



Analysis of the impact the Judicial Service Commission has on judicial legitimacy in South Africa through the appointment and accountability processes

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Abstract

Since the advent of the 1994 Constitution, an independent judiciary has been a vital component in upholding constitutional democracy in South Africa. Along with the Constitution came new ways of appointing judges and holding them accountable. This is done by the Judicial Service Commission (JSC). The appointment and accountability processes are both contentious topics in South Africa with much debate being had about the processes selected. The importance of how these processes are undertaken is high due to the influence they have on the perception of the judiciary, and consequently judicial legitimacy. Once judges are appointed through the interview process, they are expected to make their decisions without any outside influence, and if they fail to abide by the judicial standard expected of them, they are required to be held accountable for this misconduct. Judicial independence and accountability play a central role in these processes as well as judicial legitimacy and will have a lot of attention placed on them throughout the discussion. With little up-to-date literature addressing this topic in South Africa, this thesis provides a discussion of what the current status is of these processes and how they impact on the legitimacy of the judiciary. This thesis proposes that the accountability process requires more extensive alterations than the appointment process, however both require more political will of the JSC members in order for them to positively impact on the legitimacy of the judiciary. By drawing on case studies and the processes adopted in Zimbabwe, Kenya and India, this thesis recommends a variety of reforms that aim at improving the way these processes are undertaken by the JSC.

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Chapter One: Introduction

1.1 Introduction

In the last few years, we have seen a threat to judicial legitimacy in South Africa. Recent examples of this are evidenced by former president Jacob Zuma's disregard of court orders,¹ Chief Justice Zondo making public remarks that don't align with the Judicial Code of Conduct,² and the ineffective conduct process which is failing to hold judges accountable.³ Within the expansive list of threats to judicial legitimacy, this thesis focuses on the impact that judicial independence and judicial accountability have on judicial legitimacy and whether they threaten the legitimacy of the judiciary through the appointment and accountability processes.

Judicial independence is an internationally recognized value which is a pre-requisite to the rule of law and is fundamental to a fair trial being guaranteed.⁴ The internationally required standard of judicial independence requires independence and impartiality to be central to how judges perform their duties.⁵ Similarly, the independence and impartiality of the judiciary is guaranteed in s165(2) of the South African Constitution.⁶ In order for this to be realized, the judiciary need to be made up of independent judges that have been appointed to form part of the judiciary, as well as have appropriate safeguards in place that protect the judiciary from external influence. Thus, with the appointment process being the source of independent judges, it can be deduced that the process how they are appointed is a vitally important component in the ultimate independence of the judiciary.

As a result of having such an important impact on judicial independence, it is vital that the appointment process is viewed to be legitimate. Ensuring the legitimacy of this process further requires the body, the JSC, that makes these appointments to be seen as legitimate. The composition of this body was a complex issue that was dealt with by the drafters⁷ of the

¹ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* [2021] ZACC 18.

² Dan Mafora 'CASAC concerned by Chief Justice most recent remarks' available at <http://casac.org.za/media-statement-14-november-2023/>, accessed on 5 February 2024.

³ The Makhubele matter is one of the most recent examples; Alison Tilley and Mbekezeli Benjamin 'How the JSC failed our judges – and the public' available at <https://www.groundup.org.za/article/judicial-service-commission-fails-to-deal-with-judicial-misconduct/>, accessed on 10 December 2023.

⁴ The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002 at Value 1.

⁵ Ibid.

⁶ Constitution of the Republic of South Africa, 1996.

⁷ Calli Solik 'Serving the Judiciary? A review of activities of the South African Judicial Service Commission' (2022) *Freedom Under Law* at 7.

Constitution for two main reasons. First, safeguards had to be put in place to secure the process from political interference, while at the same time the drafters had to be cognizant that elected members of government had to be involved in the process to bring legitimacy to the appointment of an unelected branch of government that wields enormous powers.⁸ The concern in this dilemma is that an unelected judiciary will have the power to undermine democracy through their power to invalidate decisions made by an elected branch of government.⁹ The inclusion of all three branches of government forming part of the JSC goes a long way in ensuring democratic legitimacy of this process.

The reason it is so important that democratic legitimacy of the judiciary is secured is because it supports the long-term survival of the judiciary within the constitutional democracy of South Africa.¹⁰ After all, the South African Constitutional Court does not want to suffer the same fate as that of the Hungarian Constitutional Court which didn't survive its clash with the popular political government in power due to the court being political isolated and unpopular.¹¹ The judiciary has the opportunity to further be strengthened within the constitutional democracy through an accountability process that successfully holds judges accountable for misconduct.¹² It is vital to judicial independence that an effective accountability process is in place in order to hold judges that are guilty of misconduct accountable.¹³

The reality of the appointment process finds it to be stained by political agenda's being pursued, sexist lines of questioning being followed and a lack of clear criteria guiding interviews up until 2023. This has resulted in the appointment process to be one that is possibly delegitimized to both the public and the candidates wanting to avail themselves for appointment.¹⁴ It is within the interview arena that one sees these issues play out. The conduct process has similarly garnered a lot of attention recently. With several Judicial Conduct Tribunals investigating gross misconduct underway at the start of 2024, the reality of this process can also be viewed to be bleak. Complaints against the lengthy process in place have

⁸ Pierre de Vos 'Political appointments to the JSC are necessary, but so is skilled and informed questioning of candidates' Daily Maverick 18 August 2021, available at <https://www.dailymaverick.co.za/article/2021-08-18-political-appointments-to-the-jsc-are-necessary-but-so-is-skilled-and-informed-questioning-of-candidates/> , accessed on 3 February 2024.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Judith February et al 'How complaints against judges are handled needs to change' available at <https://www.groundup.org.za/article/how-complaints-against-judges-are-handled-needs-to-change/> , accessed on 13 October 2023.

¹³ Ibid.

¹⁴ Hugh Corder 'Comprehensive review: The JSC is in freefall and the stakes are too high for it to fail' Daily Maverick 30 June 2021, available at <https://www.dailymaverick.co.za/opinionista/2021-06-30-comprehensive-review-the-jsc-is-in-freefall-and-the-stakes-are-too-high-for-it-to-fail/> , accessed on 2 May 2023.

repeatedly been levelled against the JSC, with the longest process to date being that of Judge President Hlophe which has been ongoing for almost 16 years.

With judicial independence and accountability being central to the idea of legitimacy. An erosion or threat to either of these will negatively impact upon judicial legitimacy. This thesis will demonstrate how the appointment and conduct processes impact on the legitimacy of the judiciary through the threat and erosion of these two pillars of legitimacy.

Accordingly, this thesis seeks to analyse how these processes have been conducted by the JSC in order to determine the extent to which judicial legitimacy is impacted.

1.2 Research Background

Before South Africa was ruled under the supreme law of the Constitution, it was under a system of parliamentary sovereignty during the Apartheid era.¹⁵ Constitutional authority for judicial review of legislative action was absent at this time, the powers of the judiciary were thus very limited.¹⁶ In addition, they are said to have also lacked independence and impartiality in the judicial decision-making process.¹⁷ This is not surprising when the appointment process is considered. At this time, the State President was responsible for the appointment of judges alone in terms of s 10 of the Supreme Court Act.¹⁸ However, it is believed that it was the Minister of Justice who was essentially making these decisions on the State President's behalf, thus having political considerations playing a determinative role.¹⁹ Holding judges accountable also appeared markedly different at this time as only informal mechanisms existed to hold judges accountable.²⁰ Judges were disciplined through the "word-in-the-ear" method, whereby a Judge President or Chief Justice would deal with any type of misconduct that arose.²¹ This method was effective because of the strong collegiality that existed at the time which made peer pressure effective.²²

¹⁵ Murray Wesson & Max Du Plessis 'Fifteen years on: Central issues relating to the transformation of the South African judiciary' (2008) *SAJHR* at 191.

¹⁶ Hugh Corder 'Judicial authority in a changing South Africa' (2004) *Legal Studies* 24 at 255.

¹⁷ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 28.

¹⁸ Supreme Court Act 59 of 1959; Wesson & Du Plessis op cit note 15 at 191.

¹⁹ *Ibid.*

²⁰ Solik op cit note 7 at 35.

²¹ *Ibid.*

²² *Ibid.*; Hugh Corder 'Judicial Accountability' in Cora Hoexter & Morné Olivier *The Judiciary in South Africa* 1 ed (2014) at 213; Hugh Corder 'Judicial Accountability' in Cora Hoexter & Morné Olivier *The Judiciary in South Africa* 1 ed (2014) at 213.

Under apartheid, the importance of the legislative and executive branches was emphasized, while the judicial branch was under the influence of these other branches and acted in accordance with them.²³ The way that the judiciary was institutionalized during this period tainted the legal system to be one that was influenced by political dominance.²⁴

In comparison to the system under apartheid, an independent and impartial judiciary, free of political influence is a vital component of the checks and balances that form part of the separation of powers system that now exists.²⁵ Separation of powers emphasizes that the judiciary has a distinct responsibility to uphold the rule of law and protect individual rights and the rights of minorities. This role is different to the law-making and execution of government policy responsibilities held by the legislature and executive branches of government.²⁶ This is evident from specific sections in the Constitution such as s165 (2), (3) and (4) which all speak to the independence that the judiciary possesses. The *Van Rooyen* case sets out that all three subsections, although stating something different, speak to the same guarantee that the judiciary is independent, and this independence is to be supported by the other two arms of government.²⁷ It is the independence of the judiciary that results in the judiciary being perceived to be legitimate, and it has been held that in regard of judicial independence; “What matters is that the judiciary must be seen to be free from external interference.”²⁸ Thus, in the drafting of the new Constitution it was vital to target the political influence that once played such a decisive role in the appointment of judges, in order to make such a process fall within the boundaries of the constitutional framework.²⁹ The process adopted for the appointment of judges is a key factor in ensuring that judges act independently and impartially once they have been selected to form part of the judiciary.³⁰

As already set out, judicial accountability is also central to the determination of judicial legitimacy and thus vital to this discussion. The role of accountability in the South African

²³ Pierre de Vos & Warren Freedman *South African Constitutional Law in Context* (2014) 202.

²⁴ *Ibid* at 205.

²⁵ It is held in *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* 2022 (4) SA 1 (CC) that “because the impartiality of Judicial Officers and the impartial adjudication of disputes of law constitute the bedrock upon which the rule of law exists, there must, in any sound legal system, exist a general presumption of impartiality on the part of the Judicial Officers.” at para 56.

²⁶ Edwin Cameron ‘Judicial Accountability in South Africa’ (1990) *SAJHR* at 254.

²⁷ *Van Rooyen and Others v The State and others* 2002 (5) SA 246 (CC) Para 17.

²⁸ *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC) at para 68.

²⁹ de Vos & Freedman *op cit* note 23 at 229.

³⁰ *Ibid* at 228.

constitutional democracy is ensured as one of its founding values.³¹ Holding judges accountable is discussed in s177 which sets out the process for the removal of judges from office for conduct that does not align with what is to be expected of judges. This shows a marked change to the previous system with different processes in place for accountability to be realized within South Africa's new democratic state. These include judicial discipline, legislative intervention, common-law forms such as bias and recusal, reasoned judgment without delay and the correction of judicial error through the appeal process.³²

Central to both of these processes is the Judicial Service Commission (JSC). The JSC is established in s178(1) of the Constitution in order to strike a balance between the issues that were present with judicial appointments under the old order.³³ This results in all the power not being left in the hands of the president, while recognizing the far-reaching political consequences judicial decision can have. The JSC is the principal body to assist and protect the "independence, impartiality, dignity, accessibility and effectiveness of the courts".³⁴ For this reason it was composed in a way that supports the independence and of the judiciary while still providing for the appointments to not be completely separate from the political process.³⁵

The composition of the JSC is made up of 23 members; the Chief Justice, the President of the Supreme Court of Appeal; one Judge President, two practicing advocates nominated from the advocates profession, two attorneys nominated from the attorney's profession, one teacher of law, six persons from the National Assembly with three of those being members of opposition parties, four permanent delegates to the National Council of Provinces and four persons designated by the President.³⁶ The composition of the JSC may be surprising to some, but is important in the South African context as explained above under 1.1. Sufficient representation from the judiciary itself, legal professionals and opposition political party members provide relevant checks and balances on the power of the executive to make these appointments.³⁷ Thus, by including members from the elected branches of government in the appointment process, it assists in legitimizing the judiciary and the decisions made by them.

³¹ Constitution supra note 6 at s1(d).

³² Cora Hoexter and Morné Olivier, eds 'The Judiciary in South Africa' Juta and Company Ltd, (2014) at 212-235.

³³ Constitution supra note 6; de Vos & Freedman op cit note 23 at 229.

³⁴ K Malan 'Reassessing Judicial Independence and Impartiality against the Backdrop of Judicial Appointments in South Africa' (2014) *PELJ* at 1968.

³⁵ de Vos & Freedman op cit note 23 at 229.

³⁶ Constitution supra note 6 at s178.

³⁷ *Van Rooyen* supra note 27 at para 108.

1.3 Research Question and Motivation

The status of the judiciary, whether it is seen to be legitimate or not, plays a significant role in upholding democracy in South Africa. Accordingly, this thesis considers how the current processes of appointment and removal of judges threaten judicial legitimacy through the erosion of both judicial independence and judicial accountability and concludes that the less effective the JSC are in performing these functions, the more judicial legitimacy will be threatened or eroded. The aim of this thesis is to provide insight into how the JSC are performing their functions in both processes and how this has been or can be improved. The motivation for this thesis is to highlight significant handicaps for judicial legitimacy in the South African processes and to provide recommendations on how these systems can be improved.

1.4 Research Methodology

In order to explore the ways in which the judicial appointment and removal process threaten judicial independence and accountability, the interconnected methodologies of doctrinal and comparative research are employed.

First, this thesis will use doctrinal methodology. This type of methodology focuses on law and legal concepts by providing a comprehensive description of the rules governing a specific legal category, analyzing the relationship between rules, explaining areas of difficulty, and may give predictions of how the law could develop.³⁸ This method will be heavily relied on in this paper. The rules surrounding judicial appointments and removal will be comprehensively described in regard to how they fit within the system as well the relationship amongst these rules. In providing a systemic exposition of these rules, foundational principles such as the rule of law, judicial independence and judicial accountability will first be delved into in order to comprehensively answer the main question this paper seeks to answer. The main areas of difficulty that will be discussed focus on the primary issues experienced by the JSC in each of these processes. In relation to the appointment of judges, the main issues discussed are the inclusion of political actors in the JSC, the lack of clear criteria, the behaviour of commissioners in interviews and the transparency of the process. In relation to the conduct process, the lengthy period of the process, lack of political will on behalf of the JSC and the litigious nature who have had complaints laid against them are all striking problems to be

³⁸ Terry Hutchison & Nigel Duncan 'Defining and describing what we do: Doctrinal legal research' (2012) 17 *Deakin Law Review* at 101.

addressed. This thesis seeks to provide recommendations on ways that the JSC can move forward as a body that is more transparent, efficient and viewed to be independent in order to ensure that the legitimacy of the judiciary is secured.

It is important to note that there is a gap in the literature on judicial accountability in South Africa. When conducting doctrinal research on this area of law, it was discovered that very few primary sources exist in this regard and thus websites proved the most helpful. At this point Judges Matter and Freedom under Law (FUL) should be introduced as their works informed a lot of the discussions and analyses in this thesis. Judges Matter is a project forming part of the Democratic Governance and Rights Unit which focuses on the strengthening and support of the judiciary by acting as judicial watchdogs. FUL is a not-for-profit company that focuses on promoting democracy and advancing the rule of law as core components of constitutional democracy. Both of these bodies have monitored the appointment process and the conduct process of the JSC for many years and provide valuable insights into these processes.

The second research methodology employed by this thesis is comparative legal research. Comparative legal research is made up of a comparative evaluation of human experiences that occur in legal domains of different situations and jurisdictions.³⁹ This process entails two things being measured by one another in order to determine whether similarity or difference come to the fore.⁴⁰ Comparative research is primarily relied on in Chapter 3 where the appointment systems of India, Kenya and Zimbabwe are analyzed. These jurisdictions are all common law jurisdictions which have committed to constitutional democracy as a break to their histories of executive interference in their judicial appointment process similarly to South Africa. With constitutional guarantees of judicial independence in each state, the comparative analysis highlights how different political contexts and JSC compositions impact the structure and outcome of the appointment process. Insights from these comparators will inform the recommendations made to reform the judicial appointment and removal processes.

³⁹ P. Ishwara Bhat, 'Comparative method of legal research: Nature, process and potentiality' (2015) *Journal of the Indian Law Institute* at 147.

⁴⁰ *Ibid* at 148.

1.5 Thesis Structure

Chapter one of this thesis provides an introduction to the topic of the thesis, a historic context that has influenced the creation of the current system and the motivation for why the studying of this topic is so important.

Chapter two of this thesis analyses judicial independence and judicial accountability in order to provide a foundational understanding of the importance of each. This is done first by dissecting judicial independence and the way it impacts the appointment process and the rule of law. Thereafter, judicial accountability is considered in relation to the JSC conduct process that is in place and the matter of Judge Motata.

Chapter three of this thesis considers the appointment process in South Africa in comparison to the processes found in India, Kenya and Zimbabwe.

Chapter four of this thesis focuses on the conduct process by doing a case analysis on Judge President Hlophe in order to draw out the relevant issues with the process in place.

Chapter five of this thesis provides recommendations to the issues highlighted in Chapter 3 and 4, as well as concluding remarks.

Chapter Two: Independence and Accountability: The yin and yang of a legitimate judiciary

2.1 Introduction

The Judicial Service Commissioners in South Africa are the gatekeepers of the judiciary, as they play the vital role of selecting how the judiciary is constituted.⁴¹ What is worrying in the South African context is that the JSC is said to be performing their functions “disastrously”.⁴² This is particularly worrying as the judiciary are an important branch of government that the Constitution requires to be “independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”⁴³ Importantly, the judiciary have the responsibility of protecting and promoting the rule of law which is a foundational value in the current constitutional democracy.⁴⁴ In order for the judiciary to perform its functions the way that the Constitution has envisaged, it needs to be viewed as legitimate. This chapter seeks to explore the meaning of the values that underpin and secure the legitimacy of the judiciary: judicial independence and accountability. Understanding these concepts is vital for the discussions in Chapter 3 and 4 that look at the appointment and accountability processes which are underpinned by these values.

Judicial independence focuses on the isolation of the judiciary from other branches of government and is required for judges to properly perform their functions without the fear of arbitrary removal. Judicial accountability on the other hand emphasizes the public responsibility held by the judiciary and ensures that if they fall short of the judicial standard expected of them they are held accountable.⁴⁵ Thus, a tension between these values can arise if an appropriate balance is not struck, i.e. an accountability process that infringes on the security of tenure of judges, thus threatening judicial independence, or a judiciary that is “too independent” and can’t be held accountable like India discussed in the next Chapter.⁴⁶

⁴¹ Solik op cit note 7 at 1.

⁴² Corder op cit note 14.

⁴³ Constitution supra note 6 at s165(2).

⁴⁴ Solik op cit note 7 at 1; Constitution supra note 6 at s1(c); *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening ; Institute for Democracy in South Africa and Another as Amici Curiae)* (No 2) (CCT23/02) [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179 (4 October 2002) at para 19; *Fedsure* supra note 17 para 56; *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 3 BCLR 241 (CC); 2000 2 SA 674 (CC) at para 40.

⁴⁵ Roger Handberg, ‘Judicial Accountability and Independence: Balancing Incompatibles’ *University of Miami Law Review* (1994) at 129.

⁴⁶ Antonina Peri ‘Judicial Independence vs. Judicial Accountability – Judicial Selection Models for Constitutional Courts’ *Constitutional Law Review* (2013) at 70; This standard will be discussed in Chapter 4.

However, when the balance is well struck and judicial independence and accountability are seen to complement and reinforce each other, these values can be described as the yin and yang of a legitimate judiciary.

The broad judicial review powers of an unelected branch of government require a strong entrenchment of judicial independence, balanced by measures which ensure equal degrees of judicial accountability.⁴⁸ This is important in a constitutional democracy where an unelected branch of government holds strong powers to overturn and declare decisions made by elected branches of government unconstitutional. This Chapter sets out to establish judicial independence and accountability and their relationships with the appointment and accountability processes. First, judicial independence is discussed by introducing the importance of this value in relation to the rule of law. Once this relationship is established, internal and institutional independence are set out, followed by a discussion regarding the intrinsic relationship between judicial independence and judicial appointments. A discussion of judicial accountability follows, which sets out judicial accountability and how it is fundamental to the accountability process. This Chapter concludes by identifying how each of these values rely on proper application of the other in order for them to be secured and support the legitimacy of the judiciary.

2.2 Judicial Independence

The rule of law is one of the founding values contained within the South African Constitution which speaks to the heart of the democratic status it holds.⁴⁹ The rule of law is dependent on judges administering justice both independently and impartially. Thus, if judicial independence is not secured this could lead to the breakdown of the rule of law that is dependent on it to function.⁵⁰ The Constitution guarantees judicial independence⁵¹ and requires that state organs

⁴⁸ In accordance with s172(2)(a) of the Constitution, the courts have the power to make an order concerning constitutional validity of “an Act of Parliament, a provincial Act or any conduct of the President.”; Corder op cit note 22 at 206.

⁴⁹ Constitution supra note 6 at s1(c); *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at para 49; *Masuku* op cit note 25 para 56; *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (2) BCLR 121 (CC) at para 30; *Economic Freedom Fighters v Speaker of the National Assembly and Others*; *Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 at para 1.

⁵⁰ Justice Edwin Cameron ‘Judicial Independence – a substantive component?’ (2010) *Middle Temple and SA Conference: Judicial Independence* at 24.

⁵¹ Constitution supra note 6 at s165(2): “The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”

assist to ensure that it is upheld.⁵² With the inclusion of these sections in the Constitution it supports the important position that judicial independence holds. Judicial independence provides protection against oppression by the executive through abusing their power, it protects fundamental rights being violated, and it promises justice being delivered by judges that are impartial.⁵³ It is thus part of the bedrock that differentiates the current constitutional democracy from its predecessor.

Judicial independence notably has two aspects, internal aspects which refers to individual independence and external aspects which refers to institutional independence.⁵⁴ Individual independence is concerned with the freedom of individual judges to make decisions without external pressure or interference.⁵⁵ The Constitutional requirement that the courts act impartially, without fear or favour,⁵⁶ is vital to judicial independence.⁵⁷ In line with this, it is presumed that judges act impartially when they determine matters before them as part of their adjudicative responsibility. The Court has held that Judges are prepared to adjudicate impartially because of their legal training and experience, which trains them to discern where the truth lies within contradictory evidence.⁵⁸ If they did not act impartially, and it was perceived that judges were making decisions based on bias, the independence of the judge and the judiciary would be threatened and justice would not be properly administered. Thus, the ability of adjudicators to determine matters impartially forms the basis upon which the rule of law exists and is crucial in securing judicial independence.⁵⁹ When impartiality is questioned, the test that is applied is centered on a reasonable apprehension, thus looking at how a judge is perceived. With the legitimacy of the judiciary being based on its perception by the public, an important relationship is seen to exist between impartiality, individual independence and judicial legitimacy.⁶⁰

⁵² Constitution supra note 6 at s165(4): “Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.”

⁵³ Archibald Cox ‘The Independence of the Judiciary: History and Purposes’ (1996) *University of Dayton Law Review* at 567 – 574.

⁵⁴ John Ferejohn, ‘Independent Judges, Dependent Judiciary: Explaining Judicial Independence’ (1999) *Southern California Law Review* at 353.

⁵⁵ Cameron op cit note 50 at 25; The quote in *van Rooyen* supra note 27 para 19 discusses the importance that there is no interference.

⁵⁶ Constitution supra note 6 at s165(2); *van Rooyen* ibid para 19; *Justice Alliance* supra note 28 para 35.

⁵⁷ Ibid para 36.

⁵⁸ *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) at para 40.

⁵⁹ *Masuku* supra note 25 para 56.

⁶⁰ Chris Oxtoby and Matthias Kronke ‘Public confidence in the judiciary: a South African perspective’ (2020) *DGRU* at 99 – 100.

Institutional independence is concerned with safeguarding the judiciary against external influences. This is achieved through security of tenure for those appointed to the judiciary, financial independence and administrative independence.⁶¹ Without institutional independence being secured in these three respects, it opens up pathways for the judiciary to be abused through political interference. The link between individual independence and institutional independence was succinctly summarized in the Canadian case relied on in South Africa of *Valente v The Queen* (1986) 24 DLR (4th) 161 (SCC) where the court stated that:

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.⁶²

This quote is seen to be realized in Zimbabwe⁶³, where political influence is seen to compromise the judicial appointment process and consequently the judicial independence of the judiciary as well. This depicts the importance of institutional independence of the judiciary which is supposed to secure independence from the other branches of government by being insulated from these branches⁶⁴ in accordance with the separation of powers principle.⁶⁵ In this way, not only is the judiciary protected from being dragged into politics⁶⁶, but the rule of law is also guaranteed to not be eroded by political pressure.⁶⁷ In *Van Rooyen*, the court acknowledged that the institutional independence of the judiciary is based on how much public confidence there is in the judiciary administering justice – highlighting the need that the judiciary should appear to be independent in order to secure institutional independence.⁶⁸ Thus, rather than being valuable in itself, institutional independence secures values such as the rule of law and judicial legitimacy.⁶⁹

Institutional independence in South Africa has not gone without being challenged and has had to deal with situations where the State and political actors fail to abide by court orders, threatening the rule of law. A prime example of a member or former member of the executive

⁶¹ Cameron op cit note 50 at 25; Cathy Powell ‘Judicial Independence and the Office of the Chief Justice’ (2019) *CCR* at 502.

⁶² *Van Rooyen* supra note 27 para 22 footnote; Powell ibid at 501.

⁶³ Discussed below.

⁶⁴ *Van Rooyen* supra note 27 at para 31: “...the courts in which they hold office must exhibit institutional independence. That involves an independence in the relationship between the courts and other arms of government.”

⁶⁵ Ibid at para 22, 34.

⁶⁶ Cameron op cit note 50 at 24.

⁶⁷ David Boies ‘Judicial Independence and the Rule of Law’ (2006) *Washington University Journal of Law* at 58.

⁶⁸ *Van Rooyen* supra note 27 para 32.

⁶⁹ Ferejohn op cit note 54 at 353.

aiding to the erosion of judicial independence is South Africa's former president, Jacob Zuma. Being described as a "serial constitutional delinquent"⁷⁰, Zuma's actions have inspired defiance of the law in South Africa and promoted a negative influence on society in terms of confidence that should be placed in the judiciary.⁷¹ The actions of Zuma are especially worrying and disappointing because, as a former president, it is expected that he would be an example of how the values in the Constitution can be embodied and upheld.⁷² A prime example of how Zuma has aided to the erosion was observed in the case which held that Zuma to be guilty of contempt of court for not abiding by a court order and was sentenced to prison.⁷³ When court orders are ignored, it affects the independence and the legitimacy of the courts as citizens will lose faith that the orders of the judiciary will have the ability to impact their lives.⁷⁴ Thus, there is a risk that how the judiciary is perceived will be eroded. This behaviour is threatening because Zuma and other state actors potentially place themselves above the law.⁷⁵ The contempt of court case involving Jacob Zuma⁷⁶ showed that the Constitutional Court is aware of this threat on the judiciary's independence. Justice Khampepe emphasized the importance of following court orders to ensure that the public confidence that is placed in the judiciary is protected and maintained.⁷⁷ Where public confidence is protected, the legitimacy of the courts will in turn also be protected.

2.2.1 Judicial independence and judicial appointments

It is clear that public confidence in the judiciary is essential in upholding the rule of law and its independence.⁷⁸ The appointment process by which judges are selected plays a vital role as it ensures and directly affects the "impartiality, integrity and independence of judges".⁷⁹ Through the selection process, the JSC essentially become the gatekeepers of who forms part

⁷⁰ Nathaniel Lee 'Jacob Zuma has kept the South African Judiciary on its toes' News24 30 June 2021, available at <https://www.news24.com/news24/opinions/letters/letter-to-the-editor-jacob-zuma-has-kept-the-south-african-judiciary-on-its-toes-20210630>, accessed on 28 June 2023.

⁷¹ Omphemetse Sibanda 'Zuma's attacks on the Constitutional Court should raise red flags' News24 30 March 2021. Available at <https://www.news24.com/news24/opinions/analysis/analysis-zumas-attacks-on-the-constitutional-court-should-raise-red-flags-20210330> accessed on 14 July 2023.

⁷² Lee op cit note 70.

⁷³ Zuma supra note 1.

⁷⁴ Pierre de Vos 'Between moral authority and formalism' (2009) *CCR* at 413.

⁷⁵ Ibid.

⁷⁶ Zuma supra note 1.

⁷⁷ Ibid para 103.

⁷⁸ Sarkar Ali Akkas 'Appointment of Judges: A Key Issue of Judicial Independence' (2004) *Bond Law Review* at 201.

⁷⁹ Ibid at 200.

of the judiciary.⁸⁰ In order to maintain public confidence in judges that are selected through this process, openness and transparency in the appointment process are vital.⁸¹

To uphold the independence of the judiciary, the JSC must accordingly appoint candidates that will act independently and impartially. With the interview process being held publicly, confidence in the abilities of the candidates is inspired through important questions being posed to them in their interviews to ascertain which qualities and level of legal knowledge and skill they hold. Within the context of judicial independence, the JSC appointment process is crucial because if the process is not achieved in a manner that cultivates confidence, it has the potential to threaten the foundational value of the rule of law, as well as the view that society holds of it. The appointment of good candidates that do well in these rigorous interviews will inspire confidence in the process as well as the ability of the candidate to administer justice. Consequently, the rule of law will also be upheld.⁸³

After many years of conducting interviews that involve JSC members pursuing party-political agendas and embarrassing candidates that are being interviewed, there is a massive risk that the JSC will no longer attract and select appropriate lawyers.⁸⁴ If underqualified candidates are selected, the vision of what the judiciary is expected to appear as is threatened. This has the possibility to directly threaten institutional independence itself. Issues pertaining to the JSC selection process will be discussed in more detail in the following Chapter. The relationship between the JSC appointment process and judicial independence underpins that discussion and should importantly be understood from the context set out above.

This analysis has introduced the relationship between judicial independence and the appointment process. It is clear how the JSC has a big impact on judicial independence through this process, similarly the JSC also plays a big role in the accountability process discussed next.

2.3 Judicial Accountability

In general, accountability requires having to answer to someone or something for your actions or conduct.⁸⁵ It is essential that the judiciary are held accountable because of the broad remedial powers they are enshrined with under s172 of the Constitution.⁸⁶ In order to understand how the judiciary is being held accountable, judicial accountability in South Africa will be

⁸⁰ Solik op cit note 7 at 1.

⁸¹ Akkas op cit note 78 at 201.

⁸³ Solik op cit note 7 at 21.

⁸⁴ Corder op cit note 14.

⁸⁵ Cameron op cit note 26 at 253.

⁸⁶ Constitution supra note 6.

anatomized by looking at the different mechanisms employed, with special attention being paid to the processes set out in the JSC Act. This discussion serves to provide an introduction to the current accountability mechanisms and how effective they are before being considered through a case analysis of Judge President Hlophe in Chapter 4.

One of the few positive practices during the Apartheid era was the peer pressure that resulted from the strong sense of collegiality that existed at the time. This was caused by the majority of the legal fraternity consisting of white men. What has been observed since this time is that the diversity that has now been introduced into the bench has arguably resulted in weakened collegiality and for the first part of the constitutional democracy a gap in practice and legislation to hold judges accountable existed.⁸⁷ This has since been ‘remedied’ through the Amendment of the JSC Act, in practice though this remedy has shown that it is most definitely not a cure for the conduct process and further reform is required.

Effective mechanisms securing judicial accountability are vital to maintain legitimacy in the courts, which is essential for the courts to withstand attacks on their authority by other arms of government.⁸⁸ Without the trust of the public, the courts are unable to fulfill their constitutional role – on their behalf it is essential that they act impartially and honestly. When judges are not held accountable for not acting in line with these values, the legitimacy of the courts is weakened through a loss of public confidence.⁸⁹ Judicial accountability can be differentiated to the accountability of the other branches of government because of the need for it to be balanced with judicial independence.⁹⁰ The primary duty of the judiciary is to uphold the rule of law and protect individual rights under the Bill of Rights, which makes it important that judicial accountability be differentiated.⁹¹ These duties would not be realized if the judiciary was subservient to the views of the majority in the same way the other branches are.⁹²

The ultimate form of accountability is the removal of a judge from office which is governed by s177 of the Constitution.⁹³ In order for a judge to be removed; the JSC must make a finding that the judge suffers from incapacity, is grossly incompetent or that they are guilty

⁸⁷ Corder op cit note 22 at 205 and 206.

⁸⁸ Ibid at 206.

⁸⁹ Johann Kriegler ‘*Judge Hlophe betrayed the nation with his greed*’ Advocate December 2017, available at <https://www.gcbsa.co.za/law-journals/2007/december/2007-december-vol020-no3-pp33-34.pdf>, accessed on 17 July 2023.

⁹⁰ Corder op cit note 22 at 200.

⁹¹ Cameron op cit note 26 at 254; *UDM* supra note 44 para 40 provides examples of how the other branches hold one another accountable.

⁹² Cameron op cit note 26 at 254.

⁹³ Constitution supra note 6 at s177.

of gross misconduct.⁹⁴ Thereafter, the National Assembly must call for the removal of that judge, through a vote which must be supported by 2/3 of its members.⁹⁵ The JSC can also request that the President suspend a judge who will be subject to the removal procedure.⁹⁶

Before 2008, the JSC Act largely focused on the appointments of judges and provided little in the way of holding judges accountable.⁹⁷ Legislative intervention in 2008 created a framework for judicial accountability which came in the form of the JSC Amendment Act.⁹⁸ The main achievement of the Amendment Act was to introduce a process to be followed for the removal of a judge when they meet the criteria set out in s 177(1)(a) of the Constitution. Judicial Conduct Committees were established under the Amendment Act⁹⁹ which are comprised of the Chief Justice who heads the committee, the Deputy Chief Justice and four other judges of whom two are to be women.¹⁰⁰ The purpose of this committee is “to receive, consider and deal with complaints” in terms of the conduct of Judges¹⁰¹ and should report to the JSC at a minimum of once every six months.¹⁰² Grounds that a complaint can be grounded on include those set out in s177(1)(a) of the constitution and a negligent breach of the Judicial Code of Conduct.¹⁰³ Complaints are disposed of in three primary ways;¹⁰⁴ lesser complaints can be dismissed,¹⁰⁵ appointment of a Tribunal can be recommended to the JSC for impeachable complaints,¹⁰⁶ and where the conduct is serious but not impeachable there is provision for an inquiry into the conduct.¹⁰⁷

If the JSC accept the recommendation of the JCC that the complaint be investigated further, a Judicial Conduct Tribunal (JCT) is appointed by the JSC. JCT’s have the all-important task of investigating these impeachable complaints. Tribunals are regulated under Chapter 3 of the Amendment Act and comprise of three members; two judges, one of which must be designated as the Tribunal President by the Chief Justice, and the third from a list of persons who are not judicial officers but have been approved by the Chief Justice.¹⁰⁸ The findings and

⁹⁴ Constitution supra note 6 at s177(1)(a); Corder op cit note 22 at 213.

⁹⁵ Ibid at s177(1)(b).

⁹⁶ Ibid at s177(3).

⁹⁷ Corder op cit note 22 at 213.

⁹⁸ Judicial Service Commission Amendment Act (JSCAA) 20 of 2008.

⁹⁹ Ibid at s8.

¹⁰⁰ Ibid at s8(1).

¹⁰¹ Ibid at s10(1).

¹⁰² Ibid at s10(2).

¹⁰³ Ibid at s14(4)(a) & (b).

¹⁰⁴ Corder op cit note 22 at 222.

¹⁰⁵ JSCAA supra note 98 at s15.

¹⁰⁶ Ibid at s16.

¹⁰⁷ Ibid at s17.

¹⁰⁸ Ibid at s22(1).

report of the Tribunal are regulated under s33 which includes the Tribunal submitting its findings and decision to the JSC for consideration. The JSC must then make a decision based on the information before it, including representations made by the complainant and respondent judge, whether the conduct in question is of such a grave nature that the judge should be impeached or not.¹⁰⁹ If the JSC decide that it is of such a serious nature that removal is called for, the matter will be sent to the Speaker of the National Assembly in terms of s20(4) where it will be voted on in line with s177(1)(b).¹¹⁰

Although it is welcomed to have clear steps to follow when holding judges accountable, the introduction of the amendments has introduced a process that in practice has proven to largely be ineffective. Seeing judges held accountable for inappropriate conduct is the most important mechanism upholding judicial accountability. The impact that the JSC have on this value through the accountability process is analysed in greater detail in Chapter 4.

2.4 Conclusion: Striking a balance: Relationship between judicial accountability and independence

In the discussion thus far, it is evident that both judicial independence and judicial accountability are vital for the legitimacy of the judiciary to be secured. These concepts have been described as “two sides of the same coin”.¹²⁴ This is because accountability ensures that the judges perform their job, while independence provides the protection from outside influences in performing this job.¹²⁵ In order to maintain homeostasis in regard to the legitimacy of the judiciary, it is essential that a very careful balance is struck between these concepts for the judicial system to be perceived as legitimate. In South Africa, the weak accountability process is a threat to judicial independence and needs to be strengthened in order for this balance to be protected.

In this chapter, I have explained the meaning of judicial independence and accountability. Two concepts that form the foundation upon which the legitimacy of the judiciary is secured and central to the rule of law being upheld. Both of which are implicated by processes of the JSC as discussed above. In the chapters that follow, each will be delved into in further detail to clearly identify the impact that the JSC has on each respective concept.

¹⁰⁹ Corder op cit note 22 at 222.

¹¹⁰ JSCAA supra note 98.

¹²⁴ Sandra Day O'Connor ‘Judicial accountability must safeguard, Not threaten, Judicial independence: an introduction’ (2008) *Denver University Law Review* 86 at 4.

¹²⁵ Ibid.

Chapter 3 will consider the impact that the JSC appointment process has on judicial independence and in turn, judicial legitimacy.

Chapter 3: A comparative analysis of judicial appointment processes: Is the South African system doing it best?

3.1 Introduction

The significance of judicial selection systems is highlighted as an essential element in most theories of judicial independence.¹²⁶ Judicial appointment processes come in all shapes and sizes, with the efficiency of the chosen process dictated by the prevailing social, economic and political climate of the country.¹²⁷ Thus there is ‘no one size fits all’ when it comes to what the best process is, rather there are certain types of mechanisms that may be better suited to countries that share similar characteristics. The general goal for the chosen process is to generate public confidence in the judicial selection system and as a result secure the legitimacy of the judiciary.¹²⁸ Public confidence is negatively impacted when political manipulation of the appointment process is observed, thus the chosen appointment process is only going to be independent to the extent that it is able to be free of political manipulation.¹²⁹

South Africa is one of many countries that employ a Judicial Service Commission to undertake the process of appointing judges. This Chapter looks at the appointment process that is currently employed in South Africa with special consideration of factors that have arguably weakened the process. It then considers three comparator jurisdictions where either completely different systems are employed, such as the collegium system in India, or different variations of the JSC model have been applied such as in Kenya and Zimbabwe. When looking at these comparative jurisdictions, the three main themes that are focused on are; what impact political actors have on the process, whether criteria are employed for decision-making, and the transparency of the process. The Chapter concludes by reflecting on where the South African process can be improved, and also where the South African process could be a benchmark for the improvement of other jurisdictions.

¹²⁶ Oagile Bethuel Key Dingake et al, ‘Appointment of judges and the threat to judicial independence: Case studies from Botswana, Swaziland, South Africa, and Kenya’ (2020) 44(3) *Southern Illinois University Law Journal* at 409.

¹²⁷ Gift Manyatera & Charles Manga Fombad ‘An assessment of the Judicial Service Commission in Zimbabwe’s new Constitution’ (2014) *CILSA* at 108.

¹²⁸ Njeri Thuku ‘A comparative Analysis of Judicial Councils in the Reform of Judicial Appointments between Kenya and England’ (2013) *Annual Survey of International and Comparative Law* 19 at 46.

¹²⁹ Maureen Shonge ‘An analysis of Judicial Selection and Appointments in Zimbabwe’ (2014) *Zimbabwe Lawyer for Human Rights* at 6.

3.2 The Judicial Appointment Process in South Africa

3.2.1 The Practicalities of the Appointment Process

The appointment process in South Africa is one of the important ways that a clear break can be seen from the judiciary that existed under the apartheid regime.¹³⁰ As explained in Chapter 1, judges were appointed in an executive-driven process which lacked both transparency and criteria.¹³¹ Under this system, judges were appointed through the tap-on-the-shoulder method sourced in systems that formed part of South Africa's colonial roots.¹³² The JSC is the constitutionally established organ that is mandated with the function of appointing judges (amongst other functions).¹³³ The JSC is comprised of stakeholders from all three branches of government, with the majority of members being politicians.¹³⁴

The JSC plays different roles in the appointment of different members of the judiciary, with the role that it plays being dictated by s174.¹³⁵ For the Chief Justice and Deputy Chief Justice of the Constitutional Court, the President is required to consult with the JSC and the leaders of the parties represented in the National Assembly.¹³⁶ For the appointment of the President and Deputy President of the Supreme Court of Appeal only the JSC needs to be consulted.¹³⁷ The executive then has less discretion over the appointment of other superior court judges, which is evidenced through the President having to choose from a list of nominees presented to them by the JSC for the appointment of the remaining Constitutional Court judges¹³⁸ and acting on the advice of the JSC for the remaining superior court positions.¹³⁹

The JSC has a more notable role in its appointment of the other judges of the Constitutional Court. Section 174(4) sets out that after the President has consulted with the Chief Justice and leaders of the parties represented in the National Assembly; the JSC is to prepare a list of nominees that contains three more names than the amount of seats being filled and to submit this list to the President. Public interviews of candidates by the JSC have been shown in practice to fulfill this consultation requirement.¹⁴¹ The President may make an appointment from this list but if he finds that any of the nominees are unacceptable and an

¹³⁰ Chris Oxtoby 'The Appointment of Judges: Reflections on the Performance of the South African Judicial Service Commission' (2021) 56(1) *Journal of Asian and African Studies* at 34.

¹³¹ *Ibid.*

¹³² *Ibid* at 35.

¹³³ Constitution *supra* note 6 at s178.

¹³⁴ Oxtoby *op cit* note 130 at 36.

¹³⁵ Solik *op cit* note 7 at 8.

¹³⁶ Constitution *supra* note 6 at s174(3).

¹³⁷ *Ibid* at s174(3).

¹³⁸ *Ibid* at s174(4).

¹³⁹ *Ibid* at s174(5).

¹⁴¹ Oxtoby *op cit* note 130 at 36.

appointment still needs to be made, this should be communicated to the JSC with reasons. The JSC must then supplement this list with further nominees and the President must make the outstanding appointments from this list that has been supplemented. Oxtoby holds that there has been no occasion where the President has rejected the original list provided by the JSC.¹⁴² For the appointment of all other judges, s174(6) requires the President to make appointments based on the ‘advice of’ the JSC. These recommendations are binding on the President as he is required to appoint the recommended candidates.¹⁴³ The JSC thus plays a pivotal role in the appointment process of judges, this position being more powerful in the appointment of superior court judges that do not act as heads of courts for the CC or SCA.

When the JSC is made aware of a vacancy on a court, they are required to publicly announce it and call for nominations by a specified date.¹⁴⁴ Once this date is reached and nominations close, a seven-person “sifting committee” creates a shortlist of the candidates that will undertake interviews with the JSC.¹⁴⁵ Before this committee meets, the JSC is given an opportunity to motivate candidates that they believe should be included in the interview shortlist.¹⁴⁶ The short-list is then published for comment from the public and the interviews are conducted in a manner that is open to the public and accessible on various media platforms.¹⁴⁷ Once the interviews have been conducted, the JSC deliberate in private and decide which candidates will be recommended via a majority vote taken by secret ballot.¹⁴⁸ The appointment process employed under the Constitution has gone leaps and bounds beyond its predecessors in cultivating public confidence in the judiciary, however, after being implemented in South Africa’s new democracy parts of the process brought areas that needed further improvements to light.

3.2.2 Factors that have weakened the Judicial Appointment Process

There are three main factors that have risked threatening the legitimacy of the judicial appointment process. All three impact on the process at different stages but are vital elements in the appointment process and in securing the legitimacy and independence of the judiciary.

¹⁴² Oxtoby op cit note 130 at 36.

¹⁴³ Ibid.

¹⁴⁴ Solik op cit note 7 at 9.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Judicial service Commission Act, 1994 (Act No.9 of 1994): Procedure of Commission, 2003.

3.2.2.1 *Inclusion of political actors*

One of the concerns about the appointment process relates to the risk of political interference borne by the fact that politicians are disproportionately represented in the JSC.¹⁴⁹ Out of the 23 members of the JSC, 15 of these members are from the executive and the legislature.¹⁵⁰ Having such a large proportion of politicians as members is abnormal when one looks at international standards and other African jurisdictions such as Kenya discussed below.¹⁵¹ Not only has it been seen to be abnormal, but it has been seen to be one of the most popular aspects of the JSC that is called to be amended. With several calls being made for fewer politicians in the JSC,¹⁵² one must ask which politicians are the ones that should be removed and what impact would this have on the legitimacy of the JSC and the judiciary as a result?

Out of 23 members (sometimes 25 when it is the appointment of a High Court judge)¹⁵³ of the JSC, eight are represented by legal professionals. There are at least 11 politicians, these are made up of the minister of justice, six members from the National Assembly (three from opposing parties) and four members from the National Council of Provinces. This results in eight of these members coming from the governing party. Added to this are four delegates selected by the president who are generally practicing lawyers.¹⁵⁴ With this clear majority of politicians, as well as the majority of commissioners stemming from the governing party specific reforms have been called for. FUL recommend, similarly to Dene Smuts from the DA,¹⁵⁵ that the number of members from the NA, NCOP and delegates selected by the president should all be reduced by two members.¹⁵⁶ The goal of this recommendation is to reduce the influence that the dominating political party (ANC) has on the appointment process.¹⁵⁷ However, this thesis argues that it is important that these members are included for the legitimacy of the JSC.

Two main reasons are recognized by Oxtoby and de Vos as to why politicians play an important role in the JSC. First, because they have proven to bring ‘depth of perspective’ to the

¹⁴⁹ Oxtoby op cit note 130 at 36.

¹⁵⁰ Constitution supra note 6 at s178.

¹⁵¹ Olivier & Hoexter op cit note 32 at 168.

¹⁵² Rebecca Davis ‘*To fix the Judicial Service Commission, should the number of politicians be watered down?*’ *Daily Maverick* (30 November 2022), available at <https://www.dailymaverick.co.za/article/2022-11-30-to-fix-the-judicial-service-commission-should-the-number-of-politicians-be-watered-down/>, accessed on 3 February 2024; Solik op cit note 7 at 31.

¹⁵³ Constitution supra note 6 at s178(1)(k)

¹⁵⁴ de Vos op cit note 8.

¹⁵⁵ Dene Smuts ‘*How the JSC should be de-politicised*’ *PoliticsWeb* 30 June 2013, available at <https://www.politicsweb.co.za/politics/how-the-jsc-should-be-depoliticised--dene-smuts> , accessed on 2 February 2024.

¹⁵⁶ Solik op cit note 7 at 31.

¹⁵⁷ Solik op cit note 7 at 32.

questioning of candidates that may be overlooked by judges or lawyers.¹⁵⁸ Questions about broad political orientation (not party-political views) and judicial philosophy are important in understanding how the candidate would apply the law when interpreting provisions that require more discretion on behalf of the judge.¹⁵⁹ This is an important contribution brought by politicians that can be forgotten by judges and lawyers that focus on technical legal skills and legal knowledge. In regard to questioning, politicians are rightly accused for introducing a problematic line of questioning that has descended into 'blatant political mudslinging'.¹⁶⁰ However all blame cannot be placed on politicians as Oxtoby notes that this line of questioning is equally followed by lawyers and judges.¹⁶¹

The second reason the role of politicians is important is based on the counter-majoritarian dilemma discussed in the previous Chapter. In acknowledging that the judiciary has extensive powers to invalidate legislation and decisions taken by elected branches of government, the inclusion of politicians enhances the democratic legitimacy of the judiciary.¹⁶² This minimizes the risk that the judiciary will be out of touch with the democratic point of view or pursue an agenda to undermine the elected branches of government.¹⁶³

Thus, in the spirit of enhancing and upholding the legitimacy of the judiciary, it is vital that politicians form part of the JSC. The fact that the majority of the politicians form part of the governing party speaks to the voices that the public elected to be heard and upholds democracy. However, that is not to deny that there are serious issues that have arisen with the conduct of JSC commissioners that should be addressed. Recommendations for improvements of the conduct will be discussed in Chapter 5.

3.2.2.2 *Lack of Criteria*

A component of commissioners successfully discharging their duty of appointing the best candidates is having clear direction of what criteria should be employed in reaching their decision.¹⁶⁴ The lack of set criteria being relied on by the JSC has been protested for several years by a variety of actors in the legal community.¹⁶⁵ This is because, if no criteria are being relied on it provides an opportunity for the appointment power to be abused. This will erode

¹⁵⁸ Oxtoby op cit note 130 at 43.

¹⁵⁹ de Vos op cit note 8.

¹⁶⁰ Solik op cit note 7 at 29.

¹⁶¹ Oxtoby op cit note 130 at 43.

¹⁶² Oxtoby op cit note 130 at 43; de Vos op cit note 8.

¹⁶³ de Vos *ibid*.

¹⁶⁴ de Vos op cit note 8.

¹⁶⁵ This has been called for by FUL; Judges Matter; Allison Tilley & Zikhona Ndebe 'Judicial appointments in South Africa' (2021) *Sciendo*; de Vos op cit note 8.

institutional autonomy, authority of the judiciary and the independence of judges.¹⁶⁶Section 174 of the Constitution sets out four distinct requirements that need to be met by candidates, these are that they: are appropriately qualified, a fit and proper person, and that the gender and racial composition of South Africa is reflected by the judiciary.¹⁶⁷ Additionally, for an appointment to the Constitutional Court the candidate needs to be a South African citizen.¹⁶⁸

The application of these requirements has not been a simple task as the Constitution and the JSC Act both fail to guide their application. A tension in the application of these sections has arisen due to the perceived trade-off one could make for a candidate that is less qualified but meets the transformative goals in s174(2).¹⁶⁹ With s174(1) explicitly calling for candidates to be appropriately qualified as its primary requirement, this tension intensifies when unqualified candidates are appointed instead of qualified candidates on the justification that the transformation requirement is being met.¹⁷⁰ When this occurs, both the rule of law and judicial independence are endangered as it is vital that the candidates that are selected can effectively administer justice.¹⁷¹

At the time when the country's first democratic elections were held in 1994, besides one white female and three black males, the judiciary was comprised only of white men.¹⁷² Since then, it would seem that the JSC has taken its mandate under s174(2) very seriously with empirical data showing that 8% of appointments are white which is the same as the demographic of white people living in the country.¹⁷³ Although it is positive that the JSC take their transformation mandate seriously, it is held by Chris Oxtoby that the JSC is seemingly guilty of clouding their decisions regarding suitable employment on the basis of race and gender requirements with little examination of whether the individuals act in accordance with the values of the constitution and apply them in their professional careers.¹⁷⁴ In regard to gender, research shows that there is a much higher percentage of woman that are being appointed than before, with 50% of women that are interviewed being appointed in comparison

¹⁶⁶ Shonge op cit note 129 at 13.

¹⁶⁷ Constitution supra note 6 at s174(1) & (2)

¹⁶⁸ Ibid at s174(1)

¹⁶⁹ Solik op cit note 7 at 21.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Oxtoby op cit note 30 at 40.

¹⁷³ Tilley & Ndlebe op cit note 165 at 473.

¹⁷⁴ Oxtoby op cit note 30 at 40.

to only 35% of men.¹⁷⁵ However, there are still a larger number of men being shortlisted for interviews than women, with men making up 58% of the candidates.¹⁷⁶

Supplementary criteria were employed to go beyond the minimum requirements that have been set out in the Constitution, which placed importance on: integrity, competence, ambition, experience, the candidate's potential and the symbolism the appointment would hold.¹⁷⁷ Although created in 2010, these criteria were dusted off and applied in the April 2022 JSC interviews.¹⁷⁸ These criteria were critiqued for being too vague, and not translating to the modern advancements in the judiciary and JSC itself.¹⁷⁹ After Judges Matter suggested to Dali Mpofu, a JSC member at the time, that a set of criteria are required that seek to employ a minimum standard for interviews, he expressed the view that a set of criteria would be too restrictive when each individual candidate is being considered.¹⁸⁰ What is argued by Judges Matter, correctly in my opinion, is that the desired minimum criteria should be applied flexibly and would not equate to a standard of set questions.¹⁸¹ The implementation of criteria would positively impact many different aspects of the appointment process. One of these being the questions that are raised by commissioners, which sometimes happen to be both inappropriate as well as some that are promoting specific political agendas.¹⁸²

After many years of calls, a set of JSC criteria were finally published in May 2023.¹⁸³ The guidelines speak to each constitutional requirement and expand on what should be considered in relation to each in sufficient detail. Importantly, independence of the candidate is also set as a criteria to be considered which is set to identify candidates that will enhance judicial independence. These criteria have been seen to have a positive impact on the interviews that have taken place since their introduction because of the structure that has been introduced as

¹⁷⁵ Tilley & Ndlebe op cit note 165

¹⁷⁶ Tilley & Ndlebe op cit note 165

¹⁷⁷ Summary of the Criteria used by the judicial service commission when considering candidates for judicial appointments.

¹⁷⁸ Judges Matter '*JSC Articulates criteria to be used in April 2022 session of interviews*' available at <https://www.judgesmatter.co.za/opinions/jsc-articulates-criteria-to-be-used-in-april-2022-session-of-interviews/>, accessed on 20 May 2022.

¹⁷⁹ Ibid.

¹⁸⁰ Judges Matter '*The need for a set of clear criteria to ensure a minimum standard*' available at <https://www.judgesmatter.co.za/opinions/clear-criteria-minimum-standard/>, accessed on 15 April 2022.

¹⁸¹ Ibid.

¹⁸² Oxtoby op cit note 30 at 42.

¹⁸³ Summary and Explanation of the criteria and guidelines used by the judicial service commission when considering candidates for judicial appointments.

well as the regulating of questioning by commissioners.¹⁸⁴ In the April 2023 interviews it was observed by Judges Matter that these interviews were the most “robust and rigorous” that had been witnessed in several years because of the focus on candidates’ legal skills, knowledge and judicial philosophy.¹⁸⁵ The introduction of these criteria are a vitally important step towards a strengthened appointment process that infuses legitimacy into the judiciary.

3.2.2.3 *Lack of transparency*

Transparency is secured in the appointment process through the shortlisted candidates being published, the interviews being held publicly and the candidates that are appointed being published. With the JSC being an organ of state as contemplated in s 239(b) of the Constitution, it is bound to the values of transparency and accountability found in s 195(1)(f) and (g).¹⁸⁶ The SCA confirmed in the *JSC v Cape Bar* case that, due to the JSC’s obligation to act both rationally and transparently, as a matter of general principle they are obliged to give reasons both when recommending and not recommending a candidate.¹⁸⁷ A similar issue was also raised in the *Helen Suzman Foundation* case where they sought the record of the private deliberations of the JSC after interviewing candidates in 2012.¹⁸⁸ For the majority, Madlanga was of the view that it is vital for the JSC to be open and transparent in order for confidence to be fostered in the judiciary.¹⁸⁹ Further, he held that due to the nature of the interviews being as grueling as they are, disclosure of their private deliberations is unlikely to be the reason candidates will be put off trying.¹⁹⁰ Commissioners are also expected to not be characterized by a quality that disclosure of deliberations would discourage them from robust debate.¹⁹¹ With this reasoning in mind, it was ordered by the majority that the full recording of the JSC proceedings be delivered to the Helen Suzman Foundation.¹⁹²

¹⁸⁴ Vuyani Ndzishe & Mbekezeli Benjamin ‘*Analysis: The JSC’s new criteria and the prospect for the success of its reform agenda*’ available at <https://www.judgesmatter.co.za/opinions/analysis-the-jscs-new-criteria-and-the-prospects-for-the-success-of-its-reform-agenda/>, accessed on 5 February 2024.

¹⁸⁵ Mbekezeli Benjamin ‘*Review of the JSC October 2023*’ available at <https://www.judgesmatter.co.za/opinions/preview-of-the-jsc-october-2023/#:~:text=At%20its%20April%20sitting%20this,court%20practice%2C%20integrity%20and%20diligence>, accessed on 11 February 2024.

¹⁸⁶ Constitution supra note 6.

¹⁸⁷ *The Judicial Service Commission v The Cape Bar Council* 2012 115 (SCA) at para 51.

¹⁸⁸ *Helen Suzman Foundation v Judicial Service Commission* 2018 (8) (CC) at 1.

¹⁸⁹ Ibid para 33.

¹⁹⁰ Ibid para 40.

¹⁹¹ Ibid para 38.

¹⁹² Ibid para 81.

Transparency is important as it is vital to generate public confidence and distinguishes the current constitutional era from that which came before it which was shrouded in secrecy.¹⁹³ There is a persisting issue where seats are being left open and appropriate candidates that satisfy the criteria are being overlooked. This occurred in the most recent interviews that took place in October 2023 where two seats on the bench of the SCA were left open.¹⁹⁴ In response to questioning this decision of the JSC, vague reasoning was given which provided little clarity on the matter.¹⁹⁵ The JSC is rationally able to not appoint any candidates if they believe that there are no suitable candidates, but when these candidates do exist and the vacancies are left open, the judiciary and the administration of justice are negatively impacted by being understaffed. With these issues in mind, a study of comparative appointment processes will now be looked at.

3.3 Comparative analysis

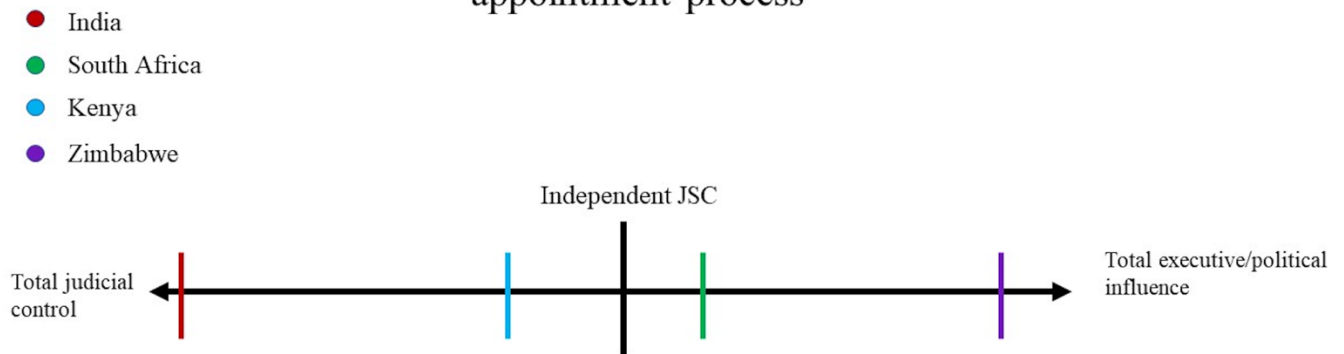
India, Kenya and Zimbabwe are all considered in relation to the three key themes discussed under the South African process in order to determine whether these jurisdictions are able to guide the South African process on how it can be improved. All four of these countries have gained independence in the last hundred years and have strived to improve the legitimacy of their judiciaries by moving away from the executive-centric processes that were originally in place and moving towards being constitutional democracies. As can be seen on the continuum below, despite this underlying similarity, the reality in each jurisdiction has had markedly different results.

¹⁹³ *Helen Suzman* op cit note 188 para 65.

¹⁹⁴ Rebecca Davis 'Judicial Service Commission fills just half of Supreme Court of Appeals posts – but why?' Daily Maverick 4 October 2023, available at <https://www.dailymaverick.co.za/article/2023-10-04-judicial-service-commission-fills-just-half-of-supreme-court-of-appeal-posts-but-why/>, accessed on 10 November 2023.

¹⁹⁵ Media statement by CASAC on 8 November 2023, available at <http://casac.org.za/campaign/judicial-service-commission/> accessed on 17 December 2023.

Degree of influence in the appointment process



3.3.1 India

As depicted on the continuum above, it is clear that the judiciary have complete control over the appointment process in India. It is significant for an appointment process to find itself in such an extreme position, thus the process of how it was established should be looked at. The Constitution sets out the appointment of judges as an executive function which is exercised through consultation with the judiciary.¹⁹⁶ After the introduction of the Constitution a healthy relationship existed between the three branches of government for the first twenty-three years.¹⁹⁷ In this time, a trend that the most senior Judge of the Supreme Court will be appointed as the next Chief Justice of India was established.¹⁹⁸ The period that followed saw an increasing tension between the judiciary and the government. This was due to the overreaching influence the government had on judicial appointments, it was observed that judges that decided in favour of the government would be promoted while those that didn't would not progress in the same way.¹⁹⁹ This tension started when Justice Ray was selected as Chief Justice and superseded three senior Supreme Court judges, breaching the seniority practice in place.²⁰⁰ On the retirement of Chief Justice Ray this practice occurred again, when Justice Beg superseded Justice Khanna with the prior deciding in favor of the government in a case and the latter being the only dissenting judge in it.²⁰¹ These practices resulted in the politicization of the judiciary through the appointments being made.

¹⁹⁶ The Constitution of India, 1950 at art 124 & 217; Arghya Sengupta & Jay Vinayak Ojha 'Judicial Appointments in India: From Pillar to Post' (2020) *CCR* at 44.

¹⁹⁷ Ayushi Saxena & Sheetal Kattyan 'Judicial Independency via National Judicial Appointment Commission' (2015) *Indian Journal of Law and Public Policy* 2(1) at 68; Sengupta & Ojha *ibid* at 44.

¹⁹⁸ Ayushi Saxena & Sheetal Kattyan "Judicial Independency via National Judicial Appointment Commission" (2015) *Indian Journal of Law and Public Policy* 2(1) at 68.

¹⁹⁹ Sengupta & Ojha *op cit* note 196 at 49.

²⁰⁰ *Ibid* at 44 – 45.

²⁰¹ Sengupta & Ojha *op cit* note 196 at 49.

The judiciary at this point felt the need to insulate itself from executive influence in order to secure judicial independence.²⁰² The transformation into a completely judiciary-led process was established in the landmark judgments known as the *Three Judges Cases*.²⁰³ In the *First Judges Case*²⁰⁴ the court was questioned as to whether the ‘consultation’ the president had with the Chief Justice in the appointment process should mean ‘concurrence’ under Art 124 of the Indian Constitution.²⁰⁵ The Chief Justice in this case held that this is not what consultation meant, and that the Chief Justice’s opinion is not binding on the President when he makes these appointments, as the President exclusively exercises this power.²⁰⁶

However, this all changed in the *Second Judges Case*²⁰⁷ where the *First* was overturned and the collegium system that now governs the operations of the judiciary was established.²⁰⁸ This case held that ‘consultation’ in the context of Art 124 did in fact mean ‘concurrence’.²⁰⁹ It further explained that the Chief Justice’s opinion holds primacy over the appointment process and thus the Chief Justice’s recommendation is binding on the president.²¹⁰ The reason for this position is to prevent the intermingling of the judicial process with the other branches of government. Without the Chief Justice’s opinion holding primacy, it allows the opportunity of malpractice and unconstitutional acts to occur in accordance with the vested interests of the ruling government.²¹¹ The collegium system was a result of the appointment power being given to the Chief Justice, with two of the most senior members of the Supreme Court now needing to be consulted by the Chief Justice when making his recommendation.²¹² Further, this case

²⁰² Ibid at 49.

²⁰³ Yashaswani Parashar & Antiksha Chahar ‘Analysis on Judicial Appointments in India’ (2022) *International Journal of Law Management and Humanities* at 1904.

²⁰⁴ *S.P. Gupta v Union of India*, AIR 1982 SC 149.

²⁰⁵ Saxena & Kattyan op cit note 197 at 70;

Establishment and constitution of Supreme Court

- (1) There shall be a Supreme Court of India constituting a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges
- (2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years: Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India will always be consulted:
 - (a) A Judge may, by writing under his hand addressed to the President, resign his office;
 - (b) A Judge may be removed from his office in the manner provided in clause (4)

²⁰⁶ Akash Kumar ‘Appointment of Judges in Higher Judiciary – A Critical Review of the Constitutional Provisions’ (2019) 11 *Supremo Amicus* 25 at 26.

²⁰⁷ *Shubash Sharma v Union of India*, AIR 1991 SC 477.

²⁰⁸ Parashar & Chahar op cit note 203 at 1905.

²⁰⁹ Saxena & Kattyan op cit note 197 at 70.

²¹⁰ Sengupta & Ohja op cit note 196 at 51; Saxena & Kattyan op cit note 197 at 70.

²¹¹ Atul Pal ‘*The contest over the Collegium System in India*’, available at <https://blogs.lse.ac.uk/southasia/2023/06/05/the-contest-over-the-collegium-system-in-india/>, accessed on 7 January 2024

²¹² Saxena & Kattyan op cit note 197 at 71; Parashar & Chahar op cit note 203 at 1905.

once again enforced the seniority rule, that the senior most judges would be appointed as the Chief Justice of India.²¹³

The *Third Judges Case*²¹⁴ built on the *Second* and fleshed out what the collegium system entailed. The court explained that the Chief Justice will consult four of the most senior judges of the Supreme Court, who, together with the Chief Justice will decide whose names will be recommended to the President.²¹⁵ Thereafter the President is bound to accept the recommendation of the collegium and appoint those that have been recommended. It further went on to set out that if both the Chief Justice and the other four members of the collegium only have one and a half years until retirement, then the next judge who will succeed the Chief Justice should also be a member of the collegium.²¹⁶ As regards to process, if two of the collegium disapprove of a nominee then that person cannot be recommended,²¹⁷ while if the Chief Justice did not agree with a recommendation they hold a veto power and thus the nominee is then also unable to be selected.²¹⁸ Finally, for appointments in the High Court, the Chief Justice along with two senior most judges of the Supreme Court will be in charge of making recommendations to the President for the appointment of High Court judges.²¹⁹

As a result of these landmark cases, the President is mostly ousted from the judicial appointment process by the collegium system.²²⁰ The appointment process under the collegium system has unfortunately not been successful in garnering legitimacy to the judiciary, as it is rife with nepotism and lacks transparency.²²¹ Merit is said to be the main consideration for appointment to the High Court, however the process is said to run informally, in the absence of criteria and with no records that are publicly available.²²² Recommendations have also allegedly been made on the basis of immaterial criteria such as caste, religion, office connections and political considerations.²²³

In 2014, the Indian Parliament attempted to change the appointment process by modifying the Constitution and approving a bill to establish the National Judicial Appointment

²¹³ Saxena & Kattyan *ibid*.

²¹⁴ *In Re Special Reference 1 of 1998*.

²¹⁵ Saxena & Kattyan *op cit* note 197 at 72.

²¹⁶ *Ibid*.

²¹⁷ Sengupta & Ojha *op cit* note 196 at 52; Parashar & Chahar *op cit* note 203 at 1906.

²¹⁸ Saxena & Kattyan *op cit* note 197 at 72; Sengupta & Ojha *op cit* note 196 at 52.

²¹⁹ Saxena & Kattyan *ibid* at 72.

²²⁰ *Ibid* at 73.

²²¹ Prannv Dhawan ‘Reform That You May Preserve’: Rethinking the Judicial Appointments Conundrum’ (2020) *Indian Journal of Constitutional Law* at 189.

²²² Sengupta & Ojha *op cit* note 196 at 52.

²²³ Dhawan *op cit* note 221 at 189.

Commission (NJAC).²²⁴ It was hoped that this would result in a process that is transparent, has specific criteria, specified members and more opportunity for accountability.²²⁵ With the membership made up of three members from the judiciary and three members made up of civil society and political leaders, it was hoped that greater accountability in the process would be established.²²⁶ These regulations were however held to be unconstitutional by the Supreme Court on the basis that they undermined the independence of the judiciary.²²⁷

Although the collegium system was established to increase the legitimacy of the judiciary by insulating it from the executive influence, it is now still experiencing a legitimacy crisis for the opposite reasons. It is said that now “nepotism is as prevalent under the judiciary as political favoritism was under the executive (prior 1993).”²²⁸ In comparison to the South African system, The Indian process shows that while it is important to insulate the judiciary from political interference, a process that excludes the representatives of the people and which has no clear criteria leads to other problems which negate legitimacy. In India it has seen to create an elite judicial class that is only accountable to itself.

3.3.2 Kenya

Similarly to India, Kenya finds itself having a strong judiciary led appointment process. However, the practicalities and composition of the Kenyan process reveal that it is more successful in promoting the legitimacy of the judiciary. Kenya’s first constitution after becoming a democracy was introduced in 1963 and is tokened as their ‘independence constitution’.²²⁹ Under this Constitution the powers of the President are said to have been very influential in the selection process of judges due to the lack of independence held by the judiciary as well as the composition of the JSC.²³⁰ All JSC members were either directly or indirectly appointed by the President and the process contained no clear guidelines or transparency.²³¹ As a result, the selection of judges and the judiciary was infiltrated with executive control, having a presidential contender remarking that the courts of Kenya formed

²²⁴ Parashar & Chahar op cit note 203 at 1907.

²²⁵ Dhawan op cit note 221 at 190.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Thuku op cit note 128 at 53; Kenya Independence Order in Council, 1963.

²³⁰ Thalia Gerzso “Here’s How a Constitutional Reform Empowers Kenyan Judges” available at <https://www.africanliberty.org/2023/11/01/heres-how-a-constitutional-reform-empowers-kenyan-judges/>, accessed on 1 November 2023.

²³¹ Thuku op cit note 128 at 69.

part of the Executive.²³² The basis of this comment related to the practice at the time where cases were decided by judges to advance and protect the executive, rather than on the basis of upholding the rule of law.²³³ It was at this time, in order to put an end to the unrest Kenya experienced because of the results of the 2007 elections, that there was an overhaul of the 1963 Constitution and an introduction of a new one.²³⁴

The political will at the time when the new Constitution was introduced was at the forefront of driving the implementation of changes to the judicial appointment system to be one where the judiciary was no longer submissive to the executive.²³⁵ The public perception of the judiciary was another driving factor in the reform process of the judiciary, as many believed that the judiciary at this time lacked legitimacy.²³⁶ With these issues in mind, the post-2010 JSC was established in Art 171 of the ‘new’ Constitution²³⁷ and is made up of twelve members. One of these members is Chief Registrar of the High Court who acts as a secretary to the JSC and is a non-voting member, five members are judges from the five different levels of courts, two advocates, and four members that collectively represent the public and the executive.²³⁸ The new appointment process and membership of the JSC hoped to inspire a new confidence in the judiciary that was starkly absent before.²³⁹ Thus, the appointment process is rigorous and prevents the appointment of judges that support the current political regime by the president.²⁴⁰ One channel that this is done through is the transparency of the process that is now employed: vacancies are now advertised on different media platforms which set out the constitutional requirements and the documents to be submitted, the list of those that have been shortlisted is advertised, members of the public are invited to comment on the candidates, interviews are held open and publicly as well as being aired on TV, and the list of successful candidates is made public.²⁴¹

The Judicial Service Act is vital to the operation of the JSC in relation to the appointment process.²⁴² In the First Schedule of the Act the whole appointment process is set out, importantly including a section setting out what criteria are relied on to evaluate the

²³² Ibid at 58.

²³³ Ibid 19 at 59 – 60.

²³⁴ Ibid at 58; Constitution of Kenya, 2010.

²³⁵ Thuku ibid at 60.

²³⁶ Ibid at 19 at 62, 70.

²³⁷ Kenyan Constitution supra note 234.

²³⁸ Ibid at Art 171(2) & (3).

²³⁹ Thuku op cit note 128 at 71.

²⁴⁰ Gerzso op cit note 230.

²⁴¹ Dingake op cit note 126 at 428; Thuku op cit note 128 at 73.

²⁴² Judicial Service Act, 2011.

qualifications of a candidate.²⁴³ These criteria should act as a guide for the decision process and fall under seven main headings; professional competence, written and oral communication skills, integrity, fairness, good judgment, legal and life experience, and demonstrable commitment to the public and community services.²⁴⁴ Section 166 of the Constitution establishes requirements that candidates must meet to be appointed as a judge to a superior court.²⁴⁵ Holding a law degree, being an advocate of the High Court or possessing a qualification in a common law jurisdiction akin to a law degree and advocacy, and possessing high moral character, integrity and impartiality are the two requirements that apply to all judges of the superior courts.²⁴⁶ Beyond this, the main difference between the requirement for different superior court positions is based on the length of experience held by the applicant.²⁴⁷

The appointment process is strengthened through the clear criteria set out above and the thorough procedure that goes into reviewing and investigating applications.²⁴⁸ A vetting process is carried out to determine that candidates meet the constitutional minimum requirements and comprehensively fact-checking the personal and professional background of each candidate.²⁴⁹ Once complete, the names of the applicants are publicized and the public is invited to share information they have on the applicants. Importantly, the members of the public who choose to share information are interviewed by the JSC.²⁵⁰ The public involvement in the appointment process of an unelected branch of government cannot be over-emphasized, the public are key stakeholders in the judiciary as their perception of the judiciary determines the legitimacy of the courts.

Despite having an appointment process in place that has been established with all the necessary elements to restore legitimacy in the judiciary, the then President Kenyatta of Kenya attempted to compromise the appointment process on several occasions.²⁵¹ This includes attempts to remove JSC members, remove powers of the JSC by giving the President discretion during appointments, and refusing to appoint candidates that have been recommended to him.²⁵² The President's role in the appointment process can be said to consist of rubber

²⁴³ Judicial Service Act, First Schedule, Rule 13.

²⁴⁴ Ibid.

²⁴⁵ Kenyan Constitution *supra* note 234 at Art 166.

²⁴⁶ Ibid at Art 166(2).

²⁴⁷ Naomi Gichuki 'Appointment and removal of judges and assignment of files at Civil Courts in Kenya – current issues' (2016) *KAS African Law Library* 3 at 314.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Dingake *op cit* note 126 at 429.

²⁵² Ibid.

stamping recommendations by the JSC rather than showing discretion in the appointments.²⁵³ This interpretation aligns with the wording of the Constitution which states that the President ‘shall’ appoint in ‘accordance’ with the JSC recommendations.²⁵⁴ This position was solidified in rounds of litigation concerning Kenyatta’s failure to appoint all but six candidates out of the forty recommended to him.²⁵⁵ The court confirmed that the President is bound by the recommendations of the JSC and failure to appoint persons recommended to the President will amount to a violation of the Constitution and the JSC Act.²⁵⁶ However, Kenyatta’s behaviour evidenced that he rather sought to bring about the return of pre-2010 appointment process practices where executive power strongly influenced judicial appointments.²⁵⁷

Kenyatta’s successor, William Ruto has been seen to follow in the footsteps of his predecessor. Tension between the judiciary and the executive persist with continued attacks on the judiciary.²⁵⁸ Most recently, this attack has taken the form of threats made against the judiciary by Ruto and fellow parliamentarians which accused the judiciary of being corrupt.²⁵⁹ Ruto also declared that he would not be abiding by the court orders which are delaying his public development projects, sending a message that seriously endangers the rule of law in Kenya.²⁶⁰ The Kenyan judiciary have continued to uphold the independence of the judiciary in the face of these threats designed to intimidate the courts into submission. With these cases being decided on the basis of the law instead of the need to appease the government, affirm the position that the courts are acting independently.²⁶¹ Thus, the judiciary has earned the confidence of the Kenyan people and has started restoring its legitimacy by protecting itself from political influence and through its decisions that uphold the Constitution and its values.²⁶²

²⁵³ Carmel Rickard ‘Judicial appointments’ problems spread like a virus’ available at <https://africanlii.org/articles/2021-06-11/carmel-rickard/judicial-appointments-problems-spread-like-a-virus> ,accessed on 10 November 2023.

²⁵⁴ Kenyan Constitution supra note 234 at Art 166.

²⁵⁵ Carmel Rickard “Judges refused appointment suffer ‘unlawful discrimination’ says Kenyan high court” *Africanlii* (5 August 2022), available at <https://africanlii.org/articles/2022-08-05/carmel-rickard/judges-refused-appointment-suffer-unlawful-discrimination-says-kenyan-high-court>.

²⁵⁶ *Benjamin v Chief Justice of the Republic of Kenya (CJ) & another; Judicial Service Commission (JSC) & 13 others (Interested Parties)* (Constitutional Petition E196 of 2021)[2022] KEHC 10072 (KLR) at 15.

²⁵⁷ Patrick Gathara ‘The judiciary and the long fight to defend Kenya’s judiciary’ available at <https://www.aljazeera.com/opinions/2021/6/12/the-kenyans>, accessed on 23 November 2023.

²⁵⁸ Carmel Rickard ‘Tensions high in Kenya as President attacks judiciary’ available at <https://africanlii.org/articles/2024-01-11/carmel-rickard/tensions-high-in-kenya-as-president-attacks-judiciary> , accessed on 2 February 2024.

²⁵⁹ Ibid; Vivianne Wandera ‘Why is President Ruto in a row with Kenya’s judiciary? A simple guide’ Aljazeera 5 January 2024, available at <https://www.aljazeera.com/news/2024/1/5/why-is-president-ruto-in-a-row-with-kenyas-judiciary-a-simple-guide> , accessed on 2 February 2024.

²⁶⁰ Rickard op cit note 258.

²⁶¹ Basillioh Rukanga ‘How Kenya’s judges stood up to President William Ruto’ BBC 29 January 2024, available at <https://www.bbc.com/news/world-africa-68108822> , accessed on 2 February 2024.

²⁶² Gathara op cit note 257.

Kenya provides a good example of a balanced appointment process where the judiciary is involved in the appointment process, without completely insulating itself from the elected branches of government and the public like India has. The Kenyan process also illustrates that a good design can lead to an in-built counter balance that secures the JSC's accountability and the legitimacy of the JSC.

3.3.3 Zimbabwe

In comparison to Kenya, Zimbabwe finds itself on the other half of the continuum towards executive influence even though Zimbabwe's most recent Constitution goes to great lengths in securing judicial independence.²⁶³ Both institutional as well as individual independence of the judiciary are addressed, with s164 setting out the expected institutional independence of the Zimbabwean judiciary, while s165 provides guiding principles for how judges should exercise their judicial authority.²⁶⁴ This position shows a break from its predecessor, the Lancaster House Constitution, which was in place from the beginning of Zimbabwe's independence.²⁶⁵ Under this constitution the method of appointing judges was vested in the Executive and consisted of the "tap-on-the-shoulder" method which was passed on from their British predecessors.²⁶⁶ This process involved the President selecting judges to head all of the superior courts after consulting the JSC, and besides informing parliament when he was making a decision inconsistent with the recommendations by the JSC, his powers were unfettered.²⁶⁷ This appointment process was the antithesis of transparent as it didn't involve any interviews or announcement of vacancies - it was simply the President making appointments based on party political views.²⁶⁸

Similarly to the 2010 Constitution introduced in Kenya, the 2013 Zimbabwean Constitution was designed to break away from this history and bring hope by introducing a new era for the Zimbabwean judiciary.²⁶⁹ The Judicial Service Commission is established in s189 of the Constitution.²⁷⁰ With the members of the JSC including judges, lawyers and others

²⁶³ Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

²⁶⁴ Ibid.

²⁶⁵ Manyatera & Fombad op cit note 127 at 98.

²⁶⁶ Shonge op cit note 129 at 3; Justice L Malaba "The merit-based system for judicial appointment" Presentation at SACJF Conference and AGM on 26 – 30 October at 3.

²⁶⁷ Shonge ibid at 3.

²⁶⁸ Shonge op cit note 129 at 3; Manyatera & Fombad op cit note 127 at 90.

²⁶⁹ Manyatera & Fombad op cit note 127 at 90.

²⁷⁰ Zimbabwean Constitution supra note 263. The JSC consist of the Chief Justice, Deputy Chief Justice, Judge President of the High Court, one judge nominated by the Judges of the superior courts, Attorney-General, Chief Magistrate, chairperson of the Civil Service Commission, three practicing legal practitioners designated by the association, one professor or senior lecturer of law, a person who has acted as an accountant or auditor in

chosen based on their profession, the Constitution sought to strike a balance where the commission would be free of too much executive influence but also not have the majority of its members being made up of the judiciary.²⁷¹ The independence of the commission is based on its members being free of purely political influences so that the judicial appointments that are made enhance judicial independence of the judiciary as a whole.²⁷² Different positions have been taken in relation to how extensive the executive's influence is over the appointment of JSC members. Manyatera, in his most recent article on the Zimbabwean judiciary noted that the JSC is insulated from political influence with the President only making one direct appointment and two indirectly.²⁷³ This can be seen as overly optimistic of the insulation the JSC experiences from political influence. Shonge, and Manyatera in an earlier article, note that seven of the thirteen members of the JSC are selected either directly or indirectly by the executive.²⁷⁴ Although JSC members are supposed to conduct their duties in a "just, fair and transparent manner"²⁷⁵, with the executive influencing the appointment of the majority of the JSC members it creates the possibility of the executive influencing the members who owe their appointments to him.²⁷⁶

When looking at the JSC process of appointing judges, one must start by looking at the criteria that are relied on when they make their decisions. The Constitution provides different qualifications that need to be met for the different superior courts in section 177 to 179.²⁷⁷ The overlapping requirements for the Constitutional Court, Supreme Court and the High Court are; the person is at least forty years old, a Zimbabwean citizen (for High Court you would need to have at least practiced in Zimbabwe), and be a 'fit and proper person'.²⁷⁸ The main difference that comes up is the threshold on professional experience and the Constitutional Court requirement of 'sound knowledge' in constitutional law.²⁷⁹ Other than the criteria listed above, Shonge notes that there are no clear criteria that have been set for the JSC appointment process.²⁸⁰ In a presentation by Chief Justice Malaba, he held that the Lilongwe Principles are

Zimbabwe for at least 7 years, one person with experience in Human Resource Management appointed by the President.

²⁷¹ Manyatera & Fombad op cit note 127 at 104.

²⁷² Ibid; Shonge op cit note 129 at 6.

²⁷³ Gift Manyatera, 'The Judicial Selection Mechanisms for Superior Court and Specialised Tribunals' (2022) *The Judiciary and the Zimbabwean Constitution* at 107.

²⁷⁴ Shonge op cit note 129 at 7; Manyatera & Fombad op cit note 127 at 104.

²⁷⁵ Zimbabwean Constitution supra note 263 at s191.

²⁷⁶ Manyatera & Fombad op cit note 127 at 105.

²⁷⁷ Zimbabwean Constitution supra note 263.

²⁷⁸ Manyatera op cit note 273 at 108 – 111.

²⁷⁹ Ibid at 111.

²⁸⁰ Shonge op cit note 129 at 13.

followed in the merit based selection system in Zimbabwe.²⁸¹ This includes reliance on the qualification requirements, other broad considerations from the 2013 Judicial Service Code of Ethics²⁸², and a set of standard questions put to each candidate.²⁸³ However, the questions asked in the 2014 interviews have shown that they still in need of development as basic procedural questions were not asked to every candidate and questioning was not always relevant to the selection criteria.²⁸⁴

There have been two amendments which threaten the process set out above by attempting to undermine judicial independence. Before discussing these Amendments the political context in which it finds itself must be explained. Zimbabwe is governed under an autocratic regime which failed to transition and mirror the democratic constitution introduced in 2013.²⁸⁵ Even though the judiciary has its independence secured in the Constitution, in reality the courts have proven to not be independent when the law is enforced against the interests of the ruling party and the government.²⁸⁶ This is evident in the several instances explained by Mavedzenge where the courts decisions fail to enforce the Constitution and rather make orders that avoid political risks for the ruling party and government.²⁸⁷ Interferences with the judiciary have intensified under the leadership of President Mnangagwa who attained his position through a military coup in late 2017.²⁸⁸ Under the current system in Zimbabwe the judiciary is considered to be captured by the Executive with erosion of judicial independence being the main aim of the political branches of government.²⁸⁹

Three main avenues have been taken by the political branches to undermine judicial independence: making threats against the judiciary, constitutional amendments which expand executive control over the appointment process, and creating a system steeped in patronage.²⁹⁰ Most relevant to the discussion of appointments is the impact that the two Amendments have on judicial independence. In events leading up to the first amendment the court had granted an

²⁸¹ Malaba presentation op cit note 266 at 2. The Lilongwe Principles were created to promote independence of judiciaries by providing guidelines for the selection and appointment processes.

²⁸² Ibid at 6.

²⁸³ Ibid at 9.

²⁸⁴ Shonge op cit note 129 at 28.

²⁸⁵ Justice Mavedzenge 'The Zimbabwean Constitutional Court as a key site of struggle for human rights protection: A critical assessment of its human rights jurisprudence during its first six years' (2020) *20 African Human Rights Law Journal* at 183.

²⁸⁶ Ibid at 184 & 205.

²⁸⁷ Ibid at 185 – 198.

²⁸⁸ Simbarashe Tembo & Annie Singh 'Mutilation of the independence of the judiciary: Threats, intimidation and Constitutional Amendments in Zimbabwe' (2023) *Obiter* at 554.

²⁸⁹ Tembo & Sing op cit note 288 at 555, 549.

²⁹⁰ Ibid at 549.

interdict against public interviews taking place for the appointment of a new Chief Justice.²⁹¹ This decision to remove transparency from the selection process of the head of the judiciary negated judicial independence, separation of powers and the supremacy of the Constitution.²⁹² On this backdrop, the first amendment gave the President discretion to appoint the Chief Justice, Deputy Chief Justice and Judge President of the High Court after consultation with the JSC.²⁹³ This position is similar to that found in the South African Constitution and the 1980 Lancaster House Constitution, with the main differences with South Africa being that in Zimbabwe the senate is only notified when the JSC recommendations aren't followed and that this appointment power extends to the Judge President of the High Court as well.²⁹⁴ The first Amendment and the request to perform the interviews in private all took place as part of a political ploy for power within the ruling party and resulted in the authority and status of the Chief Justice position being diminished.²⁹⁵

The Independence of the judiciary was once again attacked through the second constitutional amendment. Constitutional Amendment No 2 impacts on the independence of judges under s186 as it provides a mechanism for the President to extend the tenure of judges in the Constitutional Court and the Supreme Court by 5 years.²⁹⁶ This amendment was introduced with the intention of extending the tenure of Chief Justice Malaba who was set to retire in May 2021 as he was about to turn 70.²⁹⁷ An urgent application was brought the night before his birthday which requested a declaratory order that his term as Chief Justice was over and that the amendment could not benefit him in line with s328(7).²⁹⁸ The court explained that public confidence in the independence of the judiciary would be negated if it was perceived that judges could campaign to have their tenures extended.²⁹⁹ With reliance on substantive reasoning, the court found that the amendment was not applicable to Chief Justice Malaba as the benefit of the amendment cannot benefit persons who occupied the office when the amendment was made. Thus, he ceased to hold his position upon his 70th birthday.³⁰⁰

²⁹¹ Ibid at 556-557.

²⁹² Ibid at 557.

²⁹³ Zimbabwean Constitution supra note 263.

²⁹⁴ Ibid at s180 (3) and South African Constitution supra note 6 at s174(3).

²⁹⁵ Tembo & Singh op cit note 288 at 557.

²⁹⁶ Constitution of Zimbabwe Amendment (No. 2), 2021.

²⁹⁷ Tembo & Singh op cit note 288 at 559.

²⁹⁸ Tembo & Singh op cit note 288 at 559; *Kika v Minister of Justice Legal & Parliamentary Affairs* (HC 264-2021, HC 2128/21) [2021] ZWHC 264; Zimbabwean Constitution supra note 263 at s328(7) "Notwithstanding any other provision of this section, an amendment to a term-limit provision, the effect of which is to extend the length of time that a person may hold or occupy any public office, does not apply in relation to any person who held or occupied that office, or an equivalent office, at any time before the amendment."

²⁹⁹ *Kika* supra note 298 at 20.

³⁰⁰ Ibid at 24.

By enshrining the executive with the powers introduced by the amendments it creates a situation where judges can be influenced by the executive to have their tenure extended.³⁰¹ It is clear that the political context that the judiciary finds itself in Zimbabwe is not conducive to establishing an independent judiciary. Evidently the President has tactically targeted the appointment process as he holds the power to appoint the three heads of court that are members of the JSC, and also has the option to extend the tenure of two of these members. In light of this, the fact that the President is able to nominate candidates for appointment without these candidates being made public knowledge further diminishes the legitimacy of the appointment process.

The Zimbabwean appointment process highlights how the political context a judiciary is in impacts on its independence. Even though it has been alleged that the Zimbabwean process is modelled on the South African final Constitution³⁰², the Zimbabwean example illustrates how important it is that the political regime mirrors the legal regime being implemented. On this basis it is evident how the South African process secures judicial independence more effectively through the judicial appointment processes in place.

3.4 Conclusion

What can be seen from the different approaches taken is that there is a possibility for different systems to be corrupted, however a good design provides a shield that can secure a balance between the accountability and legitimacy of the JSC. Even though each of these systems started at a point where the appointment processes were governed by executive control there have been dramatically different outcomes after the introduction of the most recent Constitution's in each country. As seen by Zimbabwe, democratic constitutions are not always complemented the democratisation of politics, this resulted in serious undermining of the independence of the appointment process and the judiciary.³⁰³ The political context is thus an incredibly important factor when the appointment process is being designed. Kenya is a good example of this, with their design protecting them from the attempted overreach of their President.

Further lessons to be learnt from the Kenyan process is the extensive engagement with the public and civil society in the appointment process. Engagement does already exist in the

³⁰¹ Rickard op cit note 253.

³⁰² David Hofisi 'The Constitutional Courts of South Africa and Zimbabwe: A contextual analysis' (2021) (35) *Spec Juris* 55 at 69; Manyatera op cit note 273 at 103.

³⁰³ Mavedzenge op cit note 285 at 183.

South African system, however a less extensive process is followed which could bring more legitimacy to the process and better vetting of candidates. The Indian system provides a clear warning of what is possible if the judiciary have no checks and balances with the other branches of government. It evidences the danger of the judiciary being too independent and self-regulating with little accountability, this is not desirable either. I agree with Thuku that “On balance, judicial commissions appear to be the most effective tool at creating diversity on the bench, reducing political influence on selection, and instilling confidence from the public about the independence of the judiciary.”³⁰⁴ There is still room for further improvement of the South African appointment process, however the comparative analysis provides hopeful feedback that the South African JSC and process is doing something right in advancing the legitimacy of the judiciary. Areas where improvements can be made follow in the Chapter 5 recommendations after the conduct process has been analyzed.

³⁰⁴ Thuku op cit note 128 at 88.

Chapter 4: Judicial Accountability: An Issue of the “pot calling the kettle black”?

4.1 Introduction

The process through which we hold judges accountable is outlined in s177 of the Constitution. This section is the bedrock of judicial accountability in South Africa and starts with the JSC making a finding that the judge in question “suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct;”.³⁰⁵ The JSC are thus placed at the heart of the process in charge of removing judges from office.³⁰⁶ When the JSC decides on complaints they sit without members of parliament and are referenced as the ‘small’ JSC.³⁰⁷ This is a vitally important role played by the JSC as their failure to properly regulate judicial misconduct directly harms the legitimacy of the judiciary.³⁰⁸

Thus far, the thesis has made clear that there is an intrinsically important link between judicial independence and judicial accountability for the legitimacy of the judiciary. In the preamble of the Judicial Code of Conduct, this relationship is captured in the following quote which states that the JSC Act:

“seeks to maintain and promote the independence of the office of judge and judiciary as a whole, while at the same time acknowledging that it is necessary to create an appropriate and effective balance between protecting the independence and dignity of the judiciary when considering complaints about, and the possible removal from office of, judges as defined in section 7(1)(g) of the Act, and the overriding principles of openness, transparency and accountability that permeate the Constitution and that are equally applicable to judicial institutions and officers;”.³⁰⁹

This quote depicts two main things: the importance of the balance to be struck between judicial independence and judicial accountability, as well as the inherent importance of judicial accountability in securing the legitimacy of the judiciary. The possibility of removal is an important accountability mechanism essential to judicial independence.³¹⁰ However, if judges

³⁰⁵ Constitution supra note 6 at s177.

³⁰⁶ Judges Matter “Conduct” available at <https://www.judgesmatter.co.za/conduct/#:~:text=Complaints%20against%20judges,be%20submitted%20to%20the%20JSC>, accessed on 5 October 2023.

³⁰⁷ February et al op cit note 12.

³⁰⁸ Hugh Corder & Calli Solik ‘Judge and be judged: judicial discipline in South Africa’ in Richard Devlin & Sheila Wildeman *Disciplining Judges: Contemporary Challenges and Controversies* Edward Elgar Publishing (2021) at 320; February et al op cit note 12.

³⁰⁹ General Notice R865 in GG 35802 of 18 October 2012. The Code is available at www.justice.gov.za accessed 2 December 2023.

³¹⁰ February et al op cit note 12.

were able to be removed too easily, judicial independence would be endangered. Thus, a balance must be struck to allow for accountability while also securing independence.³¹¹

With chapter two having already introduced judicial accountability as well as the accountability process found in South Africa, this chapter aims to focus on judicial accountability through a narrower lens, that is, a case analysis of Judge President Hlophe. Before getting to the details of the Hlophe matter, the standard of judicial conduct that is expected of judicial officers is introduced. This is vital for this analysis as the Norms and Standards and the Code of Judicial Conduct set out the benchmark of what judicial behavior should look like and be assessed against.

When considering the timeline of events that occurred in the Hlophe matter, the irony that becomes clear is that the JSC who are supposed to be holding the judiciary accountable, need to actually be held accountable themselves. This is evidenced through the Hlophe matter, where we have witnessed FUL go to the courts to challenge the rationality of decisions that the JSC has reached. The timeline provides a foundation for the main issues with the process to be drawn out and discussed. These issues consist of the JSC accountability process itself, the impact of litigation, stalling by the JSC and their lack of political will to efficiently complete this process. What can be concluded is that the JSC negatively impact judicial legitimacy through this cumbersome accountability process, and reform is required to improve this position. Recommendations for this chapter will be discussed in the final chapter, which provides possible solutions that will ultimately benefit the legitimacy of the judiciary.

4.2 The Standard of Judicial Behaviour

As stated above, it is clear from looking at s177 of the Constitution that the JSC finds itself at the heart of the process of holding judges accountable in regard to how their judicial functions are performed.³¹² The Code of Judicial Conduct³¹³ and the Norms and Standards³¹⁴ were both initiated by the Chief Justice.³¹⁵ They were introduced to ensure that judges remain independent while also resolving disputes, upholding the law and dispensing justice in order to effectively complete their duties.³¹⁶ Judicial independence is a fundamental value and is discussed as a

³¹¹ Ibid.

³¹² Judges Matter op cit note 306.

³¹³ Code of Conduct op cit note 309.

³¹⁴ Norms and Standards for the Performance of Judicial Functions in GN 147 GG 37390 of 28 February 2014.

³¹⁵ Judges Matter op cit note 306.

³¹⁶ Judges Matter op cit note 306.

core value in the norms and standards³¹⁷ as well as a ground that informs the Code of Conduct.³¹⁸

As contemplated in section 12 of the JSC Act, a Code of Judicial Conduct was introduced in October 2012 by Chief Justice Mogoeng Mogoeng.³¹⁹ The code of conduct is the prevailing standard of judicial conduct that Judges should adhere to.³²⁰ The objective of this code is to provide judges with a detailed guide on the acceptable standards that their conduct should adhere to when they are either on or off the bench.³²¹ Thus, the code is wide in ambit as it applies to judges while they are acting in their official judicial roles, in their private lives, once they have retired (even though these terms are not as strict) and includes acting judges as well.³²² Most important in regard to the Code is that, if judges fail to adhere to the standard of conduct set out in the Code, it will amount to misconduct by that Judge.³²³

Furthermore, the duty to act honourably (art 5), transparently (art 8), promote equality (art 7), perform diligently (art 10), show restraint (art 11) and act in compliance with the law (art 6) comprise some of the central issues to judicial accountability that are covered in the Articles of the Code of Conduct. Most importantly, article 4 of the Code highlights the role that judges play in upholding judicial independence.³²⁴ This article is crucial in relation to the Hlophe matter that will be discussed below. This article requires that they maintain an independent mind when performing their duties (art 4(b)); take steps in order to prevent interference with the functioning of the courts (art 4(c)); and not to “ask for nor accept any special favour or dispensation from the executive or any interest group.” (art 4(d)).³²⁵ Performing duties free from outside/political influence is essential in securing judicial independence. The code crucially links a failure of upholding judicial independence through the performance of duties with judicial misconduct. The Code clearly sets out the high standard that is expected of Judges – whether it has successfully fostered a culture of strict compliance is a question that can only be speculatively answered by this thesis.

The second avenue aimed at ensuring a certain standard of behaviour on behalf of judges are the Norms and Standards for the Performance of Judicial Functions.³²⁶ The Norms

³¹⁷ Norms op cit note 314.

³¹⁸ Judges Matter op cit note 306.

³¹⁹ Code of Conduct op cit note 309; JSCAA op cit note 98 at s12.

³²⁰ Norms op cit note 314 preamble.

³²¹ Solik & Corder op cit note 308 at 320.

³²² Judges Matter op cit note 306. Code of Conduct op cit note 309 at Art 2 (1)(a).

³²³ Judges Matter *ibid*.

³²⁴ Code of Conduct op cit note 309 at Art 4.

³²⁵ *Ibid*.

³²⁶ Norms op cit note 314.

and Standards were introduced by the Chief Justice in 2014 in terms of s165(6) of the Constitution³²⁷ and s8 of the Superior Courts Act³²⁸, which allows for the monitoring of judges in all courts.³²⁹ The Chief Justice has the overall responsibility of managing judicial functions as well as overseeing that the norms and standards are implemented.³³⁰ The aim of the norms and standards revolves around improving the efficiency and effectiveness of access to quality justice for all in a swift process that guarantees the dignity of all users of the court system.³³¹ After setting out the objective, the rest of the directive is made up of the core values (s 3), management of judicial functions (s 4), the norms and standards (s 5) and monitoring and implementation (s 6).

The core values of the norms and standards reiterate the central issues that are covered in the Code of Conduct and comprise of: the independence of the judiciary, equality and fairness, accessibility, transparency, responsiveness and diligence.³³² The norms require Judicial officers to act in accordance with these core values and flesh out what is expected of each value and ensure that they are adhered to.³³³ The standards follow this trend by having the core values underpin them with a main focus on diligence, accessibility, effectiveness and efficiency. The focus is placed on sittings of the court and the efficient management of their cases to result in quality justice for all.³³⁴

The constitution protects the independence of the judiciary by requiring judges to act impartially, and without showing fear, favour or prejudice.³³⁵ In accordance with s165(3), the Code of Conduct and the Norms and Standards have been introduced to assist in ensuring independence, accessibility and effectiveness of the courts.³³⁶ Hand in hand with the

³²⁷ Constitution supra note 6 at 165(6): The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

³²⁸ Ibid at ss 8(2) & (3): (2) The Chief Justice, as the head of the judiciary as contemplated in section 165(6) of the Constitution, exercises responsibility over the establishment and monitoring of 40 norms and standards for the exercise of the judicial functions of all courts.

(3) The Chief Justice may, subject to subsection (5), issue written protocols or directives, or give guidance or advice, to judicial officers—

1. (a) in respect of norms and standards for the performance of the judicial functions as contemplated in subsection (6); and 45
2. (b) regarding any matter affecting the dignity, accessibility, effectiveness, efficiency or functioning of the courts.

³²⁹ Judges Matter op cit note 306.

³³⁰ Norms op cit note 314 at s4.

³³¹ Ibid at s2.

³³² Ibid at s3.

³³³ Ibid at s5.1.

³³⁴ Ibid at s5.2.

³³⁵ Constitution supra note 6 at s165(2).

³³⁶ Constitution supra note 6 at s165(3).

importance of the independence of judges and the role they play in administering justice, is ensuring they are held accountable as judicial officers. It has been set out how both the Code of Conduct and the Norms and Standards speak to the importance of judicial independence and accountability through the basis set out in the Constitution. Therefore, as could be expected, both avenues provide a high standard that is expected of judicial conduct.

It is vital that this standard is high as judges act as the gateway for citizens to access justice and have far-reaching powers when handing down judgments. Thus, in holding such an important position it is crucial that their behaviour aligns with the standards set in both the Code of Conduct and the Norms and Standards, and if they fail at doing so it is essential that they are held accountable for not meeting this standard. When considering recommendations from the JCT, the JSC has repeatedly failed to show an understanding of what the necessary minimum standard for judicial conduct is, this is evident in their decisions discussed below.³³⁷ The legitimacy of the judiciary depends on the public acceptance of its authority and will be put in jeopardy if it appears that they are not being held accountable to the judicial standard expected of them.³³⁸

4.3 Hlophe Matter

4.3.1 Timeline of the (protracted) Hlophe Matter

The Hlophe conduct matter is one that is well-known within the South African legal community. This is due to it being the first s177 impeachment case that has been dealt with in South Africa.³³⁹ In doing a case analysis of the events in this matter, it provides an opportunity for the problems with the accountability process to be highlighted and mapped out. In order to appropriately draw conclusions from the Hlophe matter about how it impacts judicial accountability, judicial independence and ultimately judicial legitimacy, the next section provides a timeline of events that will inform the critique of the accountability process.

2005 (Where it (kind of) began)

Judge President Hlophe's run-ins with judicial misconduct started in 2005 when a complaint was made alleging that he had been receiving monthly payments from the Oasis group of companies in exchange for giving the company permission to sue a Judge in his division.³⁴⁰

³³⁷ Solik op cit note 7 at 46.

³³⁸ February et al op cit note 12.

³³⁹ Corder op cit note 22 at 215.

³⁴⁰ Olivier & Hoexter op cit note 32 at 188.

Several complaints were made in relation to this scenario. The first was in relation to the receipt of these payments as it breaks the rule that judges should not receive any remuneration that goes beyond their salary.³⁴¹ Initially, JP Hlophe held that these payments were made for expenses he had incurred for his service as a chair of a trust for the company.³⁴² However, it was later confirmed by JP Hlophe that these payments took the form of a fee or retainer rather.³⁴³ The only exception to the rule regarding remuneration would be if the Minister of Justice gave the Judge permission to receive this remuneration.³⁴⁴ Judge President Hlophe claimed that he had permission from the Minister. Unfortunately, the Minister was now deceased and there was no evidence to support JP Hlophe's claim.³⁴⁵

The second complaint concerned him allowing the Oasis Group permission to sue Judge Desai for defamation.³⁴⁶ As part of protecting judicial independence under South African law, civil proceedings cannot be instituted against a Judge without the permission of the head of the court.³⁴⁷ In this case JP Hlophe allowed Judge Desai to be sued in return for remuneration. On top of these two complaints, other complaints were also made against JP Hlophe which included him making a racist insult towards a legal practitioner, and making remarks that belittled a fellow judge to counsel.³⁴⁸ In this same year, a report was sent to the Minister by Judge President Hlophe concerning racist practices that occurred within the legal community in the Cape.³⁴⁹

As a result, two JSC investigations were underway, one investigating the complaints against Hlophe, and the other concerning his report on racism.³⁵⁰ Those named by Judge President Hlophe in the report had largely refuted his claims and the matter was resolved by a recommendation of a dispute-resolution mechanism to deal with racial issues if they were to arise in the future.³⁵¹

2007

³⁴¹ At the time, this rule was found in section 11 of the Supreme Court Act 59 of 1959 and is now encapsulated in Art 15 of the Code of Judicial Conduct.

³⁴² Corder & Solik op cit note 308 at 321.

³⁴³ Olivier & Hoexter op cit note 32 at 189; Corder op cit note 22 at 215.

³⁴⁴ Corder & Solik op cit note 308 321.

³⁴⁵ Corder op cit note 22 at 215.

³⁴⁶ Olivier & Hoexter op cit note 32 at 189.

³⁴⁷ Superior Courts Act 10 of 2013 at s47(1).

³⁴⁸ Olivier & Hoexter op cit note 32 at 189.

³⁴⁹ Corder op cit note 22 at 215.

³⁵⁰ Olivier & Hoexter op cit note 32 at 189; Corder op cit note 22 at 215..

³⁵¹ Corder & Solik op cit note 308 at 321.

To the shock of the legal community, the JSC announced in October that it would not pursue an investigation into the complaints above.³⁵² The reasoning supporting this decision was explained by the JSC at a press conference held two weeks later. They explained that a finding of gross misconduct could not be arrived at without a formal hearing, and in order to have a formal hearing they would need prima facie evidence of gross misconduct. Following this, the majority of the JSC had decided that the available evidence did not amount to prima facie proof of gross misconduct and thus the investigation was not pursued.³⁵³ The JSC stated that three of its members that were judges would share their concerns regarding inappropriate judicial conduct with him – a gentle slap on the wrist for JP Hlophe.³⁵⁴

2008

It was in 2008 when the matter that is currently not concluded began. A complaint was lodged against Hlophe by the judges of the Constitutional Court at the end of May.³⁵⁵ They complained that through personal visits with Jafta AJ and Nkabinde J of the Constitutional Court, JP Hlophe had attempted to influence the outcome of a case concerning Jacob Zuma to be decided in Zuma's favour.³⁵⁶ Thus failing to abide by art 4 of the Code of Judicial Conduct which deals with the expected independence of a judge.³⁵⁷ JP Hlophe responded to this in June by filing a counter-complaint against the Constitutional Court Judges. He accused them of violating his constitutional rights of dignity, privacy, equality, procedural fairness, access to courts³⁵⁸ and reputation when they issued a press statement immediately after lodging the complaint without giving him an opportunity to respond.³⁵⁹ After starting their investigation with vigour³⁶⁰, the JSC found in July that there was a prima facie case to be dealt with in respect of both the complaint and counter-complaint and that it necessitated the hearing of oral evidence.³⁶¹

2009

Unbeknownst at the time, 2009 kickstarted the litigious nature of JP Hlophe's accountability process. While Hlophe's counter-complaint against the Constitutional Court Judges was

³⁵² Olivier & Hoexter op cit note 32 at 189.

³⁵³ Ibid.

³⁵⁴ Olivier & Hoexter op cit note 32 at 190.

³⁵⁵ Ibid.

³⁵⁶ Ibid.

³⁵⁷ Code of Conduct op cit note 309 at Art 4.

³⁵⁸ Solik op cit note 6 at 40.

³⁵⁹ Olivier & Hoexter op cit note 32 at 190.

³⁶⁰ Corder op cit note 22 at 216.

³⁶¹ Olivier & Hoexter op cit note 32 at 191.

pending before the JSC, he launched an urgent application in the South Gauteng High Court³⁶² for declaratory relief. A majority of 3 out of 5 judges held that his rights had been violated.³⁶³ However, this decision was reversed on the 31st of March when a full bench of the SCA delivered their decision on this matter.³⁶⁴

Following the JSC's decision in July 2008, they decided in March 2009 that the hearing of oral evidence should exclude the media and the public.³⁶⁵ This was successfully set aside in *eTV (Pty) Ltd v Judicial Service Commission* 2010 (1) SA 537 (GSJ) due to good cause not being shown as to why it should be held in private.³⁶⁶ The oral evidence was heard on the 7th and the 8th of April in JP Hlophe's absence as they had been postponed on his behalf and further postponements had been refused by the JSC.³⁶⁷ Unsurprisingly, these proceedings were challenged by JP Hlophe where the court found that his right to fair trial had been infringed.³⁶⁸ Along with this, the court ordered that these proceedings were to be instituted *de novo* on a date that both parties found suitable.³⁶⁹

It is vital to note that on the 9th of May 2009, Jacob Zuma was sworn in as the new President of South Africa. The President impacts the membership of the JSC as they have four delegates as well as a cabinet member that form part of the JSC.³⁷⁰ The JSC that was making decisions up until this point was composed of notably different members as Zuma replaced the four presidential delegates as well as the Minister of Justice.³⁷¹ Two of these delegates had ties to JP Hlophe, with one of them having to recuse themselves.³⁷²

Nonetheless, the JSC with its new members began the investigation afresh.³⁷³ A subcommittee was appointed to investigate the complaints, and once again the JSC attempted to do so behind closed doors.³⁷⁴ This decision was held to be unjustifiable when it was successfully challenged that the public and the media should be included.³⁷⁵ At last the JSC made a decision in August after considering the subcommittee's report, they decided with a majority of 6 out of 10 members that the complaints should be dismissed and the matter should

³⁶² *Hlophe v Constitutional Court of South Africa* [2009] 2 All SA 72 (GSJ).

³⁶³ Olivier & Hoexter at 190.

³⁶⁴ *Langa CJ v Hlophe* 2009 (4) SA 382 (SCA).

³⁶⁵ Olivier & Hoexter op cit note 32 at 191.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ *Hlophe v The Judicial Service Commission* [2009] 4 All SA 67 (GSJ).

³⁶⁹ Olivier & Hoexter op cit note 32 at 191.

³⁷⁰ Constitution supra note 6 at s178.

³⁷¹ Olivier & Hoexter op cit note 32 at 191; Corder op cit note 22 at 216.

³⁷² Olivier & Hoexter op cit note 32 at 191.

³⁷³ Olivier & Hoexter op cit note 32 at 191.

³⁷⁴ Ibid.

³⁷⁵ *Mail and Guardian Ltd v JSC* [2010] 1 All SA 148 (GSJ).

be finalised.³⁷⁶ The reasoning that supported this startling conclusion was that the conflicting evidence wouldn't and couldn't prove that he had tried to influence the Constitutional Court Judges, and that a formal inquiry with a cross-examination would be pointless.³⁷⁷

2010

The Western Cape Premier, Helen Zille, instituted litigation on a procedural basis that according to s178 of the Constitution the JSC was not properly constituted to make the decision above as the Premier should be included in "all matters relating to their High Court."³⁷⁸ This application was upheld on all grounds.³⁷⁹ The JSC decision to dismiss the complaints was challenged again by Freedom Under Law in the North Gauteng High Court later that year, however they were unsuccessful and the application was dismissed.³⁸⁰

Another pivotal event for judicial accountability that occurred in 2010 was the amendment to the JSC Act which came into force in June.³⁸¹ The aim of these amendments was to set out a statutory regime that dealt with complaints against judges.³⁸² The amendments established a JCC and JCT to handle complaints against judges as well as a process to be followed as discussed in Chapter 2.³⁸³

2011

Freedom Under Law did not give up so easily and on appeal to the SCA the decision of the High Court was reversed in March.³⁸⁴ The SCA dismissed the counter-complaint by JP Hlophe and found that the JSC was irrational to dismiss the complaint against him.³⁸⁵ One of these irrational steps was the standard of proof being applied, the SCA held that the High Court had inappropriately applied the criminal standard of 'beyond a reasonable doubt'.³⁸⁶

On the same day and in the same court Helen Zille's case was also on appeal.³⁸⁷ The argument made by Zille was that the decision to dismiss the complaint in August 2009 was not

³⁷⁶ Olivier & Hoexter op cit note 32 at 191.

³⁷⁷ Ibid.

³⁷⁸ Corder op cit note 22 at 217.

³⁷⁹ Ibid.

³⁸⁰ *Freedom Under Law v Acting Chairperson, Judicial Service Commission* (GNP) Case No 63513/09 of 10 December 2010.

³⁸¹ Solik op cit note 7 at 41.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ *Freedom Under Law v Acting Chairperson, Judicial Service Commission* 2011 (3) SA 549 (SCA).

³⁸⁵ Olivier & Hoexter op cit note 32 at 192.

³⁸⁶ Corder op cit note 22 at 218.

³⁸⁷ *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape Province* 2011 (3) SA 538 (SCA).

made by a majority of members entitled to be present as the JSC had failed to notify her.³⁸⁸ The court left the question of whether the JSC had been properly constituted open, but held that it was illogical for a Premier to be involved in an appointment and not the removal of a judge.³⁸⁹ This case was dismissed and the court held that the failure to include the Premier to participate caused the decision of August 2009 to be unlawful and was set aside on this basis.³⁹⁰

Predictably, in November JP Hlophe sought leave to appeal both SCA decisions to the Constitutional Court. The hearing at the Constitutional Court was postponed from September to December due to there being 3 recusals and a vacancy in the court and thus the matter being unable to be heard by a quorate of 8 judges.³⁹¹

2012

On the 29th of March the Constitutional Court dismissed the application based on several conflicts regarding the Justices hearing the matter and thus denied leave to appeal.³⁹² This decision comes as no surprise since Jafta and Nkabinde would have to recuse themselves, three others were involved in the laying of the complaint in question and two others were involved in mediation efforts between the parties.³⁹³ This meant that the SCA judgment stood and a properly constituted JSC was now tasked to properly and thoroughly reconsider the complaint against JP Hlophe.³⁹⁴

The JSC referred JP Hlophe's complaint to the JCC in April that year.³⁹⁵ After consideration, the JCC recommended that a JCT be established to investigate the complaint that October which had Judge Musi as its chair.³⁹⁶

2013

The Chief Justice announced in February of 2013 that a Judicial Conduct Tribunal had been established under the JSC Amendment Act to deal with this matter.³⁹⁷ In late September, the Tribunal set about its investigation. Before the Tribunal had the opportunity to examine the substance of the complaint, Judges Nkabinde and Jafta challenged a procedural point of the

³⁸⁸ Corder & Solik op cit note 308 at 323.

³⁸⁹ Olivier & Hoexter op cit note 32 at 193.

³⁹⁰ Corder op cit note 22 at 217.

³⁹¹ Olivier & Hoexter op cit note 32 at 193.

³⁹² Ibid at 192.

³⁹³ Ibid at 193.

³⁹⁴ Ibid at 194.

³⁹⁵ Slik op cit note 7 at 41.

³⁹⁶ Ibid.

³⁹⁷ Olivier & Hoexter op cit note 32 at 194.

process on the 1st of October.³⁹⁸ The jurisdiction of the Tribunal was challenged based on the fact that no formal complaint had been made in terms of the JSC Amendment Act. This challenge was dismissed by the Tribunal.³⁹⁹ The Justices pursued this matter by launching application proceedings in the High Court where they challenged the jurisdiction of the Tribunal and the constitutionality of this provision in the JSC Amendment Act.⁴⁰⁰

2014

In September of 2014 the High Court dismissed their case and refused leave to appeal to the SCA.⁴⁰¹ However, leave to appeal was granted by the SCA due to the importance of a finality in this case which impacts on the administration of justice.⁴⁰²

2016

Nkabinde and Jafta's case was heard in February and handed down in March of 2016 where the appeal was dismissed in a "most scathing manner".⁴⁰³ Taking into consideration the long history of this matter and the altered composition of the JSC, the court held that the matter should proceed by starting the inquiry in terms of the JSC Amendment Act.⁴⁰⁴

The events that followed this judgment are surprising when one remembers that these are the actions of two judges that sat on the bench for the highest court in South Africa to administer justice and further the country's constitutional democratic project. After unsuccessfully appealing the SCA decision to an incapacitated Constitutional Court in May⁴⁰⁵, the Judges applied for a rescission of the decision in terms of Rule 42(1)(a) of the CC Rules.⁴⁰⁶ This rule allowed the court to rescind a decision where they had erroneously granted it in the absence of a party who it would affect.⁴⁰⁷ This application was wholly dismissed by the court in August.⁴⁰⁸

2018

³⁹⁸ Ibid.

³⁹⁹ Ibid at 192.

⁴⁰⁰ Corder & Solik op cit note 308 at 326.

⁴⁰¹ *Nkabinde and another v Judicial Service Commission President of the Judicial Conduct Tribunal and Others* 2015 (1) SA 279 (GJ).

⁴⁰² Corder & Solik op cit note 308 at 326.

⁴⁰³ Ibid.

⁴⁰⁴ Ibid at 327.

⁴⁰⁵ *Nkabinde and another v Judicial Services Commission and others* 2017 (3) SA 119 (CC).

⁴⁰⁶ Solik op cit note 7 at 42.

⁴⁰⁷ Corder & Solik op cit note 308 at 327.

⁴⁰⁸ Ibid at 328.

Disappointingly due to further postponements the reconvening of the JCT on the 2nd of July was unable to proceed.⁴⁰⁹ Despite denying the allegations by JP Hlophe that he had made deprecating comments about him at a social event the previous year, Judge Musi still recused himself from the Tribunal.⁴¹⁰ A replacement was selected by the Chief Justice in August, however delays caused the hearing to only take place in December 2020. The delay was rooted in a disagreement between JP Hlophe and the State regarding the settlement of his legal fees, and the indisposition of Justice Jafta.⁴¹¹

2020

A further complication in this matter arose when judge Goliath made a complaint against JP Hlophe and his wife (also a Judge) in early January 2020.⁴¹² Judge Goliath complained that JP Hlophe had assaulted Judge Parker who sat on the bench at the Western Cape High Court, and had used abusive language and his power to deviate duties away from Judge Goliath.⁴¹³ In response to this, JP Hlophe laid a complaint against Judge Goliath on four bases: it was alleged that Goliath disclosed confidential information, was grossly incompetent, leaked her complaint to the media and performed acts of racism.⁴¹⁴ Both of these complaints were referred to an inquiry under s17(2) of the JSC Act. The second complaint was dismissed, while the JSC recommended the first complaint be investigated through establishing a JCT.⁴¹⁵

2021

The JCT unanimously concluded in April 2021 that Hlophe was guilty of gross misconduct for the complaint laid against him by the Judges of the Constitutional Court in 2008.⁴¹⁶ Even more encouragingly in August, after 13 years, the JSC arrived at the decision everyone expected them to arrive at back in 2009 – they endorsed the findings of the JCT through a majority of 8 out of 12 votes and recommended JP Hlophe to be impeached.⁴¹⁷

2022

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid; Solik op cit note 7 at 43.

⁴¹¹ Solik op cit note 7 at 43

⁴¹² Ibid at 44.

⁴¹³ Ibid.

⁴¹⁴ Ibid.

⁴¹⁵ Solik op cit note 7 at 44.

⁴¹⁶ Ibid at 43.

⁴¹⁷ Ibid; Judges Matter <https://www.judgesmatter.co.za/opinions/jsc-votes-to-impeach-hlophe/>

In true JP Hlophe style, proceedings were instituted to have this impeachment decision set aside.⁴¹⁸ This was dismissed by the High Court in early May. Following this the SCA have granted leave to appeal as they believe this to be an issue that is of public importance and can affect future matters.⁴¹⁹

In July of 2022 the JSC determined to advise the President that JP Hlophe should be suspended in terms of s177(3) of the Constitution.⁴²⁰ President Cyril Ramaphosa gave effect to this in December when he suspended JP Hlophe from his duties with immediate effect.⁴²¹ A mere fourteen years after the complaint against him had been made.⁴²² The JSC also arrived at a decision regarding the complaints made between JP Hlophe and Goliath J in December. The complaint against JP Hlophe was referred to a Tribunal to be investigated while the complaint against Goliath J was dismissed due to a lack of prima facie evidence and would not constitute impeachable gross misconduct.⁴²³

2023

The deadline to submit papers to the SCA in order to appeal the impeachment decision were due on January 21st, with JP Hlophe missing this deadline his appeal has now lapsed.⁴²⁴ This means that the path for Parliament to go ahead with the impeachment has been cleared. The JSC's recommendation has been submitted to the Justice Portfolio by the Speaker of Parliament.⁴²⁵ The Justice Committee confirmed the findings of gross misconduct by the JSC for JP Hlophe in November.⁴²⁶

2024 (What now?)

The recommendation of the Justice Committee will be tabled at a special sitting of the National Assembly to vote on JP Hlophe and Judge Motata's impeachment on the 21st of February

⁴¹⁸ *Hlophe v Judicial Service Commission and Others* [2022] ZAGPJHC 276.

⁴¹⁹ Solik op cit note 7 at 43.

⁴²⁰ Judges Matter 'Hlophe Tribunal 2008 – 2023' available at <https://www.judgesmatter.co.za/conduct/hlophe-tribunal-2008-2019/#:~:text=The%20Tribunal%20found%20that%20on,rule%20in%20a%20particular%20way>, accessed on 12 January 2024.

⁴²¹ Ibid.

⁴²² Solik op cit note 7 at 43.

⁴²³ Judges Matter op cit note 420.

⁴²⁴ Judges Matter op cit note 420.

⁴²⁵ Judges Matter op cit note 420.

⁴²⁶ Judges Matter 'A leadership transition, impeachments and election matters – issues facing the judiciary in 2024' available at <https://www.judgesmatter.co.za/opinions/a-leadership-transition-impeachments-and-election-matters-issues-facing-the-judiciary-in-2024/>, accessed on 14 January 2024.

2024.⁴²⁷ In accordance with s177 of the Constitution, a two-thirds majority is required to impeach Hlophe.

4.3.2 Main issues of the accountability process

What does this timeline tell us? It is clear that there are several structural weaknesses that can be drawn out from the timeline above in the current accountability system.

4.3.2.1 Litigation

The first and most glaring weakness is the tremendous amount of litigation that is possible to occur under the current structure. As seen above, endless litigation has characterized JP Hlophe's matter. However, what is so damaging is the fact that it has been seen that the other conduct processes which followed JP Hlophe's matter have also been riddled in litigation at every step of the process.⁴²⁸ It is the numerous complicated levels of decision making in the process which have left the opportunity for court review wide open for complainants. Even if the litigation takes place on grounds that are unfounded, what the complainants desire is achieved: delay and frustration of the impeachment process.⁴²⁹

Another issue directly linked to this large amount of litigation is a matter of funding. Funding is an issue for two reasons, first because it has been the reason used for delays in the process of the JCT as we saw in 2018 causing a two year delay in the JCT sitting for their hearing, and secondly because it causes financial pressure on the state.

4.3.2.2 JSC Accountability Process

Although the JSC accountability process set out in the JSC Amendment Act cannot be credited for being the sole cause of this lengthy process that is going on to its 16th year, it most certainly forms part of the root issue. This process has already been set out above in Chapter 2 thus will not be set out again here, but it does deserve some attention as it creates the foundational structure for this process. The main issues that are evident from the Hlophe matter are the

⁴²⁷ Jan Gerber 'Disgraced Judges Hlophe, Motata's removal votes to take place after budget speech' News24 1 February 2024, available at <https://www.news24.com/news24/politics/parliament/disgraced-judges-hlophe-motatas-removal-votes-to-take-place-after-budget-speech-20240201#>, accessed on 5 February 2024.

⁴²⁸ This can be seen in both the Makhubele and Motata matters. Summaries of each can be found in Solik op cit note 7 at 48 and 45 respectively.

⁴²⁹ Mbekezeli Benjamin 'Hlophe's case highlights difficulty in holding judges to account' available at <https://www.judgesmatter.co.za/opinions/hlophe-cases-highlight-difficulty-in-holding-judges-to-account/>, accessed on 10 January 2024.

various levels of decision-making which allow for litigation as mentioned above, but also the actual composition of the JCC and JCT.

First, the JCC is composed of Judges that are all still actively serving as Judges.⁴³⁰ In a country such as South Africa, it is a well-known fact that courts are overburdened and will often have vacancies on their benches as discussed in the previous Chapter. This structure hampers the work of the JCC as active judicial officers are not able to meet frequently as their JCC duties compete with the heavy workload they have in court.⁴³¹ Evidence of this is the fact that it took the JCC up to 7 months to recommend that a JCT be established to investigate this complaint in 2012. Although this period of time is short in comparison to the lengthy matter that has transpired, it is in fact still noteworthy when one thinks of how damaging the whole process is on the appearance of the judiciary.

JCT's are established in terms of s21 and 22 of the JSC Amendment Act and are seen to have similar issues to JCC's.⁴³² They are made up of two judicial officers and one person who is not a judicial officer. The difference with JCT's is that their process have proved to take even longer than JCC's. As seen above, the process of the JCT was initiated in February of 2013 and concluded in April 2021. Of course, this delay is not entirely the JCT's fault, but when they were not being stalled by litigation one could see the lengthy nature of them completing their task of investigation. In 2013, the JCT was established in February but only started their investigation in late September, thus taking a period of 8 months just to start the investigation.

It is disappointing to note that these structures set up to deal with instances of judicial misconduct fairly and promptly⁴³³ are in fact a main part of the cause that lengthens the process.

4.3.2.3 Stalling caused by the JSC itself

It is unfortunate that one must note that the body tasked with the duty to resolve these issues of judicial conduct is itself guilty of causing unnecessary delay. The JSC has done this in two ways, first in errors with implementation of procedures and secondly due to their evident lack of political will to hold judges to account for acts of gross misconduct.

As a constitutionally mandated body, the JSC is underpinned by the founding value of openness.⁴³⁴ Yet we have seen that twice, the JSC has attempted to complete their duties in

⁴³⁰ JSCAA supra note 98 at s8.

⁴³¹ Benjamin op cit note 429.

⁴³² JSCAA supra note 98.

⁴³³ Corder op cit note 22 at 224.

⁴³⁴ Constitution supra note 6 at s1(d).

private, both instances occurring in 2009 and causing unnecessary litigation. The JSC has also failed to rely on the correct standard of proof in arriving at their decisions rationally and not always ensured that they were correctly constituted such as the instance with Premier Helen Zille. All of these issues cause undue delay by the JSC as it opens their decisions up to litigation which we can clearly see from above is the main cause of delay.

Interestingly, in the case of JP Hlophe we have seen undue delay by the JSC in suspending him from office, this being 14 years after the complaint was made and almost a whole year after the JSC endorsed the finding of gross misconduct.⁴³⁵ If JP Hlophe had been suspended earlier it could have avoided the situation that occurred between him and Goliath as the most useful aspect of suspending a Judge is the fact that they are no longer able to sit in office and perform their judicial functions.⁴³⁶ Section 19(4) of the JSC Amendment Act explains that when a JCT is requested to investigate a complaint, the JSC must advise the President on how desirable it is for the respondent to be suspended.⁴³⁷ One may ask why the JSC took so long in the case of JP Hlophe while recent practices show that suspending judges pending investigations has become more common practice? The answer to this has been argued by Hugh Corder and Calli Solik to be a lack of political will on behalf of the JSC.⁴³⁸

Since the start of 2005 it has been evident that the JSC were lacking political appetite to hold JP Hlophe accountable for his actions. This is evident when one considers that there were practically no ramifications when he received remuneration from the Oasis Group. Their conclusion in this first matter gave the impression that they simply wanted to rather bury it than have to engage with it appropriately.⁴³⁹ But this attitude of the JSC did not end there, as we saw this all similarly play out again two years later when the complaint by the Constitutional Court Judges was also dismissed. One should also note the amount of times decisions by the JSC or its smaller bodies have been appealed as a decision has not been rationally decided. This said, it is difficult to know whether it is the cumbersome process or the lack of political will on behalf of the JSC to pursue these claims with some sense of zeal that causes the failings in the accountability process.⁴⁴⁰

⁴³⁵ Solik op cit note 7 at 43.

⁴³⁶ Ibid at 44.

⁴³⁷ JSCAA supra note 98.

⁴³⁸ Corder op cit note 22 at 216; Solik op cit note 7 at 52.

⁴³⁹ Olivier & Hoexter op cit note 32 at 190.

⁴⁴⁰ Solik op cit note 7 at 52.

4.4 Conclusion

The Code of Conduct and the Norms and Standards both set an appropriately high bar of what is expected of judges. It is possibly true to say that they have successfully fostered a culture of strict compliance with these standards, however it is instances such as that of JP Hlophe above that stain this image. Despite it being possible to attribute the blame to JP Hlophe and the other judges for the delay in this process, it is evident that the failings of this process largely lies with the JSC and the impracticable system put in place by Parliament.⁴⁴¹

The long running Hlophe matter has had many damaging effects on the South African judiciary, with Hoexter and Olivier noting how it has corroded the image of the judiciary and drained public confidence in it.⁴⁴² It has further been noted that this matter as well the many other unsettled conduct matters have damaged the legitimacy of the courts that was fought for in post-apartheid South Africa.⁴⁴³ It is possible for history to shortly be made in South Africa with the possible impeachments of Hlophe and Motata, however it remains true that the JSC's accountability process requires reform to appropriately fulfill their function.⁴⁴⁴ After all, despite all that had transpired since 2008, JP Hlophe was still actively included by the JSC in the appointment of judges to the Western Cape High Court in October 2022.⁴⁴⁵ With the main issues with the accountability process highlighted above, this thesis will proceed in the following Chapter to discuss possible recommendations for improvement of this process.

⁴⁴¹ Benjamin op cit note 429.

⁴⁴² Olivier & Hoexter op cit note 32 at 195.

⁴⁴³ Corder & Solik op cit note 308 at 320.

⁴⁴⁴ Ibid; Olivier & Hoexter op cit note 32 at 195.

⁴⁴⁵ Solik op cit note 7 at 44.

Chapter 5: Recommendations & Conclusion

5.1 Purpose of this thesis

This thesis set out to analyse the two main functions of the JSC which impact on the legitimacy of the judiciary: the appointment and accountability processes. It sought to do this by focusing on the values of judicial independence and judicial accountability as they are central to the above-mentioned processes, as well as judicial legitimacy. Throughout this thesis, the Chief Justice as the head of the JSC has been seen to play a vital role in its operations. While holding this position, the Chief Justice simultaneously leads the entire judiciary and is an active member of the Constitutional Court.⁴⁴⁶ The Chief Justice's role as chair requires a clear and firm hand to be held over the interview process. These reasons extenuate the importance that a strong and capable Chief Justice is appointed as it makes a pivotal difference in the operations of the JSC.⁴⁴⁷

Through analysis of the appointment and accountability processes, it is clear that the JSC plays a significant role in upholding judicial legitimacy. This role is seen to be actively played in both processes, while more progress is seen to be done in the case of judicial appointments with the new criteria being introduced in May 2023. The conduct process also shows progress, however whether this progress is a result of the political will of the JSC or unabating civil society organisations is questioned. Despite noting that comparatively the appointments process does well to effectively ensure the independence of the process, there is scope for improving this process further. The same can be said for the accountability process and thus what follows are recommendations for each process that could further improve the operations of each in securing the legitimacy of the judiciary.

5.2 Recommendations

5.2.1 Appointment Process

What has arisen as one of the main issues in the appointment process is the behaviour of the commissioners themselves. The Criteria and Guidelines introduced in May 2023 go some way in ensuring appropriate conduct on behalf of commissioners as they create boundaries for appropriate lines of questioning. However, the commissioners need a standard of conduct that they should be held accountable against in order to further secure the integrity of the interview

⁴⁴⁶ Corder op cit note 14.

⁴⁴⁷ Ibid.

process. It is recommended that this is done through the introduction of a Code of Conduct for commissioners to bring certainty to which conduct is appropriate and provide clear steps for holding commissioners accountable to this standard when they fail to do so.

A code of conduct for commissioners has been called for by several civil society groups, including Judges Matter, FUL, Helen Suzman Foundation and CASAC.⁴⁴⁸ Along with the introduction of a code of conduct should be compulsory training for JSC Commissioners to happen annually before the interview process takes place.⁴⁴⁹ It is vitally important that the commissioners are trained to properly understand the importance of their role and the constitutional project. This training should include detailed information on the application of the guidelines and criteria, appropriate decorum and how to prepare skillful and well-informed questions for candidates.⁴⁵⁰ As the head of the JSC, the Chief Justice, working with the Office of the Chief Justice could design and provide this training.

Along with these two recommendations, dependent on the capacity of the JSC it is recommended from comparative analysis with Kenya that more rigorous engagement with the public takes place. In comparison to the South African process, the JSC in Kenya interview the people that comment on candidates which provides an accountability check that the comments made are reliable. The interviewing of persons making comments does not happen in the South African system and has led to problematic questioning of candidates based on false accusations. An example of this is the interview of Judge President Dunstan Mlambo for the position of Chief Justice in February 2022.⁴⁵¹ With such harmful questions being asked without interviewing the person submitting these comments made about judges that are in active service, the image of the judiciary is negatively impacted. The application of the process in Kenya would thus preserve the image of candidates being interviewed (barring comments made about problematic behaviour by reliable sources as this is important) and improve the integrity of the interview process. The legitimacy of the process will be improved which will positively impact the perception of the candidates that are appointed.

It is hoped that with the enactment of these recommendations and proper application of the guidelines so that appointments that are both made and failed to be made are rationally

⁴⁴⁸ Greg Nicholson ‘*JSC must adopt a code of conduct and interview criteria before continuing its work – civil society groups*’ Daily Maverick 3 March 2022, available at <https://www.dailymaverick.co.za/article/2022-03-03-jsc-must-adopt-a-code-of-conduct-and-interview-criteria-before-continuing-its-work-civil-society-groups/>, accessed on February 2024; Solik op cit note 7 at 34.

⁴⁴⁹ Solik op cit note 7 at 34.

⁴⁵⁰ Ibid.

⁴⁵¹ Tania Broughton ‘*Chief Justice candidates: Dunstan Mlambo – a strong proponent of modernizing the courts*’ available at <https://groundup.org.za/article/chief-justice-candidates-dunstan-mlambo/>, accessed on 11 February 2024.

supported, that the appointment process will be strengthened. This will support the independence of the judiciary and as a result the long-term survival of independent courts in South Africa.

5.2.2 Accountability Process

The accountability process described in relation to JP Hlophe above has shown that major challenges exist in holding judges accountable, and arguably more reform is needed for this process than that of the appointments process. The reason for this could be disputed, however it is clear that the long process introduced to hold judges accountable is filled with opportunities for delay via litigation and its implementation has depicted a lack of political will on behalf of the JSC. What follows are recommendations to improve the accountability process and make it more efficient in holding judges to the standard of judicial conduct set out in the Norms and Standards and Code of Judicial Conduct.

First, it is recommended that the disciplinary process is rethought.⁴⁵² This is recommended to be done through streamlining processes by ensuring that the JCC always produce their reports on time and by putting timelines on the periods of time it can take to complete certain processes, i.e., the time between the recommendation by the JCC, and the JSC actually requesting a JCT.⁴⁵³ Part of this rethinking is also the membership of the JCC that deals with complaints. It is recommended that it is made up of retired judges that have more capacity to fulfill this role in a time-sensitive manner. Beyond capacity, it is also less likely that conflict of interest will arise by passing judgment on their colleagues.⁴⁵⁴

Secondly, it is recommended that a policy is introduced that judges who face complaints for impeachable conduct are suspended by default after their complaint has been looked at by the JCC and recommended by the JSC that a JCT be established and investigate the complaint.⁴⁵⁵ When Judges are suspended they still receive the financial benefits of a Judge but do not go to court to perform their judicial functions. With the grounds for impeachable conduct all being very serious, in order to maintain public trust in the judicial officer deciding their case, as well as work relations amongst Judges in that court, it is important that they stop performing this function until their complaint is decided upon. Judge President Hlophe is a perfect example of why it is so important that judges get suspended early in the process as the

⁴⁵² Corder op cit note 14.

⁴⁵³ February et al op cit note 12; Solik op cit note 7 at 52.

⁴⁵⁴ February ibid; Solik ibid at 53.

⁴⁵⁵ February ibid; Solik ibid at 53.

conduct issue with Judge Goliath would not have occurred had he been suspended at a more appropriate time.

Thirdly, a requirement that the JSC provide comprehensive and transparent reasons for why they accept or reject a recommendation from the Tribunal to ensure that decisions are being reached rationally.

Fourthly, cultivation of a culture of collegiality and respect amongst members of the judiciary as well as the members of the JSC. This will be rooted in a reform of the legal ethics being taught and practiced amongst legal professionals. There is a lack of accountability in the legal profession, which is the same profession that judges are appointed from.⁴⁵⁶ Thus a system infused with a stronger sense of ethics will be more accountable and enhance the dynamics of collegiality amongst judges.

⁴⁵⁶ February et al op cit note 12.

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