 2018), available at https://pmg.org.za/committee-meeting/26231.

[67] Ibid.

[68] The OCJ and CJ regularly lament the budgetary constraints under which the judiciary works. OCJ Annual Performance Plan 2018/2019 (note 1 above) at 12 (The Office's Plan discusses the Committee Meeting Report on the Office of the Chief Justice Annual Performance Plan (25 April 2018) (note 66 above). See also G Nicolson 'Mogoeng: Check our budget before judging the judiciary' *Daily Maverick* 23 November 2018, available at https://www.dailymaverick.co.za/article/2018-11-23-mogoeng-check-our-budget-before-judging-the-judiciary/. A further indication of the judiciary's dependence on the executive is shown by its recent loss of access to law resources when the Ministry of Justice failed to pay the necessary subscription fees. See B Phakathi 'Judges' access to Juta archive restored as justice minister apologises' *Business Live* 18 May 2018, available at https://www.businesslive.co.za/bd/national/2018-05-18-judges-access-to-juta-archive-restored-as-justice-minister-apologises/.

B Control over administration

In terms of administration, the OCJ appears to have moved well beyond the goals set out in the first phase of the original three-phase plan. The Superior Courts Act 10 of 2013 sets up a management structure for the judiciary with the Chief Justice at its apex. This was followed by the transfer of a broad swathe of functions and personnel to the OCJ in the 2015/2016 year.

The Superior Courts Act 10 of 2013 empowers the Chief Justice to guide, oversee and monitor the administration of the courts in a section headed 'Judicial management of judicial functions'. The 'judicial functions' over which the Chief Justice is given control includes the determination of sittings of the courts, the assignment of judges to the sittings, the assignment of cases and other judicial duties, procedures with respect to case flow management, recesses and the finalisation of matters before a judicial officer.[69] The OCJ Annual Report for 2015/2016 notes a further transfer of administration of superior courts to the OCJ from the Department of Justice (DOJ) in March 2015, in terms of the Public Service Act 103 of 1994. The functions and personnel included in this transfer are extensive. They cover judicial support services, case flow management, court operations, language services, the execution of 'quasi-judicial' agencies, service level contracts, editing documents and translations, ensuring equal access to all official languages, braille and sign language, procurement, data collection, the forensic unit, public education and communication, and management of a host of units now transferred to the OCJ, such as human resources, finance and security. The personnel involved in these functions, and now assigned to the OCJ rather than the DOJ, include court managers, the registrar, law researchers, court interpreters, support and food service aid, judges' secretaries, management of the units transferred to the OCJ, IT co-ordinators, administration officers and clerks, statistical officers, vetting investigators and forensic auditors.[70] This swathe of functions and personnel gives the OCJ full reign over a much wider area of administration than that suggested as 'essential to the judicial function' in the discussion above. Recall that Ngcobo J identified only case-flow management and records, statistics and information management as falling within this category essentially connected to the judicial function. He did not consider the executive handling of budgetary and financial management, space and equipment management and other administrative functions as 'incompatible with judicial independence'.[71] He would not have required that the OCJ take control over the work of financial management and procurement. The assignment of administrative functions to the judiciary also goes well beyond what is required by the *Valente* test. As noted above, *Valente* saw the recruitment and control over support staff within the court as purely administrative (not 'adjudicative').[72] Thus *Valente* would not have required that the judiciary have control over food services or even human resources management.

One of the ways in which the Chief Justice acted on the powers conferred on him by the Act was by issuing a notice, gazetted in February 2014.[73] The notice sets out a clear hierarchy of responsibility and control for the judiciary and prescribes a set of 'norms and standards' for its operation. Seen as a pyramid, the hierarchy sets the Magistrates' Courts at its base. These

[69] The Superior Courts Act 10 of 2013, s 8(6).

[70] Letter to the Minister of Justice, Michael Masutha, from Acting Minister for Public Service and Administration, Nathi Mthetwa (31 March 2015) (on file with author, see explanation note 141 below).

[71] DOJ Policy Framework (note 40 above) at paras 78 and 80, Ngcobo (note 41 above).

[72] *Valente* (note 17 above) at 188–190.

[73] GN 147 *GG* 37390 of 28 February 2014.

courts are the responsibility of the Heads of Court of each division into which they fall. The accountability structure is that the lower levels of the hierarchy have to account to the higher levels. The Heads of the Regional and Administrative Magistrates' Regions have to account for their management of these Regions to the relevant Judge President. The President of the SCA and the Judge President of each Division have to account to the Chief Justice for their management of the judicial responsibilities allocated to them.[74] But there is no regulation of how these functions are to be managed or how the persons assigned to monitor the judicial officers' fulfilment of their responsibilities are to do so.

The 'Norms and Standards' section is divided into 'objectives', 'core values', 'management of judicial functions', 'monitoring and implementation' and the 'norms and standards' themselves. They provide extensive detail about how courts should operate. Once again, the focus is on what the judges should be doing, with scant attention to the rights and expectations which the judges themselves may have of the institution and its management. The stated 'objectives' are set out in the following terms:

> [to] achieve the enhancement of access to quality justice for all; to affirm the dignity of all users of the court system and to ensure the effective, efficient and expeditious adjudication and resolution of all disputes through the courts, where applicable. These objectives can only be attained through the commitment and co-operation of all Judicial Officers in keeping with their oath or solemn affirmation to uphold and protect the Constitution and the human rights entrenched in it and to deliver justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law.[75]

Under the heading, 'Norms', the Notice emphasises the duties of each judge to act efficiently, effectively, expeditiously, courteously and respectfully towards the public,[76] and collegially towards their colleagues.[77] The Heads of Court are encouraged to 'take all necessary initiatives to ensure a thriving normative and standardised culture of leadership' and to engender an 'open and transparent policy of communication both internally and externally'.[78] The section on 'Standards' includes provisions on the numbers of hours the trial courts should sit per day[79] and time limits for the delivery of judgments.[80]

Finally, the 'Norms and Standards' paragraph sets up a Judicial Case Flow Management Report to be co-ordinated by National and Provincial 'Efficiency Enhancement' Committees (the NEEC's and PEEC's), the former headed by the Heads of Court and reporting directly to the Chief Justice. This initiative sits at the heart of the OCJ's current preoccupation with improving the efficiency of the courts.[81] Its three goals of 2015 continue to drive its efforts: capacitating the OCJ (a goal centred on improving the human resources of the office); supporting the Chief Justice in his functions as head of the judiciary; and, finally, rendering

[74] Ibid at para 4.

[75] Ibid at para 2.

[76] Ibid at para 5.1 (ii), (vi) and (vii).

[77] Ibid at para 5.1 (iv).

[78] Ibid at para 5.1 (iii) and (iv).

[79] Ibid at para 5.2.1 (iv).

[80] Ibid at para 5.2.6.

[81] It is interesting that the OCJ sees itself as having created a dialogue with non-judicial 'stakeholders' ('Presidency of the Republic of South Africa, Parliament, departments within the Justice, Crime Prevention and Security cluster, Legal Aid South Africa, civil society, Chapter 9 institutions and the media') by drawing them specifically into the NEEC process. OCJ Annual Performance Plan 2018/2019 (note 1 above) 13.

'effective and efficient administration and technical support to the Superior Courts'.[82] The focus is to ensure that the judges do their jobs and deliver the necessary services to the public.[83] This initiative has been supported by the allocation of funds to a case-flow management programme and to the modernisation of the court system to allow for e-filing.[84]

C Interim assessment: independence and judicial governance

Applied to the facts set out in part IV *B*, we see that the criteria set out in part III above provide, at best, an ambivalent, and, at worst, a meaningless result. The judiciary seems to score very poorly on one criterion (financial independence) while almost overachieving on the other (administration), as it now has control over much of the administration which the literature on judicial independence would leave in executive hands. The current vision of judicial independence does not help us to balance or interpret these widely differing scores.

The criteria isolated in part III also do not equip us to evaluate much of the structural development – or lack thereof – of the OCJ. First, they do not give us a way of evaluating the fact that the original three-phase plan for the OCJ is not being realised. Most importantly, the OCJ is still a government department (planned for phase one), and has not become an independent entity (planned for phase two). This would appear to be of central relevance to an assessment of the judiciary's institutional independence, and yet the criteria set out above do not equip us to engage with this issue.

This lacuna in our theory – the inability of scholarship to engage with what makes the judiciary independent *as an institution* – has led to some incoherent and self-contradictory stances. I have already noted the Court emphasised institutional independence in *Van Rooyen* while it offered no protections unique to the judiciary as an institution. More recently, an online publication of the OCJ provides two diametrically opposed statements about the need for the OCJ to be an independent entity. The publication, '2030 Vision of the Judiciary', consists of two pieces by the current Chief Justice, Mogoeng Mogoeng. In the first, he states that he is 'convinced' that phase two (the phase in which the OCJ becomes an independent entity) is unnecessary, although he provides no reasons for his position.[85] Instead, he simply recommends proceeding straight to phase three without attaining what the original plan

[82] Meeting Summary on the Office of Chief Justice on its 2015/16 Annual Report and 1 Quarter 2016/17 performance (18 October 2016), available at https://pmg.org.za/committee-meeting/23450/ at para 24. The three programmes set out in the OCJ Annual Performance Plan 2018/2019 are described as administration, superior court services and judicial education and support. See OCJ Annual Performance Plan 2018/2019 (note 1 above) 21–38.

[83] OCJ Annual Performance Plan 2018/2019 (note 1 above) 12. See also the report by the Secretary-General of the OCJ to the parliamentary portfolio committee on its Annual Performance Plan for 2016 (6 April 2016), available at https://pmg.org.za/committee-meeting/22279/.

[84] Office of the Chief Justice Annual Report 2015/2016 (undated), available at https://www.gov.za/sites/default/files/gcis_document/201610/ocj-annual-report-2016a.pdf (OCJ Annual Report 2015/2016) 35; Office of the Chief Justice Annual Report 2016/2017 (undated), available at https://www.gov.za/sites/default/files/gcis_document/201710/ocj-annualreport-2016-17.pdf (OCJ Annual Report 2016/2017) 34, 38, 58 and 112–113 and OCJ Annual Performance Plan 2018/2019 (note 1 above) 13.

[85] M Mogoeng '2030 Vision for the Judiciary (A Contribution to the National Development Plan)', available at https://www.judiciary.org.za/index.php/documents/publications/category/55-judiciary-publications?download=217:2030-vision-for-the-judiciary, 18. The date of publication of this document is unclear. However, it appears that the work was initially released on June 2011. It also appears that a second iteration supplanted the first publication on 25 April 2013. Ibid at 21.

seemed to consider integral to institutional independence. He reports that this approach has the support of the executive.[86] In the second piece of this online publication, however, Mogoeng CJ sets out the original three-phase plan as though it will still be realised in full,[87] a plan which is, in fact, still reflected in the recommendation currently before the executive.[88] We do not know what is happening with the original three-phase plan, and we do not know what *should* be happening because we lack the conceptual tools to specify what institutional independence really means.

Instead, institutional independence seems to have been conflated with (and reduced to) the notion of administrative independence. But the criterion of administrative independence is also inadequately realised. As we have seen, the main debate has centred on quite what level of administrative control has to be transferred from the executive to the judiciary before we can say the judiciary is independent. In the case of the OCJ, far more control has been transferred than most of the theoretical discussion required. Perhaps this is the main reason why Mogoeng CJ views judicial independence as all but attained:

> [What] the OCJ has achieved – [is] to lay a very solid foundation for Judicial self-governance, the only remaining barrier to the attainment of complete Judicial independence.[89]

However, the discussion thus far has suggested that we lack the analytical tools to determine whether administrative control over the judiciary by the OCJ necessarily equates to judicial independence. This is because the current conception of judicial independence has nothing to say about *how* the judiciary should exercise control over its own administration. It equates judicial independence with 'self-governance', but provides no guidelines on what that governance should look like. But, as Hassen Ebrahim warns, we need these 'governance' guidelines to establish whether the OCJ's control of the judiciary is the same thing as judicial independence:

> [Any] strategy that seeks to assume judicial control over the court administration system using the platform of the OCJ would merely be replacing the Minister with the Chief Justice as executive head over the administration, and would not address the demand to allow judicial officers greater control over the administration of their own courts.[90]

Ebrahim's warning suggests that *individual* judicial independence is a prerequisite for *institutional* judicial independence. In his view, judges (at every level) need control over their own courts before we can speak of judicial independence. Because the OCJ controls the judiciary, individual judges therefore need to have a voice within the governance structures of the OCJ itself. On this line of thinking, a particular form of judicial self-governance – one that allows for the participation of all the judges in the system – is a prerequisite for judicial independence.

What, then, is the connection between individual judicial independence and institutional judicial independence, and what (if any) are the requirements for a judiciary truly to be considered 'self-governing'? The literature covered in part III does not cover these issues, as it does not establish clearly what institutional independence is, nor does it discuss what the link

[86] Ibid.

[87] M Mogoeng 'The Implications of the Office of the Chief Justice for Constitutional Democracy in South Africa' (note 85 above) at 21, 28.

[88] Committee on Institutional Models Report (note 15 above) at 3–4 and at paras 2.2.3 and 4.1.

[89] Mogoeng (note 85 above) at 21, 39.

[90] H Ebrahim 'Governance and Administration of the Judicial System' (note 54 above) at 114.

between individual and institutional independence might be. But the implication is that there *is* no link. For example, by limiting individual judicial independence to the security of tenure and financial security of the judges,[91] *Valente* equates individual judicial independence with the absence of pressure on a judge to decide cases in a particular way. The idea that a judge needs some voice in the governance of the court system before either the individual or the institution can be considered 'independent' is not canvassed in *Valente* or the other sources in part III.

We need, therefore, to take a step back and explore the design requirements of a judiciary which is 'governing itself'. For this, the legal philosopher Lon L Fuller suggests a fresh way to look at what the rule of law itself might require of the form of judicial self-governance.

The rule of law is self-evidently central to constitutional democracy, and is acknowledged as such by the OCJ for its role in ensuring accountability.[92] However, it is unclear quite how the OCJ understands the term 'rule of law' in its reports, other than that the judiciary itself should be 'handing down' law and that its determination of the law should be respected by other branches. If we follow Fuller's approach, however, we will see that, under the rule of law, law has a role to play in designing the judicial institution itself, not just in locating the judiciary in a specific position with respect to the other branches of government.

V A THEORETICAL FRAMEWORK FOR JUDICIAL INDEPENDENCE: LAW IN THE PROCESSES OF THE OCJ

One of Fuller's innovations was to see law as a process and not just a product. It is, in other words, not just the rules and institutions that govern a society, but the process whereby these rules and institutions are formed. If a society is functioning under the rule of law, a particular process will form and maintain its rules and institutions; a process that is 'dependent upon the mutual generative activity and acceptance of the governing and the governed.'[93] 'Mutual generative activity' relies on ongoing communication and deliberation between the various units of society.[94] The communication needs to include 'a mode of interaction between actors based on the logic of arguing, that is, of convincing each other to change their causal or principled beliefs in order to reach a reasoned consensus.'[95] If communicative action is understood as central to law, then law becomes a process which accompanies and interfaces with the democratic project. Transferred to the judiciary, Fuller's 'interactional theory'[96] of law would mean that the institution would not just 'hand down' law, but be constituted and maintained by it.

The OCJ's governance structure, to the extent that it is set out formally, is based on a top-down hierarchy, through which the leadership seemingly ensures that the judicial officers remain 'accountable' to the public. But it is not designed to make the leadership of the judiciary accountable to its members, or responsive to their views and concerns. In Lon Fuller's

[91] *Valente* (note 17 above) at 176–190, *Van Rooyen* (note 16 above) at para 29.

[92] OCJ Strategic Plan 2015/16 – 2018/19 (note 6 above) at 10; OCJ Annual Performance Plan 2018/2019 (note 1 above) at 12.

[93] J Brunnée & S Toope 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000–2001) 39 *Columbia Journal of Transnational Law* 19, 48.

[94] J Barker 'The Politics of International Law-Making: Constructing Security in Response to Global Terrorism' (2007) 3 *Journal of International Law and International Relations* 5, 24.

[95] C Bjola 'Legitimating the Use of Force in International Politics: A Communicative Action Perspective' (2005) 11 *European Journal of International Relations* 266, cited by JC Barker (note 94 above) at 27.

[96] Brunnée & Toope (note 93 above). See also L Fuller *The Morality of Law* (1969) 221.

terms, such a structure constitutes 'managerial direction' rather than law. In his analysis, the former entails a one-way projection of authority, while the latter is built on a 'relatively stable reciprocity for expectations between lawgiver and subject'.[97] In Fuller's view, managerial direction functions for the benefit of the superior, whereas law serves the needs of the subjects themselves and of broader society:

> The directives issued in a managerial context are *applied* by the subordinate in order to serve a purpose set by his superior. The law-abiding citizen, on the other hand, does not *apply* legal rules to serve specific ends set by the lawgiver, but rather *follows* them in the conduct of his own legal affairs, the interests he is presumed to serve in following legal rules being those of society generally.[98]

My use of this passage might seem to punt a rather extreme version of the critique of the OCJ as an 'empire-building' project.[99] I need to clarify that I am not presenting a spectacle of 'Emperor Mogoeng' turning all judges into his minions to further his own, personal benefit. Instead, I am pointing out the likelihood that, without interactional law, he will use the OCJ as a vehicle to punt his own, subjective vision of how the judiciary should be operating within a constitutional democracy. The problem is that the very notion of what the judiciary is and what it needs to be independent is reduced to what the wielder of power within the institution thinks in this regard.[100] And, no matter how benign the Chief Justice's intention, such a system reduces the judiciary to an extension of the Chief Justice. Judges lose their autonomy and independence when the institution as a whole no longer operates under law.

I would thus argue that the loss of autonomy and independence for individual judges impacts on the ability of the institution as such to hand down law, and thereby reduces the independence of the institution itself. It is irrelevant that the undue influence may be coming from a particular judicial officer rather than an outside person or institution. The judiciary *as such* is hindered in its task of developing and maintaining law. Under Fuller's rule of law theory, then, individual and institutional judicial independence are intertwined because the rule of law requires a particular form of 'self-governance'.

Lon Fuller's 'interactional theory' of law – that is, his theory on the process of interaction required by the rule of law – is regarded by current legal theorists as his most fruitful insight.[101] It also resonates with a concept introduced specifically to the South African context as the country was preparing to transition to a post-apartheid legal culture. This concept, a 'culture of justification', was coined by Etienne Mureinik to describe the kind of change which South Africa needed to achieve in its move from an apartheid state to a democracy.[102] In contrast to

[97] Fuller (note 96 above) at 209.

[98] Ibid at 207–208.

[99] Rabkin (note 14 above).

[100] In an interview in 2013, Chief Justice Mogoeng denied that he had power over judges on the basis that he could not fire them (Rabkin (note 14 above)). This argument ignores the fact that judges do not merely want jobs; they want to serve on specific benches or hear particular matters, be promoted to higher courts or enjoy better working conditions. There are, in other words, more benefits at stake than employment as such. The Chief Justice's influence over the distribution of some of these benefits is by no means transparent. This point is discussed in more detail below.

[101] Brunnée & Toope (note 93 above) at 49.

[102] D Dyzenhaus 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 *South African Journal of Human Rights* 1, 33. In a later piece, he refers to these positions as democratic positivism, liberalism and a culture of justification respectively. See D Dyzenhaus 'Deference, Security and Human Rights' in B Goold & L Lazarus (eds) *Security and Human Rights* (2007) 125, 138–139.

a culture of authority, which had flourished under apartheid, a culture of justification requires that 'every exercise of power is expected to be justified', and 'the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command'.[103] These two perspectives of Etienne Mureinik and Lon Fuller differ slightly. Mureinik focuses on the legal culture required by democracy, but he describes it in terms (justification and, particularly, interaction) which Fuller depicts as quintessential to law itself. Fuller, in effect, incorporates certain features we generally associate with democracy into the very essence of law. The reason that Fuller placed within law some of the characteristics that might be seen as 'merely' democratic is that he saw them as indispensable to creating 'fidelity to law' in its subjects. In particular, he argued that the ability to reason with norms creates a sense of obligation within law's subjects to comply with the law without the need for any coercive state mechanisms to enforce it.[104]

Although they ground the requirement for justification and interaction in slightly different theoretical sources, Fuller's and Mureinik's views are not in conflict within a constitutional democracy. Instead, they complement each other and inform our attempts to understand how law requires justification and accountability from those in power. I suggest that Fuller's theory of interactional law applies within the institutions which exercise power, particularly the institution which claims expressly to be interpreting and developing law. If we apply Fuller's rule of law theory to the judiciary as an institution, then we can measure the judiciary against Mureinik's requirement of 'a culture of justification' to determine whether it is, in fact, operating under the rule of law. Our judiciary will be upholding its constitutional imperative if it demonstrates a culture of justification not only in its interaction with broader society, but also in its internal interactions. There needs to be a culture of mutual engagement *within* the judiciary before a culture of justification and the rule of law can be realised *by* the judiciary. Is the OCJ designed to play a role in the creation such a culture and promote the rule of law?

VI THE JUDICIARY AS AN INSTITUTION UNDER LAW

The OCJ undertakes to uphold the values of openness and transparency and claims that these values will, inter alia, ensure 'accountability of the Judicial branch of the State to the people of South Africa [and] public confidence in the Judiciary'.[105] It recognises, then, that OCJ and its leadership serve to facilitate the giving of account, and that accountability requires communication and justification. In this part, I argue that a culture of justification is weakened by two factors where the judiciary is concerned: first, the OCJ's own structures and processes, which are not designed to encourage mutual engagement, and, second, a lack of transparency about the structures and processes of the judiciary. The first issue goes to the need for communication and justification within the judicial institution itself. The second goes to the communication which connects the judiciary to the legislature and broader South African society, allowing the judiciary to render account to its ultimate beneficiaries.

[103] E Mureinik '"A Bridge to Where?" Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 10, 31–32.

[104] L Fuller 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630; J Brunnée & S Toope *Legitimacy and Legality in International Law: An Interactional Account* (2010) 21. When citizens are enabled to reason with norms, they can begin to develop what Fuller called 'fidelity' not just to particular norms, but to the system of law itself.

[105] OCJ Strategic Plan 2015/16 - 2018/19 (note 6 above) at 10.

A Structure and processes

In part IV B above, the current mechanisms for the OCJ's extensive administrative control over the judiciary were described in detail. For present purposes, the important aspect of all that information is how little the system attempts to maintain a system of mutual engagement. Thus the section of the Superior Courts Act 10 of 2013 headed 'Judicial management of judicial functions', which empowers the Chief Justice to oversee and monitor the administration of the courts, is limited to establishing who the manager is (the Chief Justice) and what the functions are which he or she will be managing. There is no regulation of the processes of management.

Similarly, the notice issued by the Chief Justice in February 2014 sets out a clear hierarchy of responsibility and control for the judiciary and prescribes a set of 'norms and standards' for its operation.[106] The accountability structure in the hierarchy is one-way – the lower levels of the hierarchy have to account to the higher levels.[107] There is no regulation of *how* these functions are to be managed or how the persons assigned to monitor the judicial officers' fulfilment of their responsibilities are to do so. There is also no mention of how the Chief Justice is to account or to whom.

Similarly, in the 'Norms and Standards' section, there is extensive detail about how courts should operate but only brush-stroke consideration of the rights and expectations which the judges themselves may have of the institution and its management.

However, our current Chief Justice suggests that a system of mutual engagement is nonetheless in place, despite the dearth of formal, structural mechanisms for such engagement, and that this is ensured by the leadership of the judiciary. In an interview in 2013, Mogoeng CJ dealt specifically with the critique that he was 'empire-building'. He pointed out that the 'Judicial Council' included the Heads of Courts of the provincial divisions and continued:

> I work with a team. And they can overrule me, by the way. This is not my judiciary, this is our judiciary. And you know judges speak their mind. Unless it can be demonstrated that my colleagues, who are Heads of Court, are nothing but puppets; they are thoughtless sycophants who will do whatever I say, then there would be substance in [the critique].[108]

The problem with this approach is that it makes the ability of the OCJ's governing body truly to reflect the views of the institution as a whole dependant on the character of the particular judges appointed as Heads of Court (and their willingness, in turn, to consult with the judges in their divisions). By contrast, the initial preparatory work for the Langa/Chaskalson vision of the OCJ attempted to design the Judicial Council in a way that makes the individual qualities of the Chief Justice and the Heads of Court less important.[109] The *institution* must ensure ongoing interaction; it cannot be left to the moral strength and bravery of the individuals who happen to form part of it at any one time. The structure of the institution should therefore include obligatory processes which allow for extensive input from judicial officers and even, where appropriate, require approval from the judges for certain decisions. It should also include clear procedures and criteria for the monitoring of the performance of judicial officers. For the strongest possible culture of justification, it could even provide for the evaluation of the Chief Justice by the judicial officers.

[106] GN 147 *GG* 37390 of 28 February 2014 (note 73 above).
[107] Ibid at para 4.
[108] Rabkin (note 14 above).
[109] Hugh Corder, as quoted in Rabkin (note 14 above). See also Chaskalson/Langa report (note 4 above) at para 4.

As set out in the introduction, the Judicial Council proposed by the Chaskalson/Langa report would have exercised oversight over the OCJ, even including non-judicial officers in the oversight process.[110] But this Judicial Council has not been created. Despite Mogoeng CJ's reference to it in his 2013 interview, the term 'Judicial Council' has not attained a formal meaning, as it is not mentioned in the 2013 Act. The body to which Mogoeng CJ refers is simply the Heads of Court, which has served as an informal sounding board for the Chief Justice over the years.[111] As noted above, the Heads of Court had no formal powers, infrastructure or budget.[112] The Superior Courts Act 10 of 2013 does give the body some power: a majority of its members must support any protocols or directives which the Chief Justice issues to the judiciary on matters concerning norms and standards or the 'dignity, accessibility, effectiveness, efficiency or functioning of the courts'.[113] Furthermore, their consent is required for the setting of recess periods.[114] Beyond this, the legislation does not accord the Heads of Court a strong role in the day-to-day running of the judiciary as a whole; in particular, the Chief Justice does not need their approval for any requests he makes for funding with respect to the administration and functioning of the Superior Courts.

The proposed model of the Judicial Council currently before the executive describes the Judicial Council as the 'penultimate authority' on all issues relating to judicial governance.[115] It sets out the Judicial Council's 'powers and functions' as providing policy direction for the OCJ[116] and policy guidelines for SAJEI and the Rules Board,[117] acting as advisor to the Chief Justice,[118] developing norms and standards and evaluating compliance with them,[119] and monitoring performance in all of these bodies.[120] It will also make representations to Parliament on matters affecting the judiciary.[121] While this may present a first step towards mutual engagement, it does not ensure a culture of justification. The most immediate concern is the absence of the magistracy. Instead of including magistrates in the Judicial Council, as suggested by the Chaskalson/Langa report, the latest proposal would relegate them to a secondary advisory body, the Courts Advisory Body, along with the non-judicial officers which the Chaskalson/Langa report initially proposed for inclusion in the Judicial Council itself.[122] This is even though the proposal would have the OCJ take over the 'establishing, monitoring, evaluating and costing norms and standards' for Magistrates' Courts,[123] and move the court administration of all lower courts from the Department of Justice and Constitutional Development to the OCJ.[124]

[110] Chaskalson/Langa report (note 4 above) at paras 4.1.1–4.1.2.
[111] Ibid at para 3.2.1.6.
[112] Ibid at para 3.2.1.6.
[113] Superior Courts Act 10 of 2013, s 8(5).
[114] Superior Courts Act 10 of 2013, s 9(2).
[115] Later Version Committee on Institutional Models Report (note 15 above) at para 5.2.5.
[116] Ibid at para 5.2.5.1.
[117] Ibid at para 5.2.5.4.
[118] Ibid at para 5.2.5.2.
[119] Ibid at para 5.2.5.3.
[120] Ibid at paras 5.2.5.1–5.2.5.4.
[121] Ibid at para 5.2.5.5.
[122] Ibid at para 5.3.
[123] Ibid at para 4.1.4.3.
[124] Ibid at para 4.1.4.5.

Another, important issue bearing directly on the mutual generative engagement that the Judicial Council would need to achieve is that its decision-making mechanisms are opaque, and there is no provision for how often it must meet, and how Heads of Courts should consult the judges within their own divisions. So we are left to deduce how the Judicial Council and OCJ might function from the past and current practices of the OCJ, which we must assume have been guided by the input of the Heads of Court.

Although we have scant information on the internal processes of the OCJ,[125] two recent initiatives point to gaps in the processes of communication and consultation within the institution. The first was the 'Norms and Standards' document, which, as initially drafted, was met by serious objections, being seen as too prescriptive, detailed and peremptory, and not taking into account 'the differing needs and circumstances of the various courts'.[126] Judges in busy courts were reported to describe the first draft as 'unworkable' and an infringement of their autonomy, which, in turn, impacted on judicial independence.[127] The second initiative, the case flow management system, was instituted in 2012. This system makes it the duty of judicial officers to 'intervene as early as possible in the management of a case'.[128] Its implementation has been described in the following terms:

> A matter allocated to a judge for comprehensive case manage[ment] is placed entirely under the management of the case management judge who intervenes and assists the parties to resolve interlocutory disputes until the matter is ripe for trial. The case management Judge convenes and presides over as many case management meetings as he or she finds necessary and may give such directives with regard to the matter as the judge finds necessary. The process of case management is completed when the judicial case manager certifies the matter ready for trial.[129]

The main advantage of this system is that it can speed up the processing of cases.[130] Amongst its disadvantages, it increases the work-load of judges and administrative staff, particularly filing clerks, and requires administrative expertise which may not be available.[131] In 2015, at the Gauteng Local Division and Eastern Cape Local Division, Mthatha, one judge was allocated to sit every day of the week to preside over pre-trial conferences; in the case of Gauteng, this involved approximately 100 matters.[132] Not surprisingly, lack of 'buy-in' from judicial officers was identified as a challenge from the inception of the Case Flow Management Project[133] and

[125] See part IV *B* below.

[126] Rabkin (note 14 above).

[127] F Rabkin 'Firm but Flexible is the Norm' *Financial Mail* (14 March 2014), available at https://www.pressreader.com/search?query=%22Firm%20but%20Flexible%20is%20the%20Norm%22&newspapers=1732&start=2014-3-14&stop=2014-3-14&hideSimilar=1&type=3&state=4 (paywall).

[128] N Manyathi-Jele 'Progress on Judicial Case-Flow Management' (2014) 10 *De Rebus* 65. Not all judges agree that the system works. See Draft Report on Case Flow Management Project (undated)(Submitted to the OCJ, on file with the author).

[129] Draft Report on Case Flow Management Project (note 128 above).

[130] N Manyathi-Jele (note 128 above).

[131] The absence of staff is in part due to the low wages offered for these positions. N Manyathi-Jele (note 128 above). See also Draft Report on Case Flow Management Project (note 128 above)(Complaints about lack of storage space and filing facilities); The Report of the KwaZulu Natal Local Division, Durban; Report by the North West Division (On 'staff constraints').

[132] Draft Report on Case Flow Management Project (note 128 above); Report of the Gauteng Local Division; Report of the Eastern Cape Local Division, Mthatha.

[133] Manyathi-Jele (note 128 above). See also Draft Report on Case Flow Management Project (note 128 above); Report of the Gauteng Local Division.

has continued to varying degrees over the years.[134] A draft report to the Case Flow Management Committee of 2017 also reveals the extent to which the project could be set up in such a way that the OCJ intervened directly in divisions of the High Court, without consulting or even informing the judicial officers affected. Thus, at the Gauteng Local Division, the registrar initially appointed to run the project reported directly to the OCJ without involving the leadership of the Division. The judges themselves were caught unawares by the various steps and requirements of the project as it unfolded.[135]

Both these experiences raise the possibility that the leadership of the OCJ is centralising control of the judicial function without heeding sufficiently the individual working environments and practical obstacles faced by judicial officers. If this is the case, then it is possible that governance as enforcement might not even ensure efficient service delivery, but it clearly affects the autonomy of individual judges and may thus reduce the independence of the institution as a whole.

B Transparency in process and design

In part VII A, I argued that the rule of law requires both an internal and external culture of justification for the judicial institution. The governance structures of the institution must facilitate the communication of concerns from the judicial officers on the ground to the leadership. But these internal design features need to be made known to the broader public, which is where the OCJ's respect for openness and transparency must find expression. It may be that the judiciary is, in *fact*, a well-oiled machine of mutual generative activity, as the depiction by Mogoeng CJ above would suggest. We will only know when the design features of the OCJ are formalised. The judiciary cannot communicate with, and justify itself to, the South Africa public without the transparent institutional structure which ensures that the internal process of communication is taking place. Outsiders cannot see that the judiciary is functioning under the rule of law if they have no idea how it is functioning at all.

The lack of formal institutional design and transparency was challenged over four years ago, when the Secretary-General of the OCJ presented her report to the parliamentary Portfolio Committee on Justice and Correctional Services on 6 May 2013.[136] At this point, the wording of the Superior Courts Bill had already been settled.[137] But as one of the committee members, Dene Smuts, pointed out, it did not provide a legislative basis for the administration of the courts.[138] Instead, it merely entrenched 'control of the judicial function by the CJ and JPs'.[139]

[134] Draft Report on Case Flow Management Project (note 128 above); Report of the Gauteng Local Division; Report of the Eastern Cape Local Division.

[135] Draft Report on Case Flow Management Project (note 128 above); Report of the Gauteng Local Division.

[136] Office of the Chief Justice 2013 Plans: briefing by Secretary General (6 May 2013), available at https://pmg.org.za/committee-meeting/15875/.

[137] The Bill was approved by the National Assembly on 22 November 2012 and was approved by the NCOP in the week after the Portfolio Committee meeting. See W Hartley 'Courts bill "a shield from political influence" *Business Day* (23 November 2012), available at https://www.businesslive.co.za/bd/national/2012-11-23-courts-bill-a-shield-from-political-influence; 'Human Trafficking, Superior Courts Bills Get NCOP approval' Lawyers for Human Rights (15 May 2015), available at http://www.lhr.org.za/policy/human-trafficking-superior-courts-bills-get-ncop-approval.

[138] Office of the Chief Justice 2013 Plans: Briefing by Secretary General (note 136 above).

[139] Ibid.

For her part, the Secretary-General acknowledged that governance structures still had to be set up, and that the OCJ was researching which model would best suit the judiciary in South Africa.

Six years later, we still have no legislation in place to establish how the judiciary is governed. In her 2018 report to Parliament, the current Secretary-General of the OCJ admitted that 'not much progress' had been made on the Court Administration model.[140] The OCJ functions behind a veil, with almost no formal regulation of its internal processes. Indeed, uncovering what it is doing and how required some journalistic determination in the case of this article. It is noteworthy that the list of functions which the DOJ transferred to the OCJ in April 2015 was not set out in a Government Gazette, but in a letter from the Minister of Justice to the CJ. The letter is also not available on the website of the OCJ.[141] Similarly, the existence of one particular set of objections to the Norms and Standards was public knowledge, but I was unable to obtain a copy of them despite requests to judges, the Constitutional Court and the OCJ itself.[142]

VII CONCLUDING REMARKS

South African jurists and theorists have recognised that judicial independence is protected by security of tenure, financial independence and administrative independence. There is also an acknowledgement that these three 'core characteristics' can support the independence, either of the judiciary as an institution, or of the individual judges.[143] Current jurisprudence and scholarship fail, however, to engage with the relationship between individual and institutional independence, and struggles to identify mechanisms of protection for the institution as such. The factors which have received the most emphasis are the financial independence of the judiciary and the judiciary's control over its own administration.

The OCJ has not, as yet, managed to secure significant control over the process of determining what funds are allocated to it from central government. This is one of the consequences of its failure to move to phase two of the initial OCJ plan. Where administration is concerned, on the other hand, the OCJ has taken over wide areas of control. However, it is not apparent that the vastly increased control enjoyed by the *leadership* of the judiciary has translated into improved control for *individual* judges. We therefore need to determine how the independence of individual judges relates to the independence of the institution.

In this regard, I drew on Lon L Fuller's account of the rule of law, an approach closely linked to Etienne Mureinik's concept of a culture of justification. Fuller's theory suggests conditions precedent for any society or institution, including the judiciary, to operate under law. In particular, it requires what has been termed 'interactional law' – a process of mutual engagement – *within* those institutions which have to uphold the rule of law. Unless the judiciary is itself constituted by law, it will not be equipped to uphold the rule of law in its dealings with litigants, other branches of government and the society which it is meant to serve.

[140] Office of Chief Justice and Judicial Administration 2017/18 Annual Report (16 October 2018), available at https://pmg.org.za/committee-meeting/27243/.

[141] I was able to obtain a copy of this letter through the kind help of Yvonne van Niekerk of the OCJ administration. As of 20 January 2019, the letter is still not accessible on the website of the OCJ.

[142] One judge did not consider the objections confidential, but did not have a copy. I was then referred to two other judges or former judges who refused to provide the document on the basis that it was internal and confidential. I received no response from the Court or the OCJ when I asked various functionaries at these institutions for the status of the objections, permission to view them and a copy of them.

[143] DOJ Policy Framework (note 40 above) at para 71.

If individual judges are not drawn into a process of mutual engagement in the very functioning of the judiciary but instead 'managed' by a one-way projection of authority, then the judiciary as an institution is not able to hand down law. Looking at the OCJ from this perspective, it appears that the institution may not be in a position to protect the *institutional* independence of the judiciary, because it does not contain the mechanisms to accommodate the input of *individual* judges on the best conditions for effective and independent work. In this respect, I drew on two events within the work of the CJ and the OCJ – the drafting of the Norms and Standards and the Case Flow Management projects – to find indicators of communication gaps within the judiciary. There were insufficient formal sources to describe the current structure and processes of the OCJ, a lacuna which in itself suggests an accountability deficit. The lack of transparency in the functioning of the OCJ may have serious repercussions for judicial independence in South Africa.

Judicial independence is more than the relationship between the judiciary and outside governmental bodies or the general public. It starts, and is maintained by, the rule of law processes within the judicial institution itself. However, its primary virtue is to protect the society which the judiciary serves, which means that the processes of communication, justification and interaction also need to be carried out between the judiciary and broader society on an ongoing basis. This will be possible only when the governance structures of the OCJ are clear and accessible to the South African legislature and public.