What Lies Beneath: The Complex Nature of Appointing Women Judges in Zambia And South Africa

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Declaration

I, ...*Tabeth Lynn Masengu* .. hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise). This thesis has also been submitted to Ghent University in Belgium, as part of a Joint doctoral agreement. Outside of this joint doctoral agreement, neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

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ABSTRACT

Using a socio-legal framework, this thesis addresses the present dearth of research on gender and judging in Africa, by examining the judicial appointment processes in Zambia and South Africa. This study is grounded in the argument that judges, and those who appoint them, are operating in environments where multiple factors can and do have an impact on whether a country is able to successfully create a gender-diverse judiciary. Using a feminist lens, this thesis describes women in terms of gender and explores various facets of the appointment system, in order to respond to the research question. How do aspects of the judicial appointment process inform equal representation of women and men on the bench? Drawing from existing literature on gender and judging, this thesis interrogates particular formal and informal aspects of the appointment process. It highlights the various subtleties that exist within or around these aspects and how they affect women candidates, while appreciating the difficult balance that is involved in selecting judges. In doing so, this thesis affirms the importance of context when studying judicial appointments and seeking solutions for judicial diversity. This thesis additionally reveals various elements of the process affected by bias, discrimination, exclusion, and a traditional definition of merit, that invariably devalues women's contributions and attributes. This study makes the case for gender diversity not just in the courts but on the judicial appointment bodies that appoint judges. While arguing that one benefit of this diversity would be the presence of more representative perspectives, it acknowledges that a feminist perspective can and should also be held by male judicial appointers. This study makes suggestions for improving the appointment systems in both jurisdictions and emphasises the need for a multi-sector response.

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When I commenced this PhD journey, I asked two judges who had obtained their PhDs for some advice. Both of them made the same statement that stood out to me. 'A PhD is not a test of your intelligence; it is a test of your psychological strength'! They were not far from the truth as this four year journey has indeed been a test of my psychological strength and will. I didn't make things easier for myself when I chose to do most of the PhD while in fulltime employment and pursue a joint doctorate degree! As the pioneer joint doctorate candidate in the UCT Law faculty, the collaboration meant twice as much administrative bureaucracy −but still the process had not been as perilous, as I first feared thanks to a number of factors. My Christian faith meant that I knew that there was a higher power assisting me. My belief in God meant that I knew that though this project was important, it did not define me or my purpose on earth. The prayers of my family and friends also helped strengthen my resolve to continue, especially when I faced an unexpected illness that derailed the PhD project for some months.

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FREQUENTLY USED ABBREVIATIONS

ANC	African National Congress
BLA	Black Lawyers Association
CGE	Commission for Gender Equality
CSO	Civil Society Organisation
DGRU	Democratic Governance and Rights Unit
EAMJA	East African Magistrates and Judges Association
EFF	Economic Freedom Fighters
FODEP	Foundation for Democratic Process
GCB	General Council of the Bar
HC	High Court
HSF	Helen Suzman Foundation
ICJ	International Commission of Jurists
IDLO	International Development Law Organisation
IFP	Inkhata Freedom Party
JCC	Judicial Conduct Committee
JCT	Judicial Conduct Tribunal
JSC	Judicial Service Commission
LAZ	Law Association of Zambia
LSSA	Law Society of South Africa
MP	Member of Parliament
NADEL	National Association of Democratic Lawyers
NCOP	National Council of Provinces
SAC-IAWJ	South African Chapter of the International Association of Women Judges

SACJF	Southern African Chief Justices' Forum
SACCORD	Southern African Centre for the Constructive Resolution of Disputes
SADC	Southern African Development Community
SADCLA	Southern African Development Community Lawyers Association
SAWLA	South African Women Lawyers Association
SC	Senior Counsel
SC	State Counsel
SCA	Supreme Court of Appeal
SDG	Sustainable Development Goal
TIZ	Transparency International Zambia
UN	United Nations
UNZA	University of Zambia
USA	United States of America
WCHC	Western Cape High Court
ZIALE	Zambia Institute of Advanced Legal Education

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CHAPTER 1
INTRODUCTION

> I was lamenting the paucity of young men in my hometown, studying law. And I thought, "It would be wonderful if we had more people like you," I said to him. "Young men who go to university to study law, so that we can have people like you, to practise law in the city and to defend people in the way, you know, you did with me." And he just looked at me and said, "Why men?" At that point in time, you hardly had women as lawyers, as practising lawyers, particularly within black communities. And he actually encouraged and motivated me to study law. So, I went to university. I actually raised it [money] for a legal degree, and the rest is history.[1]

These are the words of world renowned former South African Constitutional Court Justice Yvonne Mokgoro, as she recounted her decision to study law. In the quote, she highlighted two poignant aspects of her history. That she lived in a time where law was considered to be a male domain and that the paucity of women lawyers was even more pronounced in black communities. As a black woman living in South Africa, the practice of law seemed to be an impossibility and while this has changed dramatically in the last two decades, elements of exclusion still remain in the judiciary and in the legal profession. This thesis is an attempt to re-focus discussions of gender diversity, on the pivotal aspects of the judicial appointment process that can and do affect women's judicial aspirations. It re-examines assumptions that underpin debates on the need for gender diversity in the judiciary and those that hinder the possibility of more targeted initiatives.

1.1 BACKGROUND

In the last decade, there has been growing recognition across the globe of the importance of having diverse judiciaries. In particular, the significance of increasing the number of racial

[1] Rutherfurd Living History Program, 'Yvonne Mokgoro' (North Carolina: Duke University, 2009), pp. 1–48 <http://livinghistory.sanford.duke.edu/interviews/yvonne-mokgoro/>.

minorities and women in judiciaries has been debated worldwide.[2] The study of women and judiciaries is commonly referred to as the field of gender and judging.[3] This field evolved from initially focusing on arguments that justify the presence of women on judiciaries, to studies that identified barriers to women's appointments. Now the attention has turned to examining ways to make courts more gender equitable. There is ample research on gender and judging in the global North but despite the increasing visibility of African women on domestic and international courts, the research on and in the African region is limited.[4] As such, in order to add to the limited research on the African region, this research is driven by one question. *How do aspects of the judicial appointment process inform equal representation of women and men on the bench*?

This research is especially relevant because despite the great strides made by legal feminists in inspiring a growing jurisprudence in Africa, particularly on the violation of women's rights,[5] there is insufficient attention paid to who is creating this jurisprudence in the courts. One of the reasons is that historically in Africa, judiciaries were marginalised due to single party rule or military regimes.[6] VonDoepp argues that the 'onset of democratic rule in many African countries brought new significance to judicial institutions, in both theoretical and practical terms'.[7] The practical result was that 'some processes of political transition brought court institutions directly into the political arena, as judges were forced to adjudicate disputes between democratic movements and the incumbents they sought to replace'.[8] Judge

[2] There have been various global initiatives that seek to improve racial and gender diversity on courts from academia, Civil Society Organisations and even international organisations such as the International Commission of Jurists .
[3] Initially used by political scientists, this term is now widely used by socio-legal scholars too.
[4] See Josephine J Dawuni, 'African Women Judges on International Courts: Symbolic or Substantive Gains?', *University of Baltimore Law Review*, 47.1 (2018), 199–245.
[5] Sylvia Tamale and Jane Bennett, 'Editorial: Legal Voice: Challenges and Prospects in the Documentation of African Legal Feminism', *Feminist Africa Legal Voice: Special Issue*, 2011, 1–16.
[6] Mable Agyemang, 'Foreword', in *Gender and the Judiciary in Africa: From Obscurity to Parity*, ed. by Josephine J Dawuni and Gretchen Bauer (New York: Routledge, 2015), pp. xiii–xv.
[7] Peter VonDoepp, *Judicial Politics in New Democracies: Cases from Southern Africa* (Colorado: Lynne Rienner Publishers Inc, 2009) p.3.
[8] Ibid.

Agyemang agrees with VonDoepp and identifies the last few decades of political transition as the period when the prominence of the rule of law became a benchmark of proper governance in fledging democracies.[9]

The last six decades brought the establishment of more authoritative courts worldwide. This global expansion of judicial power was a catalyst for a growing interest in the appointment process of judges. This is what Malleson, one of the leading scholars in judicial appointments refers to as 'judicialisation'.[10] This was either in the form of judicial activism of magistrates in France, Spain and Italy; or increasing judicial authority by way of the establishment of constitutional courts in countries that had experienced rapid political change.[11] Eventually, the growing interest in appointments facilitated questions about the composition of judiciaries and the lack of women judges.[12]

This growing interest in courts has raised various arguments to advance the case for women judges. Sally Kenney has argued that women have the right to form part of the judiciary because they are part of society.[13] Others have argued that democratic legitimacy and public confidence are strengthened when judiciaries are gender equitable.[14] Further, a better quality

[9] Agyemang, p.xiv.
[10] Kate Malleson, 'Introduction', in *Appointing Judges in an Age of Judicial Power ;Critical Perspectives from around the World*, ed. by Kate Malleson and Peter.H Russell (Toronto: University of Toronto Press, 2006), pp. 3–12.
[11] Ibid, p.3
[12] Beverly B. Cook, 'Women Judges: A Preface to Their History', *Golden Gate University Law Review*, 14.3 (1984), 1–38; Susan Tolchin, 'The Exclusion of Women from the Judicial Process', *Source: Signs*, 2.4 (1977), 877–87 <http://www.jstor.org>; Ruth B Cowan, 'Women's Representation On The Courts In The Republic Of South Africa', *University of Maryland Law Journal of Race, Religion, Gender and Class*, 9 (2006), 291–318 <http://digitalcommons.law.umaryland.edu/rrgc>;Leny E. De Groot-Van Leeuwen, 'Merit Selection and Diversity in the Dutch Judiciary', *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World*, 2006, pp. 145–58.
[13] Sally J. Kenney, *Gender &; Justice:Why Women in the Judiciary Really Matter* (New York: Routldege, 2013).
[14] See Iyola Solanke, 'Diversity and Independence in the European Court Of Justice', *Columbia Journal of European Law*, 15 (2008), 89–121 <https://www.copyright.com/ccc/basicSearch.do?>.Judith Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges', *Southern California Law Review*, 61 (1988), 1877–1944 <http://digitalcommons.law.yale.edu/fss_papers>.

of deliberation and an enhancement of judicial decisions, are additional reasons given for a more gender diverse bench.[15]

Amidst the making of this case for gender representation, a number of obstacles have been identified that have inhibited diversity on the bench. These include the continued presence of an 'old boys' network' and a male dominated legal profession,[16] the presence of gatekeepers, the fallacy of the argument that women will 'trickle up,'[17] and stereotypical perceptions of masculinity and femininity.[18] However it remains uncertain whether the selection methods employed in recruiting judges are obstacles in and of themselves.

This uncertainty is evident in the different results emenating from global studies. In the United States of America (USA), there have been contradictory results from studies trying to determine whether a particular selection method influences women's chances of becoming a judge.[19] Studies in the United Kingdom have also found no evidence that judicial appointment commissions provide better results for women, as opposed to executive-only selections.[20] Scholarly material from an African perspective that can add to this particular issue of judicial

[15] See Yvonne Mokgoro, 'Judicial Appointments', *Advocate*, 23.3 (2010), 43–48; Catherine Albertyn, 'Judicial Diversity', in *The Judiciary in South Africa*, ed. by Cora Hoexter and Morné Olivier (Cape Town: JUTA, 2014), pp. 245–87.
[16] Hugh Corder, 'The Appointment of Judges: Some Comparative Ideas', *Stellenbosch Law Review*, 2 (1992), 207–30.
[17] Cook, 'Women Judges: A Preface to Their History', p, 2; see also Kate Malleson, 'Diversity in the Judiciary: The Case for Positive Action', *Journal of Law and Society*, 36.3 (2009), 376–402.
[18] Ulrike Schultz and Gisela Shaw, 'Introduction:Gender and Judging:Overview and Synthesis', in *Gender and Judging*, ed. by Ulrike Schultz and Gisela Shaw (Portland: Bloomsbury Publishing, 2013), pp. 3–44.
[19] Nicholas O Alozie and others, 'Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods', *Sociel Science Quaterly*, 71.2 (1990), 315–25.
[20] Sundeep Iyer, 'The Fleeting Benefits of Appointments Commissions for Judicial Gender Equity', *Commonwealth & Comparative Politics*, 51.1 (2013), 97–121 <https://doi.org/10.1080/14662043.2013.749673>.

selection is limited to one study.[21] In general, the role of women in African judiciaries remains largely under-investigated, with a few notable exceptions.[22]

1.2 THE QUESTION OF WOMEN'S PARTICIPATION IN AFRICAN ADJUDICATION

Article 9(2) of the Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa, requires states parties to ensure increased and effective representation and participation of women at all levels of decision-making.[23] Buoyed by this, the Southern African Development Community (SADC) Protocol on Gender and Development went further in an attempt to increase the participation of women in decision-making mechanisms. Initially, Article 12(1) of the SADC Protocol required states to endeavour to have women in at least fifty percent of decision-making positions, in the public and private sectors by 2015.[24] In 2016, the SADC protocol was amended with the fifty percent threshold removed,[25] in order to align it with the United Nations Sustainable Development Goal (SDG) 5.[26]

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[21] J Jarpa Dawuni and Tabeth Masengu, 'Judicial Service Commissions and the Appointment of Women to High Courts in Nigeria and Zambia', in *Research Handbook on Law and Courts*, ed. by Susan.M Sterett and Lee Demetrius Walker (Northampton: Edward Elgar Publishing, 2019), pp. 213–30.

[22] See *Gender and the Judiciary in Africa:From Obscuirty to Parity?*, ed. by Josephine J Dawuni and Gretchen Bauer (New York: Routledge, 2015); Ruth B Cowan, 'Women's Representation on the Courts in the Republic of South Africa', *Univeristy of Maryland Law Journal Race Religion Gender & Class*, 9 (2006), 291–318; See note 15 Albertyn 'Judicial Diversity'; Elsje Bonthuys, 'Gender and Race in South African Judicial Appointments', *Feminist Legal Studies*, 23.2 (2015), 127–48 <https://doi.org/10.1007/s10691-015-9285-5>; Tabeth Masengu, 'A Perspective on Women and Leadership in the South African Judiciary', *South African Journal on Human Rights*, 31.3 (2015), 655–65 <http://ipproducts.jutalaw.co.za/nxt/print.asp?NXTScript=nxt/gateway.dll&NXTHost=ipproducts.jutalaw.co.za&d=&multi=0&pb=0&isrc=yes&f=print&>.

[23] African Union, *Protocol to the African Charter on Human and Peoples' Rights on The Rights of Women in Africa*, 2003, pp. 1–33 <http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf> [accessed 7 August 2018].

[24] Southern African Development Community, 'SADC Protocol on Gender and Development' (Johannesburg: SADC, 2008) <https://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf> [accessed 6 April 2018].

[25] Southern African Development Community, 'Agreement Amending the SADC Protocol on Gender and Development' (Gabarone: SADC, 2016), pp. 1–14 <https://www.tralac.org/documents/resources/sadc/1187-agreement-amending-the-sadc-protocol-on-gender-and-development-31-august-2016/file.html>.

[26] Nyarai Kampilipili, 'Revised SADC Gender Protocol Enters into Force', *TRALAC Newsletter*, 2019 <https://www.tralac.org/news/article/13380-revised-sadc-gender-protocol-enters-into-force.html#targetText=The SADC Protocol on Gender and Development (1002 KB) *,age of 18 shall marry."&targetText=The SADC Protocol on Gender and Development entered into fo> [accessed 14 October 2019].

The focus of SDG 5 is the promotion of gender equality and empowerment of all women and girls and it sets nine targets to be met by the global community by 2030.[27] Of relevance to this discussion, is the target that seeks to ensure 'women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life'.[28] In this research, judicial office is considered a decision-making mechanism where officials hold power. Therefore the appointment of women judges falls squarely within the remit of the SADC Protocol and SDG 5. Yet even before the amendment to the SADC Protocol, no country in the region had achieved the 50% threshold in its judiciary.

In 2015, the composition of the bench in Tanzania was 44% women, Lesotho and Zimbabwe had a complement of 40% and South Africa was at 36%. Namibia had 21% women and Botswana had a paltry 5.6%.[29] However in spite of this lag, some countries in and outside of the SADC region had made some gains. For example, Benin, Nigeria, Malawi and Rwanda enjoyed female leadership on their Constitutional Courts.[30] Today, the current Chief Justices in Zambia, Sudan and Seychelles are women,[31] and in 2017, Zambia became the first nation in the region to reach a representation of 50% women in its judiciary.[32]

While the ideal of gender equity in judiciaries is widely shared, the judicial appointment process itself has received inadequate attention in the region. In Shultz and Shaw's edited volume, there is some literature on the appointment process in Kenya and Uganda.[33] However as Mingst noted three decades ago, 'there is a relative neglect of cross-national studies of the

[27] United Nations, 'Achieve Gender Equality and Empower All Women and Girls', *UN Chronicle*, 2015, 13–14 <https://doi.org/10.18356/a014136d-en>.
[28] Ibid.
[29] These statistics were collated from requests to individual judiciaries. Efforts to collate statistics for 2017 proved futile as most judiciaries are weary about giving desegregated data to outsiders.
[30] Dawuni and Kang, p.27.
[31] A fourth, Nthomeng Majara who was the first woman Chief Justice of Lesotho, has been on suspension since September 2018.
[32] By 2019, the number had gone up to 52%. Statistics collated from the judiciary website, see https://www.judiciaryzambia.com/.
[33] Ulrike Schultz and Gisela Shaw, *Gender and Judging*, ed. by Ulrike Schultz and Gisela Shaw (London: Hart Publishing, 2013) <https://doi.org/10.5771/1866-377x-2013-3-133>.

African judiciary'.[34] Consequently, there is a dearth of research on women and judicial appointment methods on the continent and a lack of comparable data on women in the highest courts in all African countries.[35] To date, there has also only been one attempt to collate the experiences of African women judges adjudicating in international bodies.[36]

An additional study on women Chief Justices in Africa by Dawuni and Kang is enlightening. Their research on the rise of female Chief Justices in Africa highlighted regional diffusion as a basis for the increase of women in leadership.[37] They argue that a woman's promotion to the top of the judiciary in one country may have an influence on gatekeepers who hold judicial power in a neighbouring or peer country. Furthermore, they contend that women activists spurred on by seeing the possibility of a woman at the top of the judiciary, may mobilize and encourage women judges in their own countries to seek leadership.[38] The regional diffusion that Dawuni and Kang found present in West African countries, appears to be absent in the SADC region. For instance at the end of 2017, Tanzania, Zambia and Zimbabwe all had over 40% women on their courts, while Botswana lagged behind with 5.6%.[39]

The difference in regional demographics is not only present in Africa, but in other judiciaries globally.[40] Hence an international commission of jurists recommended that 'laws, procedures and administrative practices governing judicial selection and appointment must be

[34] Karen A Mingst, 'Judicial Systems of Sub-Saharan Africa: An Analysis of Neglect', *African Studies Review*, 31.1 (1988), 135–47 <http://www.jstor.org/stable/524587>.
[35] G Bauer 'Conclusion' in J Dawuni & G Bauer (eds.) *Gender and the Judiciary in Africa: From Obscurity to Parity* (2015) 154-169 (p.168).
[36] *Interntional Courts and the African Woman Judge: Unveiled Narratives*, ed. by Josephine Jarpa Dawuni and Akua Kuenyehia (New York: Routldege, 2017) <https://doi.org/10.1159/000144207>.
[37] Josephine Dawuni and Alice Kang, 'The Rise of the Female Chief Justice Africa', *Africa Today*, 62.2 (2015), 44–69.
[38] Ibid, p.62.
[39] Statistics obtained from the judiciaries, on file with the author.
[40] See Maria C Escobar-lemmon and others, 'Appointing Women to High Courts', in *Research Handbook on Law and Courts*, ed. by Susan Sterett and Lee .D Walker (Northampton: Edward Elgar Publishing, 2019), pp. 200–212.

designed to ensure judicial diversity and equality of opportunity'.[41] It has also been suggested that any measures for reform need to be context-specific, because of the varying methods of appointment across jurisdictions.[42] Indeed there is no uniform process of appointing judges in the SADC region. African countries have different colonial histories, and different types of legal systems and their legal professions are structured differently.

However the variation in methods of appointment stimulates questions about whether and which particular aspects of the appointment process affect the relative success of women with judicial ambitions. Escobar-Lemmon et al have argued that 'while the exact concerns that enter in, will vary across countries and over time, selectors make choices given the domestic political context'.[43] There is no study on any African country in this regard.[44] The study on the rise of female Chief Justices in Africa found that the ascension of women in leadership is not necessarily attributable to the appointment method alone.[45] Yet, the authors did not suggest that this theory applies to judicial appointments for ordinary judicial positions and there has been no research undertaken on this area since.[46]

1.3 EXPLORING JUDICIAL APPOINTMENTS IN THE TWO CASE STUDIES

To initiate such research, two distinct countries in the SADC region – Zambia and South Africa, were selected as case studies. The countries were studied separately as sites of exploration and not as sites of comparison because of their disparate characters.[47] The focus was the judicial

[41] International Commission of Jurists, *Women and the Judiciary*, Geneva Forum Series (Genevva, 2013) <https://www.icj.org/wp-content/uploads/2014/10/Universal-Women-and-Judiciary-Gva-For-1-Publications-Conference-Report-2014-ENG.pdf>.
[42] Ibid, p.27.
[43] Maria Escobar-lemmon and others, 'Breaking the Judicial Glass Ceiling : The Appointment of Women to High Courts Worldwide', *Unpublished*, 2019.
[44] See Bratton and Spill 'Existing Diversity and Judicial Selection'; Malia Reddick, Michael J Nelson, and Rachel Paine Caufield, *Examining Diversity on State Courts How Does the Judicial Selection Environment*, 1 April 2009, 2009 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731012>.
[45] Ibid.
[46]Ordinary judicial positions here refers to positions in the High Court , Courts of Appeal and Constitutional Courts that have no leadership designations.
[47] This will be explained further in part 2 of Chapter 3, under Methodology.

appointment period of 2013-2017 in both jurisdictions. Both countries have appointing bodies for judges known as the Judicial Service Commission (JSC), though they operate differently. South Africa inherited a mixed legal system of common law and Roman Dutch law and at the end of 2017 had a 36% representation of women on its Superior Courts (which include High Courts, the Supreme Court of Appeal (SCA) and the Constitutional Court). It has a widely admired jurisprudence on equality[48] and legislation specifically promoting equality.[49] Moreover, the judicial appointment process is guided by section 174 of the Constitution of the Republic of South Africa 1996, which includes a clause that states that the racial and gender composition of society must be considered when appointing judges.[50] There is also some academic literature on the judicial appointment process and the JSC since 1994.[51]

Additionally, the JSC conducts interviews before appointment to judgeships in what could largely be considered as a transparent and accountable manner, with judicial vacancies publicly advertised. Anybody can nominate candidates and the interviews of the shortlisted candidates are also held in public. This has enabled lay persons and legal commentators to observe the interviews in person.[52] On the face of it, such a process is ideal because it implies a willingness to move away from an opaque biased system, in order to encourage greater citizen involvement which minimises the chances of visible nepotism.[53] However due to a number of

[48] This included ground-breaking cases declaring the customary law practice of male primogeniture as unconstitutional and allowing Muslim women involved in polygynous marriages to inherit a share of their deceased husband's estate.
[49] Promotion of Equality and prevention of Unfair Discrimination Act 4 of 2000.
[50] Section 174 (2) of the Constitution of the Republic of South Africa, 1996.
[51] For example see Hugh Corder, 'Struggling to Adapt:Regulating Judges in South Africa', in *Regulating Judges: Beyond Independence and Accountability*, ed. by Richard Devlin and Adam Dodek (Edward Elgar Publishing, 2016), pp. 372–89; Chris Oxtoby and Tabeth Masengu, 'Who Nominates Judges ? Some Issues Underlying Judicial Appointments In South Africa', *Stellenbosch Law Review*, 3 (2017), 541–63; Francois Du Bois, 'Judicial Selection In Post-Apartheid South Africa', in *Appointing Judges in an Age of Judicial Power - Critical Perspectives from Around the World*, ed. by Kate Malleson and P H Russell (Toronto: University of Toronto Press Incorp, 2006), pp. 280–312; Ruth B Cowan, 'Women's Representaion on the Courts in the Republic of South Africa', *Univeristy of Maryland Law Journal Race Religion Gender & Class*, 9 (2006), 291–318.
[52] For example, the public can watch and comment on interviews through a live feed on YouTube, see https://www.youtube.com/watch?v=0fScWayAEgk
[53] MTK Moerane SC, 'The Meaning of Transformation of the Judiciary in the New South African Context', *South African Law Journal*, 120 (2014), 708–18 (p.712) <https://doi.org/10.1525/sp.2007.54.1.23.>.

factors, the process has attracted criticism as regards to whether there is a real concerted effort to appoint more women.[54]

In contrast, Zambia is purely a common law legal system and at the end of 2017, it had the highest number of women judges in the SADC region (50%). Despite this achievement, there is an absence of detailed literature on the appointment process. Worse yet, there is no literature on how Zambia has achieved gender parity on its courts. The appointment process is mostly private, with no public announcement of vacancies or requests for nominations.[55] When vacancies arise, the Judge President in charge informs designated members of the legal profession. This method was adopted from Zambia's former colonial power, England. and is also referred to as 'secret soundings'.[56] In Zambia, all prospective judges are interviewed in private by the JSC.[57] Governed by section 140 of the Constitution of Zambia Amendment Act No. 2 of 2016, the JSC makes recommendations for judicial appointment to the President. The President has the power to appoint judges, subject to ratification by Parliament.[58] This allows for legislative influence or interference in the appointment process. This is unlike the South African process, where the president must appoint the judges that the JSC recommends for positions in the High Court and SCA.[59]

It is also worth noting that a clause to ensure gender equality in appointments to public office was only included after the new amendment to the Zambian Constitution.[60] The creation of a Gender Commission is also a recent development and there is no specific legislation

[54] See Masengu 'A Perspective on Women and Leadership' and Bonthuys 'Gender and Race in the South African Judicial Appointment System'.
[55] This process will be explained in detail in Chapter 4 entitled' The Judicial Service Commission in Zambia: Gatekeeper or Ally?'.
[56] Dermot Feenan, 'Judicial Appointments in Ireland in Comparative Perspective', *Judicial Studies Institute Journal*, 1 (2008), 37–66 (p.56).
[57] Pamela Towela Sambo, 'The Legal Profession and Judicial Appointments in Zambia', in *SADC Lawyers Association Conferencce and General Meeting* (Dar es Salaam,Tanzania, 2015), pp. 1–10.
[58] Section 140 of the Constitution of Zambia Amendment Act No. 2 of 2016.
[59] This however, excludes the leadership of the SCA and the justices and leadership of the Constitutional Court who have a different process of appointment.
[60] Part 10 under the General Provisions Section, in section 259.

regarding gender equality or discrimination.[61] Thus, a study of the two jurisdictions from these sets of facts provides an interesting learning prospect. Zambia has a relatively closed appointment method and is only just strengthening its constitutional protection of women and yet it has more women on the bench than South Africa. The latter, which has a relatively transparent appointment method and is famed worldwide for its equality jurisprudence, appears to be lagging behind in regard to gender equity in the judiciary. Academics continue to wonder why some judicial appointment systems seem to be making much faster progress in diversifying the composition of the bench than others.[62] There is insufficient writing on gender and the judiciary in Africa to provide answers to this question.[63]

Various studies have explored gender and judicial appointments from different avenues.[64] A research report written by Cheryl Thomas on the United Kingdom specifically addresses the question of 'what factors might directly or indirectly lead to a lack of diversity in the judiciary'?[65] This report was useful in framing the question for this research because it recognised that there are many variables that affect whether gender diversity is increased in various jurisdictions.[66] Using Thomas's approach of exploring which factors may be determinant, this research identifies specific formal and informal aspects of the appointment process for examination. The formal aspects identified are I suggest, constitutive of a first layer of scrutiny before a potential judicial candidate can proceed to the next level. These formal aspects are the recruitment process, recommended qualifications and experience for candidates

[61] Section 231 of the Constitution makes provision for the Commission for Gender Equality.
[62] Rachel L. Ellet, *Pathways to Judicial Power in Transitional States.Perspectives from African Courts.* (Chicago: Routledge, 2013),p.2.
[63] The first in-depth analysis of various African countries was only published in 2015. See Dawuni and Bauer 'Gender and the Judiciary in Africa'.
[64] For example, others have looked at the selection method, others have focused on the legal profession and some have looked at the definition of merit.
[65] Cheryl Thomas *Judicial Diversity in the United Kingdom and other jurisdictions: A review of research , policies and practices* (November 2005) available at https://www.ucl.ac.uk/laws/judicial-institute/files/Judicial_Diversity_in_the_UK_and_other_jurisdictions.pdf, accessed on 16 May 2016.
[66] The report also includes a section on the study of diversity in other jurisdictions, excluding Africa and Asia. See pp.25-27.

and the operations of the appointment body. In addition, interview data from this research revealed an additional aspect that is worthy of examination. That is the role of the judge and the expectations that the judiciary, lawyers and citizens have of a judge. This aspect goes beyond professional qualifications and experience and it includes conduct, character traits and specific preferences that each judiciary has.

There are also informal aspects that have a bearing on judicial appointments. They include the extent to which political actors, the organised legal profession and Civil Society Organisations (CSOs) are involved in the process. Moreover this study also considers the legislative environment for women's rights in each jurisdiction, as it interrogates whether the legislation advancing women's rights is relevant in the goal to diversify judiciaries. It is noteworthy that scholars have asserted that the judicial appointment system is not gender neutral and that seemingly neutral institutional processes and practices are in fact gendered.[67] Acknowledging these views and using a feminist lens,[68] this study examines the structure and process of the identified judicial appointment methods. It does this by asking the central research question of how aspects of the judicial appointment process inform equal representation of women and men on the bench.

In order to answer this question, the following sub-questions are also explored:

1) How do various stakeholders such as judges, lawyers, JSC members, CSO's and journalists (who have been identified as relevant in exploring the informal aspects), perceive the judicial appointment process in respect to gender diversity goals?

[67] See Kate Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do', *Feminist Legal Studies*, 11 (2003), 1–24;Sally J Kenney, 'Thinking about Gender and Judging', *International Journal of the Legal Profession*, 15.2 (2008), 87–110 <https://doi.org/10.1080/09695950802461837>.

[68] This lens recognises patriarchal elements of society and in turn explores the consequences that flow from seemingly neutral gender policies, in order to identify discrimination in the judicial appointment process.

2) What is the general experience of women judges and legal professionals in respect of the appointment process and how does this affect women's judicial aspirations?
3) Does the gender composition of the JSC matter and will more women JSC members lead to more women judges being appointed?
4) Does a more public and transparent appointment process lead to an increased presence of women on the bench?
5) What is the role of various political actors such as Presidents and Members of Parliaments and is there a notable effect on how their power is used in respect of women and judicial appointments?
6) With regard to judicial appointments, what can be deduced from various achievements and shortcomings present in both jurisdictions?

1.4 POSITIONING THE WOMAN JUDGE

'Once we accept that who the judge is matters, then it matters who our judges are'.[69] This quote by eminent academic Erika Rackley encapsulates the essence of the research approach in this study. If who a judge is matters, then it is necessary to reject the idea of judges as objective beings, devoid of any personal baggage or subjective attitudes. The judge is a culmination of various life experiences that are informed by, amongst others, their gender, social status, race, sexual orientation, religion and even political ideology. The judge and those who appoint judges operate within a context that is filled with multiple factors. These can and do affect who gets appointed as a judge and what type of environment they operate in. Accordingly, this research uses a feminist lens and deliberately describes women in terms of gender (as a social process), rather than sex (as a biological category). This is because of the societal ramifications

[69] Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity*, *Women, Judging and the Judiciary: From Difference to Diversity*,(p.164*)* (Cavendish: Routldege, 2012).

that flow from the construction of gender and how they affect women.[70] In the context of gender and judging, these ramifications become evident as the analysis in this thesis progresses.

Second, this research focuses on an interrogation of various factors that may have a bearing on women's judicial aspirations. The focus on women in this research is 'not meant to privilege gender' or 'to deny the importance of other identity characteristics'.[71] Using women as a focal point is also not an indication that women as a category are not differentiated by various societal factors. This research recognises how the intersectionality of identities affects women and thus it does not take an essentialist view of women.[72] In Chapter 2, two additional justifications for gender diversity are offered and with relevant alteration, these arguments can also apply to other under-represented groups in judiciaries.

Third, various authors use the terms gender diversity and gender representativity interchangeably. Thus some references to women in this thesis will use the term representativity and/or representativeness, based on the work that is being referred to. However, this research adopts Cathi Albertyn's preference for the use of the term diversity over representativity. Albertyn has argued that diversity is a 'more complex idea of multiple judicial differences that go beyond the facial, group-based difference to difference in norms, values, judicial attitudes and philosophies'.[73] Representativity she suggests, is just the requirement that the judiciary should consist of different social groups.[74]

Thus, as noted by Andrews quoting Carmel Rickard in her observations on the South African judiciary:

[70] A detailed discussion on this will follow in Chapter 2 under the section entitled 'Gender as a Social Process and Democratic arguments for diversity'.
[71] Rackley, 'Women, Judging and the Judiciary 'p.2.
[72] For more on the effect of intersectional identities, see Chapter 7, under the section 'Dynamics in the Legal Profession'.
[73] Albertyn 'Judicial Diversity', p.242.
[74] Ibid.

> Diversity is not just about women, black people and other groups that one might want to see on the Bench. It's also about whether the candidate being considered has a fresh outlook; whether in addition to traditional legal competence he or she can really understand the great shift in thinking that has come with the new Constitution. Whether they have the kind of openness that will ensure the values of the Constitution do shape the way they approach legal problems.[75]

The above description of diversity is specific to South Africa, yet the essence of the message can be applied to other jurisdictions. It is desirable to have judges who understand the new values in their respective constitutions, while having a philosophy that ensures that these values are properly infused into their decision-making.

Fourth, the focus of this research is on appointment to Superior Courts (High Courts, Courts of Appeal and Constitutional Courts) and does not include appointments to lower courts often known as Magistrates Courts.[76] This does not negate the importance of gender diversity in the lower courts, neither does it suggest that the judicial functions of the lower courts are unworthy of attention. Rather it is because the Superior Courts are often where ground-breaking or definitive decisions are made. Additionally, the number of women in lower courts is often higher than that in Superior Courts and as in South Africa, the glass ceiling starts to appear as women ascend up the judicial ladder.[77]

Finally, this research does not consider the question of whether the appointment of women has made judiciaries more efficient, neither does it examine courts' jurisprudence as a means to determining women's contributions. Those issues are outside the remit of this research. However, I do posit that one's judicial contribution and/ or merit for judicial appointment are not determined by their gender; even though gender does affect what is often perceived as merit or who is considered meritorious.

[75] Penelope Andrews, 'The Judiciary in South Africa: Independence or Illusion?', in *Judicial Independence in Context* (Toronto: Irwin law Inc, 2010), pp. 466–98 (p.480).
[76] The magistracy is examined as a pool from which judges are drawn in Chapter 7.
[77] This will be discussed further in Chapter 7 of this thesis.

1.5 OUTLINE OF THE THESIS

Most discussions about 'judicial diversity typically coalesce around two issues: first, what are the reasons we don't have diverse judiciaries and how can we have them'?[78] Second, 'why should we want greater diversity among judges'?[79] The first part of Chapter 2 focuses on the first issue by introducing the body of literature on gender and judging. The literature corpus consists primarily but not exclusively of American, English and Canadian resources, with some contributions from South Africa, Australia and other parts of the world. The latter part of the Chapter responds to the question of why increased diversity amongst judges is needed. It does so by introducing new justifications for gender diversity. These justifications are concerned with judicial independence and impartiality.

Chapter 3 sets the scene for the discussions that follow in the rest of the thesis. Firstly, it introduces the reader to the research methodology employed in this study, including the choice of research design and the selected case studies. It discusses the research methods employed in this study and their limitations, and it also provides the reader with a breakdown of interview participants across both jurisdictions. The second part of Chapter 3 recognises that context matters and in doing so, it offers a historical account of each country's judiciary, explaining the process of judicial appointments.

Subsequently, Chapters 4-8 are devoted to an examination of the various aspects of the appointment process identified as useful sites of study. Chapter 4 considers the JSC in Zambia analysing its composition, procedures, lack of transparency and its appointments in the period of 2013-2017. It then takes a normative approach by detailing views from the interview participants on their respective appointment process. It suggests that the negative perception of women judges found in some responses, could be attributed to illegitimacy perceptions of

[78] Rackley, 'Women, Judging and the Judiciary ' p.4.
[79] Ibid.

women in leadership positions. The final part of Chapter 4 moves discussions away from the need for a gender diverse judiciary, to why we need a gender diverse appointment body. In examining the gender composition of the JSC, it provides theoretical arguments for gender diversity on judicial appointment bodies.

Taking a similar approach, Chapter 5 is focused on the South African JSC and examines similar aspects of the process. The visibility of the appointment process is critical here, as data compiled from participant observation and media reporting unveils three central issues. The first is that there are limitations on how transparent the JSC is, resulting in two instances where parties have approached the courts for relief.[80] The second issue is that the JSC's mandate to transform the judiciary has resulted in questions about its independence and its inability to appoint 'meritorious' candidates. Third, gender bias has been present in some JSC interviews revealing that some JSC members are not immune from the patriarchal and masculinist cultural attitudes, present in South African society.

Chapter 6 takes a step back from the operational aspect of the appointment process. It instead examines what international guidelines, judiciaries and lawyers expect of judges in order to determine whether there are impediments that prevent women from ascending to the bench. Using responses from interview participants and an assessment of jurisdictional and international requirements, it finds that women are not found wanting in regard to qualifications or technical expertise. Rather the challenges that women face include amongst others, the difficulties of balancing career and family life, and the lack of acting appointments. The chapter

[80]See *The Judicial Service Commission & Another* v *Cape Bar Council & Another*, 2012, DCCCXVIII <http://www.saflii.org/za/cases/ZASCA/2012/115.pdf> [accessed 16 January 2018]; *Helen Suzman Foundation v Judicial Service Commission & Others*, 2018, ZACC 08, 1–33 <https://collections.concourt.org.za/bitstream/handle/20.500.12144/3903/Full judgment Official version 24 April 2018.pdf?sequence=30&isAllowed=y> [accessed 24 April 2018].

closes with a categorisation of the main expectations of judges into three thematic groups, before concluding with some insight into whether expectations of judges are gendered.

Chapter 7 builds on the previous chapter by interrogating women's challenges, this time, in the legal profession. It commences with a review of women in the legal profession globally, before localising the discussion to South Africa and Zambia. It investigates the dynamics of the legal pools in both jurisdictions and explores the various legal pools from which judges are drawn. Subsequently, it considers the structural and cultural barriers preventing women from progressing to upper levels of the legal profession in private practice. It comes to various conclusions on each jurisdiction, while recognising that the presence or absence of women in the judiciary is a direct result of what occurs in the legal profession.

Chapter 8 examines other relevant aspects of the judicial appointment process such as the role of political actors, the legislative landscape for women's rights and the role of CSOs and legal professional organisations. These aspects of the process have different effects in each jurisdiction and hence the chapter continues to emphasise the importance of context in the larger debates around gender diversity. It is argued that political will has been one of the most critical elements of Zambia's success in appointing more women. However, in South Africa the landscape for women's rights and the involvement of CSO's have been more influential than political will. This chapter therefore is a reminder that the presence or absence of women on the bench is informed by many factors and that any solutions to address the lack of diversity, require a holistic approach.

Chapter 9 concludes the thesis by reiterating the importance of judicial diversity, not just for women but for the judicial system and those whom it serves. It makes further contributions to issues highlighted in previous chapters, while also addressing concerns present in each jurisdiction. It concludes by providing potential solutions to achieving more diverse

judiciaries. It does this by making six recommendations for research and policy initiatives. These recommendations are not limited to the case studies and can be applied to other jurisdictions in the region. They are the outcome of a narrative on gender diversity and judicial appointments in two jurisdictions. This narrative commences with a theoretical overview of the gender and judging field.

CHAPTER 2
A DIFFERENT CASE FOR GENDER DIVERSITY

2.1 INTRODUCTION

This chapter introduces the various existing arguments for gender diversity in the judiciary. It then offers a different additional model to the current, largely accepted justifications for diverse judiciaries.[81] This model is two-pronged, and it posits that gender diversity can strengthen substantive independence and judicial impartiality. It is recognised that the term gender diversity is replete with various possible definitions. How gender is expressed ranges across a broad spectrum—'one can, for instance, be a masculine woman or be a person who used to be a woman and is now a man; the sex assigned to one's body can be distinct from the gender one expresses; and gender is distinct from sexuality'.[82] This broad spectrum includes members of the Lesbian, Gay, Bisexual, Transgender, Queer and Others (LGBTIQ+) communities.

However for the purposes of this research, I refer to gender in respect of the social constructions of women and men. In sum, I argue that women face various challenges because of the social constructions of womanhood and the expectations that flow from this. They are not merely a result of biological differences, but rather of what is fashioned from our social fabric. To this end any reference to women and men in this research, includes those who present themselves as either of the two genders, irrespective of sexual orientation, biological classification and any other manner of lived experience.[83] A discussion on the debates that arise from using the term 'gender' and an analysis of the consequences of doing so in a binary manner, are beyond the scope of this thesis.

[81] Amongst others, there are justifications that gender diverse judiciaries will more equitable, more democratically legitimate, and will have better decision-making processes.
[82] Gabeba Baderoon, '"Gender within Gender": Zanele Muholi's Images of Trans Being and Becoming', *Feminist Studies*, 37.2 (2011), 390–416 <http://www.jstor.org/stable/23069910> [accessed 7 February 2017].
[83] Ashley Currier, 'Representing Gender and Sexual Dissidence in Southern Africa', *Qualitative Sociology*, 34 (2011), 463–81 <https://doi.org/10.1007/s11133-011-9198-9>.

This thesis commences from an understanding that there are some elements about the adjudicative role that are indisputable. The role of the judge in common law and civil law countries differs. In the former, judges craft legal decisions that have far-reaching consequences both politically and socially. In the latter, there are some debatable theories that suggest that judges function as 'automatons', because of limitations on how creative they can be.[84] Yet irrespective of the jurisdiction, one such indisputable element that stands is the point that adjudication is an interpretative exercise.[85] In the absence of clear established norms or in the presence of what may be deemed unjust laws, the adjudicator makes a decision based on the interests of justice. The definition of what is in the interest of justice differs depending on who is interpreting the law and penning the judgment. Thus though a judicial appointment process is a means to an end, it is a necessary means to study, because of the power that lies in the hands of judges.

Globally discussions have moved away from why we need women judges, to how to get more women judges. Yet Rackley and Webb suggest that arguments for judicial diversity are still important because they take us in several directions, leading to different ideas of judicial diversity and differently constituted judiciaries.[86] In this chapter, differently constituted judiciaries are viewed as a means of achieving two goals: first, strengthening judicial independence by improving a judge's substantive independence and secondly, improving judicial impartiality.

[84] Adelaide Remiche, 'When-Judging-Is-Power', *Journal of Law and Courts*, 3.1 (2015), 95–114.
[85] For discussions on the role of the judge in regard to adjudication, see Richard Devlin, A. Wayne MacKay, and Natasha Kim, 'Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or towards a Triple P Judiciary', *ALberta Law Review*, 38 (2000), 734–865 <http://heinonline.org/HOL/Page?handle=hein.journals/alblr38&id=746&div=34&collection=journals> [accessed 19 October 2016]; Leslie Green, *Law and the Role of a Judge*, Legal Research Paper Series (Oxford, 2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2495953> [accessed 19 October 2017].
[86] Erika Rackley and Charlie Webb, 'Three Models of Diversity', in *Debating Judicial Appointments in an Age of Diversity*, ed. by Gee Graham and Erika Rackley (Abingdon: Routledge, 2018), pp. 283–98 (p.238).

I have previously argued that gender transformation in South Africa,[87] can enhance perceptions of impartiality and in this chapter, I expand on this theory.[88] It is submitted that actual impartiality, which is a hallmark of a strong judiciary, can be strengthened by having more women on the bench. Further, once one appreciates that judicial independence and impartiality are valid reasons to diversify the judiciary, the examination of the formal and informal aspects of judicial appointments becomes more important. This chapter commences with an outline of the more prominent theoretical views on gender and judging in the judiciary in order to provide an overview of the field. I draw mostly from international sources because of the dearth of material on this subject matter in Africa. When reference is made to African sources they are mostly from South Africa.[89]

The section does not include a deconstruction of most feminist theories or an examination of wider feminist debates. Nonetheless, it is acknowledged that some of the reasons advanced for appointing women to the bench have been informed by justifications for more women in other sectors of society, such as politics.[90] These reasons have also been critiqued by general feminist theories.[91] For example, it has been argued by radical feminists that the gender of legal personnel is largely irrelevant, because the law's maleness is inherent in the very form of legal reasoning.[92] Therefore, while more women judges would clearly

[87] Gender transformation refers to the demographic restructuring of the courts, to ensure that more women are appointed as judges.
[88]Tabeth Masengu, 'Gender Transformation as a Means of Enhancing Impartiality on the Bench', *South African Law Journal*, 133.3 (2016), 475–490.
[89] The first compilation of essays from different African jurisdictions was only published in 2016. See *Gender and the Judiciary in Africa: From Obscurity to Parity?*, ed. by Josephine Dawuni and Gretchen Bauer (New York: Routldege, 2016).
[90] See Patricia Yancey Martin, John R. Reynolds, and Shelley Keith, 'Gender Bias and Feminist Conciousness amongst Judges and Attorneys', *Signs*, 27.3 (2002), 665–701. *Martin and others* promote the feminist Standpoint theory and argue that women's greater experiences of life sensitizes them to gender inequality and makes them worthwhile judges.
[91] Catherine Mackinnon directly questions the office of the judge and challenges the very hierarchical institutions that allow for the existence of judges. For a detailed discussion of her views see Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges'.
[92] Emily Jackson, 'Catharine MacKinnon and Feminist Jurisprudence: A Critical Appraisal', *Journal of Law and Society*, 19.2 (1992), 195–212 <https://doi.org/10.2307/1410220>.

impact upon prevailing attitudes, it would not be incompatible with the retention of a male legal order in the judiciary.[93] In this study the presence of a male order is not disputed, it is a consequence of the social construction of gender. Rather, the additional justifications for gender diversity advanced in this chapter seek to ameliorate the effects of this male order.

The second section of this chapter briefly refers to the work of Carol Gilligan, a feminist psychologist and ethicist, who is widely known for promoting the ethic of care versus the ethic of responsibility.[94] Reference is made to Gilligan's research because it has been used to promote what is referred to as the 'difference' argument by proponents of gender diversity on the bench.[95] The difference argument postulates that women should be appointed as judges because they speak in a 'different voice' from men. However this argument has limitations which will be discussed later in this chapter and, therefore it is useful to look beyond difference when making the case for more women judges.

To do this, it is necessary to deconstruct the difference argument from an unfamiliar perspective; that of an African woman. I encourage an appreciation of the multiple layers of perspectives that women can bring, that make them different, in order to improve the quality of justice delivered by the entire judiciary. Subsequently, I proceed to outline the first strand of my theory which relates to the independence of the judiciary. This section will focus on building an understanding of gender diversity as a central element of judicial independence. Judicial independence is an indispensable element of the rule of law with two strands: institutional independence and substantive independence.[96] I propose an extended definition of

[93] Ibid p.208.
[94] Carol Gilligan, *In a Different Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982).
[95] For a good summary of this literature, see Dermot Feenan, 'Editorial Introduction: Women and Judging', *Feminist Legal Studies*, 17.1 (2009), 1–9.
[96] Akinola Aguda, 'The Judiciary in Africa', *The Fletcher Forum*, 9 (1985), 13–35.

substantive independence that includes the ability to be independent from one's inarticulate premise.[97]

It is suggested that this extended definition of substantive independence can be strengthened by gender diversity. In advocating for greater diversity on the European Court of Justice, Iyiola Solanke rightly argued that judicial legitimacy has two important inputs − judicial independence and diversity.[98] In this study, in addition to being an input of legitimacy, I consider diversity as an integral input of judicial independence. The latter part of the third section in the chapter focuses on impartiality, which is closely related to substantive independence. In my argument, I discuss the difference between the two, before concluding the chapter by linking substantive independence and impartiality to the judicial appointment process**.**

2.2 THEORETICAL VIEWS ON GENDER AND JUDGING IN THE JUDICIARY

2.2.1 Gender as a Social Process and Democratic arguments for diversity

Empirical, biographical and other narrative studies have revealed important information on women's continuing difficulties and some successes in appointment to, and retention of, judicial office.[99] In the 1980's, political scientists such as Beverly Blair Cook[100] and Elaine Martin positioned the absence of women in the judiciary as a political matter.[101] Cook chronicled the failure of the trickle-up process which was meant to see more women hold higher positions in judicial office, as more women graduated from law school.[102] The trickle-up process appeared to be incompatible with what Cook was discovering and this prompted a

[97] John Dugard, *Human Rights & The South African Legal Order* (Princeton, New Jersey: Princeton University Press, 1978), p.284.
[98] Solanke, 'Diversity and Independence in the European Court Of Justice', p.114 .
[99] Feenan 'Editorial Introduction: Women and Judging', p. 1.
[100] See Beverly B. Cook, 'Women Judges: A Preface to their History', *Golden Gate University Law Review*, 14.3 (1984), 1–38.
[101] Sally J Kenney, 'Thinking about Gender and Judging'.
[102] Cook 'Women Judges: A preface to their history', p.574.

further investigation into the nature of the legal profession and the judiciary. Inspired by Cook, Kenney argued that by exploring gender as a social process and establishing the implications of such, Cook exposed unfairness in the treatment of men and women.[103] This had radical implications for thinking about merit and the best way of choosing judges.[104]

Building on Cook's work, Kenney emphasised that discussions on gender and judging needed to avoid using sex as a variable and rather view gender diversity through the lens of gender as a social process.[105] In her view, the meaning attached to sex differences creates a false dichotomy where sex masks other variables. By stripping down people's identities and ignoring other aspects just to look at sex difference, one approaches sex as a biological category instead of gender as a social process.[106] For Kenney, approaching gender as a social process meant recognising that gender is intersectional, not just something that happens to women who are 'otherwise privileged'.[107] For example, one cannot limit the description of a woman to a single aspect of privilege such as being middle class and yet ignore the fact that being middle class and black, is very different from being middle class and white. Therefore, failing to recognise gender as a social process results in a simplification of both the challenges women face in their quest to ascend to the bench and the solutions to address any existing problems.

Accordingly, viewing gender as a social process also enables one to understand how the structure of society and the courts impedes women's progression on to the bench. Kenney suggests that if one delves deeper into why women must be present at the centre of power as issues are framed and agendas constructed, one finds a simple answer.[108] It is that the demand

[103] Kenney, 'Thinking about Gender and Judging', p.88.
[104] Cook 'Women Judges: A preface to their history', p.589.
[105] Sally.J Kenney, *Gender & Justice:Why Women in the Judiciary Really Matter* (New York: Routldege, 2013).
[106] Kenney, 'Thinking about Gender and Judging', p. 89.
[107] Ibid.
[108] Sally J. Kenney, 'Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice', *Feminist Legal Studies*, 10.3 (2002), 257–270 (p.258).

for women judges is intrinsically linked to putting all public policies under a gender lens.[109] Essentially, if the judiciary is part of government which is a political body, then the appointment of judges is part of public policy. It cannot be excluded from the scrutiny that the legislature and executive have been placed under.

Devlin *et al* refer to this as a democratic argument for diversity because 'a democratic institution must be open to the input of those upon whom it has an effect and there must be an equal capacity for self-determination'.[110] The decisions of the judiciary have far-reaching effects and because judges enforce the law (and in some jurisdictions makes law) the judiciary should not be composed of a section of society that is privileged. In this case privileged, because they are men. Rackley and Webb add that to advance the argument for democratic legitimacy, 'we need to identify which communities the judiciary should reflect'.[111] The answer to what appointments will improve the legitimacy of the courts, 'will depend not just on the present make-up of the judiciary, but also more importantly, on the social and political backdrop against which these appointments fall to be made'.[112] Thus, it is necessary to view courts as representative institutions even if their administrative functions differ from legislatures.[113] Efforts to increase women's roles in legislatures have advocated that women should have more political space in society to organize, assert themselves as political actors, and voice gender equity concerns because women make up a large aspect of societies.[114]

Kenney reasons that if women are viewed as representatives who are 'standing for a particular section of society', their presence in the judiciary is as important as in the

[109] Ibid.
[110] Richard Devlin, A.Wayne MacKay and Natasha Kim,'Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or towards a Triple P Judiciary', *Alberta Law Review*, 38 (2000), 734–865 .
[111] Rackley and Webb, 'Three models of Diversity', p.290.
[112] Ibid.
[113] Ibid, p.130.
[114] Mi Yung Yoon, 'Democratization and Women's Legislative Representation in Sub-Saharan Africa', *Democratization*, 8.2 (2001), 169–190 (p.1730).

legislature.[115] Not in the same manner as parliamentarians who have been voted in by a constituency, but in a manner that recognises the 'other half' of the population.[116] This recognition of the other half of the population is not only about having women's faces in court, but is also revealed when women are present in the decision-making process. When they participate in the process of adjudication by either writing judgments or agreeing with those written by their peers, it is a sign that the judiciary, like other political institutions, is including those who were previously outsiders. In doing so, the judiciary normalises women's power and authority.[117]

2.2.2 Women as Outsiders

Erika Rackley's work has illustrated that the exclusion of women from the judiciary is the exclusion of a particular voice and being. Like Kenney, she encourages seeing gender as a social process and has submitted that 'the experience of being a woman' has an impact on judicial decision-making.[118] Thus by harnessing the power of storytelling, Rackley's work has provided indicative and illustrative tales of women judges who by their presence, 'disrupt the apprehensible world in order to open spaces for dreaming alternatives'.[119] It is a disruption because the role of the judge at present is still not imagined as one which women and members of other currently under-represented groups can comfortably and constructively occupy.[120] Informal networks of male power through various manifestations of the 'old boys' network' operate alongside more structural forms of institutional discrimination, within the legal

[115] Kenney, 'Gender and Judging', p. 129.
[116] Ibid.
[117] Nancy B. Arrington, 'Gender and Judicial Replacement', *Journal of Law and Courts*, 6.1 (2018), 127–54 (p.129).
[118] Beverley Baines, *Women Judges and Constitutional Courts: Why Not Nine Women?*, 077 (Kingston, 2016) <http://ssrn.com/link/Queens-U-LEG.html> [accessed 15 May 2017].
[119] Erika Rackley, 'Judicial Diversity,the Woman Judge and Fairy Tale Endings', *Legal Studies*, 27.1 (2007), 74–94 (p.76).
[120] Rackley, 'Judicial Diversity,the Woman Judge and Fairy Tale Endings', p. 624.

profession preventing women from reaching the top.[121] Rackley found that women not only have a harder time getting on to the bench, but once they get there, at best they are considered as an oddity or token. At worst, they are considered a threat to the judicial norm, simultaneously confirming and disrupting its established masculinity.[122]

2.2.3 Equality, Legitimacy and Improved Quality of deliberations

In recognising the masculine context in the judiciary, Malleson proposes that a starting point to promoting gender diversity is equity arguments that explain how inherently unfair it is that men enjoy a near monopoly of judicial power.[123] There are no inherent attributes that make men better suited to be judges than women[124] and I have echoed this in previous work focusing on women and leadership in the South African judiciary.[125] This therefore means that the disproportionate levels of participation of men in law generally and in the judiciary specifically, are the result of unfair arrangements both past and present which disadvantage women.[126] As Lord Neuberger MR argued:

> if ... women are not less good judges than men, why are 80% or 90% of judges male? It suggests, purely on a statistical basis, that we do not have the best people because there must be some women out there who are better than the less good men who are judges.

That is why equity arguments emphasise that there should be equal opportunities for making it into the pool of possible appointees. This is not just about fairness to the individuals but also

[121] Erica Rackley, 'Representations of the (Woman) Judge: Hercules, the Little Mermaid, and the Vain and Naked Emperor', *Legal Studies*, 22.4 (2002), 602–624 (p. 606).
[122] Erika Rackley, *Submission to the Lord Chancellor's Advisory Panel on Judicial Diversity* (Durham, 2009) <http://www.law.qmul.ac.uk/eji/docs/51452.pdf> [acccessed 15 May 2017].
[123] Kate Malleson 'Justifying Gender Equality on the Bench: Why Difference Won't Do', *Feminist Legal Studies*,11(2003), 1-24 (p.15).
[124] Ibid.
[125] Tabeth Masengu, 'A Perspective on Women and Leadership in the South African Judiciary', *South African Journal on Human Rights*, 31,15 (2015), 655–666.
[126] Kenney 'Thinking about Gender and Judging, p. 15.

to ensure that the judiciary finds those best suited for the job− assuming that attributes relevant to judicial excellence are distributed more or less evenly.[127]

However, Malleson warns that, if the demands for equal participation of women judges are to last, they must be both empirically and theoretically sound.[128] From a South African perspective, Albertyn provides sound theoretical and empirical demands for women judges by echoing the view that a diverse and representative judiciary will provide greater institutional legitimacy. This legitimacy is critical for public confidence and accountability.[129] By doing this, Albertyn encourages us to view the necessity of having more women on the bench, not only as a means to create equality between genders, but also as a manner in which citizens can feel that they 'belong' when they look at the bench.[130]

Albertyn adds better quality of deliberation and judicial process and improved legal outcomes as further justifications for a diverse bench.[131] Dawuni has also proposed the improvement in the quality of deliberation and legal outcomes as reasons for gender diversity. She has used the International Criminal Court and the African Court of Human and Peoples' Rights, as proxies for opening up the discussion on substantive and tangible contributions women judges bring to international courts.[132] Another example of African women judges' contribution to jurisprudence, is a novel collection of essays narrating the experiences of African women judges on international courts.[133] The judges' personal and legal experience as women, contributed to their efforts to improve the decision making process.[134]

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[127] Rackley and Webb, 'Three models of Diversity', p.287.
[128] Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do', p.1.
[129] Catherine Albertyn, 'Judicial Diversity', in *The Judiciary in South Africa*, ed. by Cora Hoexter and Morné Olivier (Cape Town: Juta, 2014), pp. 245–287.
[130] Ibid, p.265.
[131] Ibid, p.247.
[132] Josephine J Dawuni, *African Women Judges on International Courts: Symbolic or Substantive Gains?*, *ICourts Paper Series* (Hague, 2016).
[133] Dawuni and Kuenyehia.
[134] For example, in *Prosecutor* v. *Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic*, IT-96–23-T, Judge Florence Mumba held that rape and enslavement were Crimes against Humanity.

2.2.4 Symbolism

Symbolic arguments for diversity have been identified by British academic Rosemary Hunter. In addition to judicial legitimacy and equality arguments, the presence of women judges encourages lawyers and students and provides mentoring opportunities for those with judicial aspirations.[135] Having women on the bench symbolises a new era where the doors of judicial office are not entirely closed to women because of their gender. It also makes courts less intimidating and instils confidence in women practitioners who appear in those courts.[136]

Hunter then refers to three reasons for diversity which she describes as practical arguments. The first is that women judges are more likely to be empathetic with women litigants and provide a better court room experience.[137] Secondly she submits that women will educate male colleagues by denouncing sexist comments, gender bias and stereotyping.[138] Finally, Hunter argues that women will bring a gendered sensibility to the process of decision-making sometimes altering the outcome.[139] This gendered sensibility to judging is what other academics have referred to as a different approach to adjudication[140] that leads to improvements in the lives of other women especially litigants.[141] However, the notion of a different approach to adjudication has also fuelled the argument that women judges will speak in a different voice– a theory that I examine in a later section.

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[135] Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-Making', *Current Legal Problems* 68,1 (2015) 119-141 (p.123).
[136] A view expressed by South African senior Counsel Advocate Nkosi Thomas during the interviews of now Deputy President of the Supreme Court of Appeal Justice Mandisa Maya, at the le Vendome Hotel Sea Point on 14 April 2015 in Cape Town.
[137] Ibid. This is also known as the Balance theory. See Christina L. Boyd, 'Representation on the Courts? The Effects of Trial Judges' Sex and Race', *Political Research Quarterly*, 69.4 (2016) <https://doi.org/10.1177/1065912916663653>.
[138] Also see Judith Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges', *Southern Carlifornia Law Review*, 61 (1988), 1877-1944.
[139] Ibid.
[140] Feenan 'Editorial introduction: Women and judging', p.2 .
[141] For some examples of this, see Baines.

2.2.5 The use of merit as an exclusionary method

An important aspect of the research on gender and judging has also been the appreciation that the paucity of women in the judiciary is manifestly unfair. For Malleson, this unfair arrangement is buttressed by continuing requirements and criteria for appointment that invariably keep out women, such as preference for private-schooled advocates and the definition of a 'meritorious' candidate.[142] In Australia, this improper arrangement resulted in competent candidates who possessed requisite qualities for judicial office, being overlooked because they were women.[143] In 1985, Thornton posited that the direct or indirect exclusion of women from the Australian judiciary from amongst those who were deemed to be the most able, had little to do with the innate ability of group members.[144] She suggested that it was the traditional exclusion of people on the basis of 'merit' or lack thereof, which has served the myth of intellectual inferiority and given rise to the view that the appointment of women or 'non-whites' was synonymous with a decline in efficiency.[145]

This perception of women still exists today, where calls for gender diversity are denounced as being antithetical to merit. Kenney describes this perception as an idiosyncratic phenomenon.[146] Global research has found that the notion of merit is not an objective standard neutrally applied; rather it is socially constructed to the advantage of a narrow group of white male lawyers.[147] This is applicable in jurisdictions such as South Africa, Canada, the USA and England where the population is racially diverse.[148] This means that instead of being a fairer

[142] Kate Malleson 'Rethinking the Merit Principle in Judicial Selection', *Journal of Law and Society* 33,1 (2006) 126–140.
[143] Rachel Davis and George Williams, 'A Century of Appointments but Only One Woman', *Alternative Law Journal*, 28 (2003), 54–58.
[144] Margaret Thornton, 'Affirmative Action, Merit And The Liberal State', *Australian Journal of Law and Society*, 2.2 (1985), 28–39 (p. 30).
[145] Ibid.
[146] Kenney 'Gender and Justice',p. 128 .
[147] Sally J Kenney, 'Thinking about Gender and Judging', p.90.Margaret Thornton, '"Otherness" on the Bench: How Merit Is Gendered', *Sydney Law Review*, 29 (2007), 391–413 (p.392).
[148] Ibid, also see Rachel Davis and George Williams, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia', *Melbourne University Law Review*, 27 (2003), 819–863.

and more transparent process that achieves gender diversity, the merit-based system also becomes a process that excludes women on the basis that they lack 'merit'. As Hamilton submits, 'merit can lie in the eye of the beholder and it has not served women and "other" contenders for judicial office in the past'.[149]

While merit or the lack thereof is often cited regarding the appointment of women judges, Mcloughlin notes that when eminent men are appointed judges, it is taken for granted that they are appointed on the basis of merit. Yet merit is determined in the context of power.[150] The concept of merit is determined by where the power deciding it lies and, for a long time, this power has lain with white men. Thus, the real issue is not that the appointment of women is antithetical to the competence and capabilities required to be a judge. It is rather that the definition of what is regarded as competent and capable is drawn from a small elite group of men. Consequently, when applied to those unlike them, the 'others' will always fall short of the prescribed measure of merit.

2.3 JUDGING IN A 'DIFFERENT' VOICE: MYTHS AND REALITY

Before proceeding to the next section, it is necessary to respond to one question borne from another theory on gender and judging: is the presence of women on the bench necessary because they are different or because they adjudicate in a different voice from their male counterparts?

[149] Barbara Hamilton, 'The Law Council of Australia Policy 2001 on the Process of Judicial Appointments: Any Good News for Future Female Judicial Appointees?', *Queensland University of Technology Law and Justice Journal*, 1.2 (2001), 223–240.
[150] Kcasey McLoughlin, 'The Politics of Gender Diversity on the High Court of Australia.', *Alternative Law Journal*, 40 (2015), 166–70 <http://heinonline.org/HOL/Page?handle=hein.journals/alterlj40&id=170&div=46&collection=journals>.

2.3.1 Women and the Ethic of Care

Gilligan's book emanating from developmental psychology was ground-breaking in the feminist arena because it detailed how men and women make decisions about morality.[151] Using a psychological framework, Gilligan argued that gender differences in moral reasoning result in the feminine voice acknowledging and being concerned to preserve social relationships. The masculine voice on the other hand, tends to see individuals as atomistic and makes judgments according to a hierarchy of rights.[152] Therefore the male approach to morality sees individuals as having certain basic rights, and that as an individual, you must respect the rights of others. Morality imposes restrictions on what you can do. The female approach to morality, views people as having responsibilities towards others and thus morality instead of being a restriction, is an imperative to care for others.[153]

The latter imperative is what has been described as the distinctly feminine 'ethic of care', which proponents of the difference theory have drawn directly or indirectly from Gilligan's work. Commentators on women in the legal profession have argued that the greater presence of women on the bench 'will bring about a reorientation of the legal system away from formalism, objectivity, universalism and adversarial methods of conflict solving'.[154] The result will be a move towards the subjective needs of individuals and a greater use of alternative dispute resolution such as mediation. Menkel-Meadow also theorised that applying Gilligan's female form of 'moral reasoning' to the legal process would result in different substantive solutions and an increased emphasis on a 'just' result.[155]

[151] Gilligan, *In a Different Psychological Theory and Women's Development*, pp. 26-31.
[152] Ibid.
[153] Ibid.
[154] 'Kate Malleson 'Justifying Gender Equality On The Bench: Why Difference Won't Do', pp.3-4.
[155] Carrie Menkel-Meadow 'The Comparative Sociology of Women Lawyers :The "feminization" of the Legal Profession', *Osgoode Hall Law Journal*, 24,4 (1986), 897–918 (pp.914-915).

To further buttress this argument, Sherry noted that women's participation as judges operates on one level – within either the masculine or the feminine paradigm – to constrain the gender-directed harms of the system.[156] Thus because women are more naturally connected to others, they are more likely to be governed by true empathy, and a strand of 'paternalism' grounded on self and other and not on power.[157] Accordingly, Sherry believed that women brought a unique contribution to law and judging that made a difference and impacted on judging as a whole. In an interesting counter to this school of thought, former justice of the Supreme Court of Canada Bertha Wilson responded to a question about difference, as follows:

> If the existing law can be viewed as the product of judicial neutrality or impartiality, even although the judiciary has been very substantially male, then you may conclude that the advent of increased numbers of women judges should make no difference, assuming, that is, that these women judges will bring to bear the same neutrality and impartiality. However, if you conclude that the existing law, in some areas at least, cannot be viewed as the product of judicial neutrality, then your answer may be very different.[158]

Justice Wilson argues that the legal field and law itself has been dominated by men and male perspectives. As such Wilson continues, the advent of women on the bench could invariably bring an element that was lacking. Arguably, Wilson's comments could be interpreted as confirmation that women bring 'a gendered sensibility to the process of decision -making'.[159] On the face of it this reasoning appears valid because if women reason based on morality and are more inclined to desire a just outcome for the greater good, then women will surely speak in a different voice. The function of law and how it is dispensed will and can change because those who have been allowed into in the system, are using a different reasoning

[156] Suzanna Sherry 'The Gender of Judges', *Law & Inequality*, 4 (1986), 159–169 (p. 161).
[157] Ibid at 169.
[158] Madam Justice Bertha Wilson 'Will Women Judges Really Make a Difference? Will Women Judges Really Make a Difference', *Osgoode Hall Law Journal*, 28,3 (1990). 507–22 (p.511).
[159] Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-Making'. pp 124.

from those who have dominated it.[160] However, a deeper examination of the difference theory requires that we interrogate the meaning of 'speaking in a different voice'. What is this voice and what evidence is available to show that women across nations, cultures, class and other forms of status speak with it?

2.3.2 Whose Voice is being heard? The problem with the 'different' voice from an African perspective

In the last two decades, there have been more convincing and less divisive justifications for gender diversity on the bench. There is an absence of conclusive evidence to the effect that women bring a singular voice to judging, and numerous studies conducted in the global North have been inconclusive.[161] In the 1990s, former US Supreme Court Justice Sandra Day O'Connor reflected on feminist commentators' views on the difference theory.

> The gender differences currently cited are surprisingly similar to stereotypes from years past. Women attorneys are more likely to seek to mediate disputes than litigate them. Women attorneys are more likely to focus on resolving a client's problem than on vindicating a position. Women attorneys are more likely to sacrifice career advancement for family obligations. Women attorneys are more concerned with public service or fostering community than with individual achievement. Women judges are more likely to emphasize context and deemphasize general principles. Women judges are more compassionate. And so forth.[162]

O'Connor described the difference approach as interesting but troubling, because it echoed the Victorian myth of the 'true woman',[163] The very description that kept women away from law for such a long time.[164] It painted a picture of one type of woman who would don the judicial robe dispensing justice in a specific manner.

[160] For example, Dawuni's research in Ghana found that women were conciliatory in how they handled their cases. See Josephine Dawuni, 'To "Mother" or Not to "Mother": The Representative Roles of Women Judges in Ghana', *Journal of African Law*, 60.3 (2016), 419–40.
[161] Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-Making, pp 125-26'.
[162] Sandra Day O'Connor 'Portia's Progress', *New York University Law Review, 66* (1991), 1456–1558 (p. 1553).
[163] Ibid, p.1553.
[164] Ibid.

Menkel-Meadow conceded that the difference argument is a dangerous and problematic argument because of the possibility that arguments or claims about differences, can be distorted into claims about inabilities or stereotypical devaluing of what is labelled female.[165] The inabilities she refers to would occur if a woman judge didn't meet the expected standard of womanhood. I suggest that the existence of such a standard only reinforces sexist views about how women should behave. Hunter further proffers that it was 'at best naïve and at worst essentialist', [166] to assume that women would make a difference merely by being present. An essentialist concept of gender is defined as the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.[167]

In rejecting essentialism, Canada's first female judge of East Asian ancestry Maryka Omatsu, differentiated between two arguments. She stated that the special or uniform insight of women, or of any other demographic group, is not the same thing as the claim that the presence on the bench of heretofore under-represented people can help to balance an existing tilt.[168] It is argued that promoting a view of a special or uniform insight of women, places all women in one category leaving no space for varying perspectives. Consequently, if the existing tilt is favoured towards a homogenous male narrative, arguing for a unique woman's voice will only tilt the balance towards an equally homogenous female narrative with no in-between

[165] Carrie Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process', *Berkley Women's Law Journal*, 2.39 (1985) <https://www.copyright.com/ccc/basicSearch.do?> [accessed on 17 September].
[166] Rosemary Hunter, 'Can Feminist Judges Make a Difference?' *International Journal of the Legal Profession*, 15 (2008), 7–36 (p.7).
[167] Angela P Harris 'Race and Essentialism in Feminist Legal Theory', *Stanford Law Review*, 42,3 (1990), 581–616 (p. 585).
[168] Maryka Omatsu 'The Fiction of Judicial Impartiality', *Canadian Journal of Women and Law*, 9 (1997), 1–16 (p.6) .

stance. A homogenous female narrative does not exist. Not only is it essentialist because it proffers the idea of one type of woman, but it also silences the polytonality of voices.[169]

Harris has found that 'it is not only that some voices are silenced in order to privilege others, but that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice', among them voices of black women.[170] Critical race theorist Kimberle Crenshaw argues that black women are sometimes excluded from feminist theory and antiracist policy discourse because both are predicated on a discrete set of experiences, that often does not accurately reflect the interaction of race and gender.[171] If the difference argument is applied to the judiciary, it effectively prevents the presence of adjudication in 'different' voices and establishes a myopic view of jurisprudence that does not consider the multiple layers of the judge who is dispensing justice. It also prohibits women from offering intellectual excellence and diverse experience that can fully enrich the court proceedings.

To elaborate, African societies are very different from those in the global North or even other continents in the global South such as Asia. In the region, there exists a plethora of different ethnic groups, different languages and customs each with their own histories and the same applies in individual African countries too. Since the literature on women and judging is predominantly from the global North, the result is that the difference argument either assimilates African women judges into an existing type of 'woman' or it alienates them because they are not 'that' type of woman. Secondly African women themselves are not a homogenous group. Despite the common heritage derived from colonialism, economic exploitation, and racism, there are wide variations in the ways that these have impacted on individual women in

[169] Erika Rackley 'Detailing Judicial Difference', *Feminist Legal Studies, 17* (2009), 11–27 (p.17).
[170] Harris, p.24.
[171] Kimberle Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', *University of Chicago Legal Forum*, 1 (1989), 139-67.

different regions and communities.[172] For example, colonial rule created chasms or hierarchies of ethnic groups, thus people experienced the effects differently depending on where they were positioned.[173]

Consider the two countries chosen for this study: Zambia alone has 72 languages, it gained independence from Britain in 1964, and has not experienced any civil wars like its regional neighbours.[174] South Africa on the other hand was a former British and Dutch colony and instituted apartheid laws for decades with democratic rule only achieved in 1994.[175] While both colonialism and apartheid were established for the subjugation of one people by another, the ripple effects of both are different. In Zambia, colonial rule resulted in amongst others, the governance of customary law in matters of personal law and succession which to date still has an adverse effect on women.[176] Yet even in the Zambian populace, despite a history of patriarchy, a fair number of women who are middle class and live in the urban areas, are literate and educated.[177] Those that come from matriarchal tribes are able to inherit and thus women's exposure to education, wealth and discrimination differs.

In South Africa although apartheid consistently favoured white people over other people who were regarded as 'broadly black' or 'not-white,' it also deliberately differentiated between groups of black people classifying them as African, Indian, and 'Coloured'.[178]

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[172] S Tamale, '"Point of Order, Mr Speaker": African Women Claiming Their Space in Parliament', *Gender and Development*, 8.3 (2000), 8–15 (p.14).
[173] A notable one is how the Tutsi's were favoured over the Hutu's in Rwanda which resulted in the minority Tutsi's being treated better than the majority Hutu's.
[174] See Daniel N Posner, 'The Political Salience of Cultural Difference: Why Chewas and Tumbukas Are Allies in The Political Salience of Cultural Difference: Tumbukas Are Allies in Zambia and Adversaries in Malawi', *American Political Science Review*, 98.4 (2004), 529–45.
[175] For a detailed discussion on the impact of apartheid on South Africans and the legal system see Ruth B Cowan, 'Women's Representation on the Courts in the Republic Of South Africa', *Univeristy of Maryland Law Journal Race Religion Gender & Class*, 9 (2006), 291–318 and Christopher Forsyth 'The Judiciary Under Apartheid' in *The Judiciary in South Africa*, eds. Cora Hoexter and Morné Olivier (Juta, 2014), p 26–27.
[176] Muna Ndulo 'African Customary law,Customs and Women's Rights', *Indiana Journal of Global Legal Studies*, 18.1 (2011), 87–120.
[177] The UN indicators provide a good breakdown of this. See UNGEI, 'Zambian UN Indicators', *United Nations* 2013 available at http://www.ungei.org/resources/index_469.html.
[178] Elsje Bonthuys 'Gender and Race in South African Judicial Appointments', *Feminist Legal Studies*, 23.2 (2015), 27–148 (p. 130).

Bonthuys writes that black people were all disadvantaged to different extents and in different ways by the various manifestations of apartheid.[179] Most severely affected were people of African descent, while Coloured and Indian people were treated differently and in certain respects better than black African people.[180] In this research, any reference to Africans when discussing the South African context is specific to indigenous black South Africans and does not include those identified as Indian, Coloured or white.[181] Due to this racial differentiation, African women in South Africa experienced discrimination that was both similar to and different from other women of colour, white women and even African men.

Moyer reveals that 'studies show that women who are also members of racial and ethnic minorities, have experiences with discrimination that both include and transcend sex discrimination or race discrimination alone'. [182] If one considers these studies and the different circumstances and experiences encountered by women of different classes and varied social identities, is it even possible that they can have the same voice? To say that women from these localities speak with one voice is to ignore the interactions of race, gender, class and even ethnic politics involved in both Zambia and South Africa. Eva Brems notes that African feminists have called for a broader conception of feminism that recognizes the historical African experience of imperialism combined with patriarchy, and on the other hand the contemporary divergent cultural context in which feminism must be situated.[183] This is because

[179] Ibid
[180] Ibid.
[181] Section 1 of the Broad- Based Black Economic Empowerment Act 53 of 2003 states that 'black people' is a generic term which means Africans, Indians and Coloureds.
[182] Laura.P Moyer, 'Gender on the International Bench', in *Research Handbook on Law and Courts*, ed. by Susan.M Sterett and Lee.D Walker (Northampton: Edward Elgar Publishing, 2019), pp. 187–99 (p.193).
[183] Eva Brems, 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights', *Human Rights Quarterly*, 19.1 (1997), 136–64 (p.179)<http://www.jstor.org/stable/762362>.

there is a need to account for multiple grounds of identity when considering how the social world works.[184]

Initiatives such as the African Feminist Judgment Project consider how the social world works by writing alternative feminist judgments in leading cases.[185] One question the project asks amongst others, is how alternative feminist judgments could contribute to African jurisprudence, legal practice and judicial decision-making. This desire to contribute to African jurisprudence recognises the importance of infusing context specific experiences into adjudication, as opposed to merely adapting from other jurisdictions. This does not mean that feminist judgments can only be written by women. Women do not have a monopoly on caring and compassion, nor do men have a monopoly on cold detachment and mistaken reliance on conclusions dictated by abstract reason.[186] Seminal judgments advancing women's rights and denouncing discrimination in both Zambia and South Africa, such as *Longwe v Intercontinental Hotel*[187] and *Bhe and Others v Khayelitsha Magistrate and Others,*[188] have been written by men.

In the former case Sara Longwe successfully challenged a rule at the Intercontinental Hotel that prevented women who were not accompanied by men from entering the hotel bar. This was declared discriminatory and unconstitutional. A similar declaration was made in the *Bhe* case where the applicants challenged the customary law rule of male primogeniture that the stated first-born son inherited a deceased estate and prevented daughters from inheriting. These decisions demonstrate that men can also be gender conscious and identify gender-

[184] Kimberle Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color', *Stanford Law Review, 43.6* (2016), 1241–299 (p.1245).
[185] This project is hosted by Cardiff Law and Global Justice, see https: https://www.lawandglobaljustice.com/the-african-feminist-judgments-project [13 February 2019].
[186] Omatsu, 'The Fiction of Judicial Impartiality' p.6.
[187] *Sara Longwe v. Intercontinental Hotel*, 1992, p. 1992/HP/765.
[188] *B*he *and Others* v *Khayelitsha Magistrate and Others*, 2004, p. (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC) <http://www.saflii.org/za/cases/ZACC/2004/17.html> [17 september 2017].

specific harm. However, later in this chapter, I argue that the different perspectives women judges bring to the bench, not as one voice but as a polytonality of several voices, can greatly improve substantive independence and impartiality.

A third problem with essentialising women and giving them one unique voice is the danger of easily getting lost in the detail of ascertaining what this voice is. As mentioned earlier, the inference of the voice is that of a woman judge from the global North. Trying to discern whether a Zambian or South African judge is speaking with this voice places too much emphasis on the detail of the judgment alone, without due attention to the process of reaching the said judgement. For instance, if a woman judge is assumed to be more empathetic, averse to conflict and more compassionate, this creates expectations about how a woman judge will adjudicate in cases where there is a gendered dimension to the case. A case in point is former Judge Thokozile Masipa who presided over the widely publicised *S v Pistorius* trial, where the former Paralympic gold medallist was charged with the murder of his girlfriend.[189]

Masipa was heavily criticised for acquitting Pistorius on the charge of murder, with many of the frequent comments expressing shock at her decision, 'especially because she was a woman.' [190] The dismay with Judge Masipa's decision was in part because she was expected to 'care' more, because another woman had been killed.[191] Here the adverse comments and public opinion focused on the factual findings of the judgement, ignoring the process of reasoning that informed her decision. Regardless of one's view on the severity of the sentence handed down, Judge Masipa used legal reasoning to apply the law to the facts of the case, as

[189] *S v Pistorius*, 2014, p. (CC113/2013) [2014] ZAGPPHC 793 <http://www.saflii.org/za/cases/ZAGPPHC/2014/793.html> [accessed 30 December 2016].
[190] She initially convicted him of manslaughter, effectively sentenced him to 19 months in prison and then convicted him to six years in prison when the Supreme Court of Appeal changed his conviction to murder.
[191] See Tabeth Masengu 'When We Judge the Judges, Where Do We Draw the Line' *Mail & Guardian*, 25 September 2014, available at <http://mg.co.za/article/2014-09-25-when-we-judge-the-judges-where-do-we-draw-the-line>, [accessed on 1 October 2016] ; Bianca Ackroyd, 'ANCWL Calls for Lengthy Sentence for Oscar Pistorius' *ENCA*, 3 December 2015, available <https://www.enca.com/south-africa/ancwl-calls-lengthly-sentence-oscar>, [accessed 1 October 2016].

judges do in a system that strives to solve legal problems.[192] To expect her to adjudicate in a particular manner because she is a woman, invariably shackles her and other women judges to an unfair standard that seeks to treat them as automatons operating in a singular dimension. Ironically, the very argument used to lobby for more gender representation, also diminishes a woman's contribution if it does not conform to a specific 'type' of woman.

Fourth, a claim that women speak with one voice is problematic because it restricts appointing bodies and anybody else involved in the appointment of judges. If a Judicial Service Commission (JSC) is made to believe that women speak with one singular voice, it effectively provides an excuse not to probe potential appointees on their intellectual and judicial views on pertinent subjects of law. If the belief is that women in their compassionate, conflict-averse and kind ways will adjudicate in a particular way, there is no need therefore for the appointers to expand the pool from which judges are selected.[193] After all why should they be encouraged to seek women and minorities from the attorneys' profession, magistracy and academia if those who are advocates can adjudicate in the same voice that non-advocates would? Furthermore, the stereotypes of women's behaviour could also be an impediment to women's aspirations for the bench. An example is the JSC interview of now Judge Benita Witcher, who was interviewed for a position on the Labour Court of South Africa. Witcher came under severe scrutiny due to comments provided to the JSC, which said she was aggressive as an acting judge.[194]

Commissioner Julius Malema however, pointed out to the commissioners that everybody wants an assertive lawyer and he questioned why this trait was appreciated in men

[192] In lecture on judicial independence, Masipa J stressed that a judge can not decide a case based on public opinion or outrage. See Thokozile Masipa, 'Reflections on the Independence of the Judiciary in the New South Africa', *Sunday Times*, 5 July 2015, available at <http://www.timeslive.co.za/sundaytimes/stnews/2015/07/05/Read-Judge-Masipas-full-speech-here>, [accessed on 13 May 2016].
[193] In most common law countries, appointments have previously only been from the Advocates/Barristers profession, which is mainly white, male and privileged.
[194] JSC interviews held at the President Hotel Bantry Bay on 8 October 2014 where the author was present.

and yet considered as aggressive and thus unworthy in women.[195] His comments were a firm reminder that ideas about how a 'true woman' behaves are deeply ingrained in people's consciousness, resulting in the application of a double standard when considering judicial candidates. Thus, a focus on what different women can bring to the bench would avoid situations like the above mentioned one. It would also encourage bodies to extend the judicial pool further into communities or groups which are absent from or under-represented on the bench. Ultimately, this thesis is not disputing that the presence of women will make a difference on the bench. Gender is but one of many variables which might influence patterns in judgment writing, these patterns are nonetheless an important part of situating and understanding a judge's contribution to a given court.[196]

What is disputed is that women will make a difference because of the singular voice they bring in their adjudication. Malleson summarises various studies that have been undertaken in the USA and Israel, which show no clear or consistent differences between men and women on the bench.[197] She further adds that differences only emerged in cases directly related to sex discrimination and even there the findings were mixed.[198] Moreover where there are differences, these do not necessarily fit with expected gender patterns according to theories such as Gilligan's ethic of care/rights dichotomy.[199] Conversely, some research in affirmative action cases in the USA has shown that diversity is more likely to move decisions in the direction that the law requires.[200]

[195] Ibid.
[196] KcaseyMcloughlin,'"A Particular Disappointment?" Judging Women and the High Court of Australia', *Feminist Legal Studies, 23.3* (2015), 273–294 (p. 287).
[197] 'Kate Malleson 'Justifying Gender Equality On The Bench', (pp.5-7).
[198] Ibid.
[199] Ibid.
[200] Baroness Brenda Hale, 'The Appointment and Removal of Judges: Independence and Diversity' *8th Biennial Conference of the Intenational Association of Women Judges,* (Sydney,Australia, 2006), p. 2.

So, does the absence of a distinct voice or the inconsistencies around it deny any traceable impact of gender on judging? I submit that it does not; rather the justification for including women in the judiciary is precisely the fact that women are not monolithic and not speaking in a singular voice. Including women in the ranks of judges will more closely approximate varying societal experiences. This is exemplified in Belleau and Johnson's research of dissenting opinions from women judges on the Supreme Court of Canada.[201] They found that even though the first three women on the bench[202] had the highest number of dissenting judgements, it did not necessarily mean that they had a shared perspective stemming from their feminine essence.[203] Rather as the first women, 'they were positioned distinctively in relation to the majority',[204] because of their gender. Yet this shared positioning did not result in shared reasoning, simply because they were women.

Similarly, the findings of an experiment conducted by Erica Rackley to ascertain whether her students could guess the correct gender of a judge from anonymised judgments, showed no definite difference.[205] The students were able to identify the correct gender in only 46% of the cases. Rackley argues that it is implausible to think that gender does not affect judicial decision-making however, 'there is no reason for thinking that it does so in a particular and identifiable way'.[206]

Furthermore, having chronicled the performance of Australia's first women high court judges, Mcloughlin noted the disappointment of commentators with the fact that women were

[201] Marie-Claire Belleau and Rebecca Johnson, 'Judging Gender: Difference and Dissent at the Supreme Court of Canada', *International Journal of the Legal Profession*, 15.1–2 (2008), 58–70.
[202] Justice Claire Heaureux-Dube, Justice Bertha Wilson and Justice Beverly Mclachlin.
[203] Marie-Claire Belleau and Rebecca Johnson 'Judging Gender: Difference and Dissent at the Supreme Court of Canada', *International Journal of the Legal Profession,* 15.1 (2008), 58–70 (p. 62).
[204] Ibid p. 63.
[205] Erica Rackley 'Judgment Day for Gender Is Diversity Crucial in Court', *The Conversation*, 8 June 2013, available at <http://theconversation.com/judgment-day-for-gender-is-diversity-crucial-in-court-15273>, [accessed on 1 October 2016].
[206] Ibid.

not different in the ways that had originally been hypothesised.[207] She writes that difference is defined as being invidious, because exhibiting any kind of difference is inimical to the judicial role. Hence, she believes that there is a need to reconceptualise difference. This would involve recasting not only how we understand difference itself, but also expectations around who might make that difference and how the difference should be made.[208] It is this reconceptualization that I turn to in my discussion on substantive independence.

2.4 SEEING A DIVERSE JUDICIARY AS A PUBLIC GOOD: AN INDEPENDENT JUDICIARY IS A STRONG JUDICIARY

2.4.1 Redefining Substantive Independence

Sonia Lawrence posits that judicial independence like any concept worth its salt, is not particularly well defined and thus attempts at definition are cabined by jurisdiction or limited to the world of theory.[209] Article 2 of the Siracusa Draft Principles on the Independence of the Judiciary states that judicial independence means:

> (a) That every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and
>
> (b) That the Judiciary is independent of the Executive and Legislature, and has jurisdiction, directly or by way of review…[210]

The Bangalore Principles disseminated two decades later charge judges to uphold and exemplify independence in both its institutional and individual aspects.[211] The application of

[207] Kcasey Mcloughin, '"A Particular Disappointment?" Judging Women and the High Court of Australia', (p.274).
[208] For instance, Rosemary Hunter has called for a distinction between feminist judges and women judges as the former are those who voluntarily identify with feminism and adjudicate in a manner that supports feminism. For more see Hunter, 'Can Feminist Judges Make a Difference?', p 8.
[209] Sonia Lawrence, 'Reflections: On Judicial Diversity and Judicial Independence', in *Judicial Independence in Context*, ed. by Adam Dodek & Lorne Sossin (Toronto: Irwin law Inc, 2010), pp. 193–219.
[210] Committee of Experts, *Draft Principles on the Independence of the Judiciary: Siracusa Principles* (Siciliy, 1981).
[211] 'Judicial Group Strengthening Judicial Integrity', in *The Bangalore Principles of Judicial Conduct* (The Hague, 2002) <http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf> [accessed on 15 February 2017.

such independence it is stated, requires a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.[212] Thus, judicial independence is often equated with the court's ability to act sincerely according to its own preferences and judgements.[213]

The court's ability to do so is of course premised on the conduct of its judges. Any undue interference whether external or internal has the ability not only to damage the quality of justice, but also to place individual judges in a precarious position. Despite numerous guidelines on judicial independence,[214] contention continues to exist because the role of the courts has evolved over time and judges find themselves adjudicating matters that are seemingly political, as opposed to just commercial and criminal law matters.[215] This in turn gives rise to a myriad of sources and forms of interference. The more insidious the interference, the less likely it is that a judge will quickly become aware of it and resist its effects. Issues such as security of tenure are often a common agenda item in discussions on independence, because it is believed that if judges know their job is secure, they are less likely to fall prey to such undue interference.[216]

Former South African Chief Justice Arthur Chaskalson described tenure as an essential component of independence, but not a sufficient guarantee of such.[217] In trying to provide solutions to prevent undue interference, efforts are often aimed at defending against executive interference, public opinion and even interference from one's Chief Justice; these are

[212] Article 1.1 of the Principles.
[213] Shipan Charles Ferejohn John and Rosenbluth Frances, *Comparative Judicial Politics, The Oxford Handbook Of*, 2004 <http://ssrn.com/abstract=1154123.> [accessed on 22 September 2017].
[214] Amongst others, Article 26 of the African Charter on Human and Peoples' Rights of 1981.
[215] Tabeth Masengu, 'The Vulnerability of African Judges in Contemporary Africa: Alarming Trends', *Africa Today*, 63.4 (2017), 3-19.
[216] Brian Opeskin, 'Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges', *Oxford Journal of Legal Studies*, 35.4 (2015), 627-33.
[217] Susannah Cowen, in *Judicial Selection in South Africa*, First (Cape town: Democratic Governance and Rights Unit, 2013).

commonly recognised as sources of judicial interference.[218] The focus is more on substantive independence than formal independence (also known as institutional independence). Formal independence involves the question of whether the judicial appointment procedures at the various courts require judges to be independent.[219] Swart differentiates this from substantive independence, which occurs when a judge acts independently and impartially in a concrete case before her/him.[220]

Shetreet's definition of substantive independence specifically states that in the discharge of a judge's official functions, he/she must be subject to no one and to nothing but the law and his conscience.[221] In Shetreet's definition, it is presumed that a judge's conscience is not a source of undue influence or concern, that one's conscience is without bias or untainted and thus it can offer no interference. I advance a contradictory perspective and argue that this is an incorrect presumption, because judges are products of personal experiences and different backgrounds that can and do influence how they see life and adjudicate matters.[222] It is suggested that the definition of substantive independence should include the ability to recognise and be free from one's personal proclivities or as Dugard referred to it, one's 'inarticulate premise'.[223]

Dugard defines one's inarticulate premise as the presence of concealed factors or hidden agendas, that play a major role in the judicial function.[224] The presence of the inarticulate premise means that as long as the judicial function is entrusted to human beings,

[218] Incidences have occurred in Swaziland, Botswana and the Gambia in the last thirteen years where the Chief Justice has been the antagonist in the removal of judges.
[219] Mia Swart, 'Judicial Independence at the Regional and Sub-Regional African Courts', *South African Public Law*, 29.1 (2014), 388–406.
[220] Also referred to as normative or internal independence by others such as John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence', *Southern California Law Review*, 74 (1998), 353–84.
[221] Shimon Shetreet, 'Judicial Independence and Accountability', *Law and Contemporary Problems*, 33.4 (1998), 979–1012.
[222] Erica Rackley 'Representations of the female judge', pp. 622.
[223] John Dugard, *Human Rights & The South African Legal Order* (Princeton, New Jersey: Princeton University Press, 1978), p.284.
[224] Ibid.

not automatons, subconscious prejudices and preferences will never be completely removed from the judicial process.[225] Thus, it is suggested that a rarely discussed aspect of substantive independence is the extent to which a judge has knowledge of which prejudices and preferences inform their inarticulate premise. The lack of attention to this, creates a lacuna because one can not search for creative ways to counter what has not been identified. Lawrence proposes that this gap exists because the links between diversity, legitimacy and impartiality do not explicitly mention judicial independence despite a connection.[226] Therefore trying to establish the link between judicial independence and diversity on the bench, brings in new questions and opens new areas for research and policy-making.[227] Efforts at establishing the link between judicial independence and diversity start with noting the centrality of an extended definition of substantive independence.

As Ifill explains, judges are situated actors who, like members of the community, see the world through their own knowledge and experience and ascending to the bench does not strip them of pre-existing values and embedded cultural experiences.[228] It is well known that the judicial oath requires that a judge administer her/his role without fear, favour or prejudice. This is a worthy duty to demand from those tasked with the heavy responsibility of dispensing justice. Nevertheless, taking the judicial oath does not miraculously strip a judge of his or her previous experiences. Different jurisprudential schools of thought may be an acceptable basis for differentiation of judicial opinion,[229] but biases arising from differences in such factors as political view, race, gender, ethnic background or religion are not.[230] If one concedes that a

[225] Ibid.
[226] Lawrence, 'Reflections: On judicial diversity and independence', p. 195.
[227] Ibid.
[228] Sherrilyn Ifill, 'Racial Diversity on the Bench Beyond Role Models And Public Confidence', *Washington & Law Review*, 57 (2000), 405–95.
[229] Schools of thought include positivist, naturalist, realists, liberal, Marxist, feminist, utilitarian, critical race theory and others.
[230] Joanne Fedler and Olckers Ilze, *Ideological Virgins and Other Myths: Six Principles for Legal Revisioning* (Pretoria: Justice College, 2001).

judge's inarticulate premise means that a judge can be subject to subconscious prejudices, can those subconscious prejudices be exposed if there is diversity amongst judges? If so, what is the clear connection between diversity and substantive independence and how is this useful? To answer these questions, former South African Constitutional Court Justice Kate O'Regan offers insight into the role of judges.

2.4.2 Finding strength in differences: independence from one's inarticulate premise

O'Regan states that the task of judging in a democracy 'demands more of judges than that they merely give effect to a world-view inherited from their particular backgrounds'.[231] It demands a self-conscious appreciation of the impact of their judge's background on their way of thinking'.[232] Judges apply legal doctrine, but they do so by employing their own interpretation of the law. Moreover, when permitted, they at times use judicial discretion to make decisions, in a manner that is not easily challenged. The self-conscious appreciation O'Regan refers to entails that a judge not only admit to the possibility of being affected by their world view (regardless of their oath), but that they critically consider how they can avoid internal undue interference.

An appreciation of the possibility of undue influence from one's inarticulate premise does not mean that society expects a 'perfect' judge, who has no baggage. Such a judge does not exist and in any case the definition of what is a perfect judge would be open to contestation. It does mean though, that a judge should be open to interrogating their own perspectives and receptive to having their perspectives challenged; or as Martha Minow describes it, 'being willing to be surprised, rather than always confirmed'.[233] To reach a stage where one is willing to be surprised, one has to be exposed to views or perspectives that are unlike what they have

[231] Kate O 'Regan, 'A Pillar of Democracy: Reflections on the Role and Work of the Constitutional Court of South Africa', *Fordham Law Review*, 81 (2012), 1169–86 (p.1176).
[232] Ibid.
[233] Martha Minow, 'Stripped Down Like a Runner or Enriched by Experience Bias and Impartiality of Judges and Jurors', *William and Mary Law Review*, 3 (1991), 1201–18 (p.1214).

known before. The more alike the judges are, the more likely that they will mistake prejudices for simple truths; the more different they are, the more likely that they will interrogate the correctness of their assumptions.[234]

This is why O'Regan opines that a collegial court with different members enables judges to interrogate their own prejudices or blind-spots.[235] This reasoning is applicable to many institutions and not just the courts, as a homogenous group breeds comfort which eventually makes it harder to accept anything different. Homogenous sections function on shared interests, values, lifestyles and even habits with no regard for anything outside this group because anything outside their mould is unnecessary for their existence. For example, male dominated spaces such as the legal system and the judiciary have viewed women as alien to the system or as the 'other'. As a result, women have been met with dismissal, deliberate ignorance or simple aversion.[236]

Yet, there is ample proof that a diversity of judges in courts worldwide has only strengthened deliberations and added richness to jurisprudence. Former justice of the US Supreme Court Thurgood Marshall is often touted as one of the greatest jurisprudential minds of that court, not only because of his jurisprudential acumen, but because his presence challenged his colleagues in their previously steeped understanding of law and society.[237] In the words of Justice Sandra Day O'Connor:

> at oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing

[234] O'Regan, 'A Pillar of Democracy ', p.2011.
[235] Ibid.
[236] Women's experiences of law as the outsiders is aptly chronicled by Erica Rackley in 'Judicial Diversity, the Woman Judge and Fairy Tale Endings',pp.76 and Kimberle Crenshaw in 'Demarginalizing the Intersection of Race and Sex', pp. 141-153.
[237] Munyonzwe Hamalengwa, *The Politics of Judicial Diversity and Transformatio*n: *Canada; USA; UK; Australia; South Africa; Israel; Colonial and Post-colonial World and International Tribunals* (Toronto: Africa in Canada Press, 2012).

> and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth'.[238]

The moral truth evoked by Justice Marshall was very much influenced by his experiences as an African American man growing up and living in a system that discriminated against African American people for so long. His objective was not only to challenge his colleagues to re-examine their preconceived notions of justice, but also to alert them to the lived experiences of people like 'him'.[239]

Likewise former Canadian Supreme Court justice Claire L'Heureux-Dubé's enduring legal legacy will be her emphasis on equality rights in Canadian society.[240] As the first female justice on the Supreme Court from the province of Quebec[241] and only the second woman justice on the court, she was known to dissent from her colleagues many a time. She saw her dissents as a sign of judicial independence, but also as an opportunity to have a dialogue with colleagues and point out weaknesses in the majority judgement.[242] She also famously stated that 'law is not for lawyers, nor for academics; it is for people'[243] and was known to be very candid with colleagues when she believed that they were straying from making law about the people.[244]

Sir Sydney Kentridge, who once acted as a justice of the South African Constitutional Court, commented on his experience there:

> [W]hat I found overwhelming was the depth and variety of [the judges'] experiences of law and of life. This diversity illuminated our conferences especially when competing

[238] Sandra Day O'Connor, 'The Influence of a Raconteur', *Stanford Law Review A Tribute to Justice Thurgood Marshall*, 44 (1992), 1217–20, <http://www.jstor.org/stable/1229051> [accessed 16 November 2016].
[239] Ibid,p.1219.
[240] Daphne Gilbert, 'Unequaled: Justice Claire L'Heureux Dube's Vision of Equality and Section 15 of the Charter', *Canadian Journal of Women and the Law*, 15 (2014), 1–27.
[241] Quebec is the only French province in Canada and the Québécoise consider themselves as a minority group in Canada.
[242] Claire L'Heureux-Dube', 'The Dissenting Opinion Voice of the Future', *Osgoode Hall Law Journal*, 38 (2008), 495–516.
[243] Gilbert, 'Unequaled: Justice Claire L'Heureux Dube's Vision', p.1.
[244] For a discussion on the backlash she received in response to some judgments, see Claire L'Heureaux-Dube, 'Outsiders on the Bench: The Continuing Struggle for Equality', *Wisconsin Women's Law Journal*, 16 (2001), 15–30 <https://doi.org/10.1525/sp.2007.54.1.23.>.

> interests, individual, governmental and social, had to be weighed. I have no doubt that this diversity gave the court as a whole a maturity of judgment it would not otherwise have had. Yet no-one, black, white, male or female was representing any constituency.[245]

The result of the diversity that Kentridge experienced underpins the deliberative argument in favour of diversity. Advocates of this argument posit that a proportionally diverse judiciary provides an opportunity for the development of channels of communication, openness, mediation, and mutual understanding.[246] While the essence of this argument applies mostly to a collegial court where a bench has more than one judge sitting in a matter, it is submitted that it can go further than that. Even when judges sit alone, the presence of other judges in their divisions, tea rooms or hallway that are unlike them, can have the purpose of exposing them to otherwise unconsidered views.

High Court judges who preside single-handedly have found that tearoom exchanges with other judges assist them, when they are adjudicating complex matters. It has been said that discussions with fellow judges have enlightened a judge's perspectives on their case and provided a vantage point they had not previously considered.[247] A dialogue I witnessed amongst a group of four women judges from different High Courts of South Africa, of different races and backgrounds, illustrates this point best. The judges shared notes on common issues that widows faced in their courts, regarding inheritance. There was an agreement on the gendered implications of the dissolution of intestate estate on women. However they differed on their views of how a judge should approach the intestate consequences of customary law marriages. [248]

[245] Cowen, 'Judicial Selection in South Africa', p.56.
[246] Devlin, MacKay, and Kim, 'Reducing the Democractic Deficit', p. 795.
[247] These have been related to me by judges from different courts in the country over the years as the annual South African Judges Forum facilitated by the Democratic Governance and Rights Unit (DGRU) at Mont Fleur in Stellenbosch, South Africa.
[248] In this context African refers to indigenous South Africans while the term black women in this thesis will refer to African, Coloured and Indian women as per South African legalisation.

Customary law marriages are defined as marriages negotiated, celebrated or concluded according to any of the systems of indigenous African customary law that exist in South Africa.[249] It was previously enough that customary law marriages were concluded with the permission of the given community. Unlike civil law marriages, they did not need to be registered. However, the Recognition of Customary Law Marriages Act[250] was enacted to ensure that these marriages were registered with the Department of Home Affairs to protect the position of women in customary law marriages.[251] There was common agreement amongst the judges, that many women did not know that customary law marriages should be registered, and this often came to light when their husband was deceased. To compound matters further, this realisation often arose in instances where the deceased had died intestate and the spouse's inheritance was being threatened by the appearance of 'another' wife.

The judges reported that this other 'wife' would be supported by the relations of the deceased, who would deny any knowledge of the first wife. The white woman judge in the group questioned why there was often such a great emphasis on the familial denial in these cases, because it was common practice for witnesses to deny parties and/or change statements in court. The African women judges explained that a customary law marriage relied on representatives of both families being involved in discussions and bride price negotiations.[252] There were no written documents or signed certificate as in a civil marriage and the marriage stood by an oral agreement, sometimes followed by a celebration. A denial by the deceased's family of the wife's marriage to the alleged husband, meant that the widow would lose more than just an inheritance from the deceased estate because she could not prove the marriage.

[249] South Africa. Department of Home Affairs, 'Preparing to Get Married', 2016 <http://www.dha.gov.za/index.php/civic-services/identity-documents> [accessed 14 November 2016].
[250] Department of Home Affairs, *Recognition of Customary Law Marriages Act* (South Africa: South African Parliament, 1998).
[251] This protection includes aligning customary law marriages so that women in customary marriages are on equal footing with their husbands in both status and capacity.
[252] African here, refers to indigenous South Africans as explained earlier.

This denial was not just considered an insult to those family members who had negotiated her marriage, but it also meant that the widow's status as the 'daughter' of the deceased's family would be lost.

Consequently, her standing in the community would suffer because marriage made one a part of the man's family and made the husband's family responsible for the bride. The importance of what the wife would be losing therefore went further than just the property benefits that would be derived from a deceased estate. It was the loss of identity that was at stake and the dignity of her family too.[253] This explanation though not a legal consideration in inheritance matters, was enlightening for the white judge who had never had that aspect explained to her in court. She was able to understand the significance of taking a bit more time and going beyond the approach typical of a civil marriage enquiry, in cases regarding customary law marriages and intestate estates.

This example epitomises the need for strengthening substantive independence, by recognising the need to be independent from one's inarticulate premise. This is not just about reaching an outcome with an untainted view, free from one's own personal views and baggage. It is also about the process of reaching that outcome. The judge in question who learnt from her colleagues may still arrive at the same conclusion in similar cases involving customary law, but the process of arriving at it will now be enriched by an understanding that was previously missing. This process I suggest, is one which takes into consideration the majority and minority narratives, especially in societies that have been fractured by previous systems of racial, ethnic or other types of segregation.[254] A judge's thought process should also involve a recognition

[253] For a discussion on women's status in customary marriages, see Tracy E Higgins, Jeanmarie Fenrich, and Ziona Tanzer, 'Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism', *Fordham International Law*, 30.2 (2007), 1653–1708 <https://doi.org/110.1163/22112596-01702003>.

[254] For a further elaboration on different narratives in fractured societies, see Taneisha.N Means, Andrew Eslich, and Kaitilin Prado, 'Judicial Diversity in the United States Federal Judiciary', in *Research Handbook on*

that one's perspective on truth as a judge is not always the only truth available in instances where societal factors are involved.

It is conceded however, that this expanded notion of substantive independence is built on the presumption that 'legal decision-making is a rational and deliberative process; that is, after lawyers on either side present their arguments, judges then retire to ponder and discuss the arguments with their colleagues'.[255] 'A pivotal assumption of this argument is that judges actually approach a problem with a relatively open mind and are willing to be persuaded by the process of discursive engagement.' [256] If not persuaded, then at least that judge will consider what has been offered, as advice or reasoning by other judges. Considering advice from colleagues is not a matter of replacing one's inarticulate premise with that of your colleagues, because that would be undue influence of another type. It is rather to allow room for one's premise to be exhibited, analysed and explained if need be.

Experience informs understanding and the more that judges engage with the experiences of others by mingling and communicating with a diverse group, the more informed their understanding of life will be. Former Justice of the Zambian Supreme Court Florence Mumba[257] once said:

> the cause of justice has moulded social values regarding doctrines and different interpretations of law, which all lead to justice as understood by different communities in the world. I have come to learn that justice does accommodate a diversity of social values for different peoples on earth.[258]

Law and Courts, ed. by Susan.M Sterett and Lee.D Walker (Northampton: Edward Elgar Publishing, 2019), pp. 231–45.

[255] Devlin, MacKay, and Kim, 'Reducing the Democractic Deficit', p. 795.

[256] Ibid.

[257] Widely respected for her work in the International Criminal tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (ICTY) and the UN Extraordinary Chambers in the Courts of Cambodia.

[258]Lusaka Voice, 'Justice Florence Mumba Reflects on Women's Rights and Gender Justice | Lusaka Voice', *Lusaka Voice*, 19 April 2013, pp. 1–2, <http://lusakavoice.com/2013/04/19/justice-florence-mumba-reflects-on-womens-rights-and-gender-justice/> [accessed 17 November 2016].

This is more reason why different people should be on the courts, so that these different social values can be shared, heard and debated amongst one another. The process of getting to a decision can be enriched by having different kinds of women on the bench. Women from different cultures, ethnicities, race, social status, professional background and differently abled can all contribute to a reshaping of reality for those that are different from them.

This is illustrated by Justices Kate O'Regan and Yvonne Mokgoro who were the first and only women on the South African Constitutional Court for twelve years of their tenure.[259] While they had commonalities in gender and being outsiders on the bench, they had different experiences that informed the way they saw matters before them. In the case of *President of the Republic of South Africa and Another v Hugo*[260], a male prisoner had challenged the constitutionality of Presidential Act No. 17 (the Presidential Act) signed by President Nelson Mandela pardoning approximately 440 imprisoned mothers but not fathers of children under the age of 12.[261] While both justices arrived at the conclusion that the Presidential Act was not unconstitutional, they did so for different reasons.

Justice Mokgoro argued that the Presidential Act amounted to unfair discrimination[262] because the reasons for the Presidential Act were stemmed in gender stereotyping.[263] However she found that the discrimination was justified and therefore not unconstitutional. She reasoned that referring to mothers as special caregivers of children and primary caregivers deprived women of fair opportunities and saw fathers as less capable. Mokgoro submitted that women had been prevented 'from gaining economic self-sufficiency, or forging identities for themselves independent of their roles as wives and mothers'.[264] However, she concluded that

[259] Justice Bess Nkabinde was appointed in 2006, three years before O'Regan and Mokgoro retired.
[260] *President of the Republic of South Africa and Another v Hugo* (CCT11/96) [1997] ZACC 4.
[261] He acted pursuant to his presidential powers under section 82(1)(k) of the Interim Constitution of the Republic of South Africa 200 of 1993.
[262] Section 8 of the Interim Constitution of South Africa Act No. 200 of 1993.
[263] *President of the Republic of South Africa and Another v Hugo*, para 92.
[264] Ibid, para 93.

the aim of easing the plight of South African children was extremely important and that every possible opportunity should be taken to further that aim. Thus the temporary denial of parenthood to fathers (the unfair discrimination), was justifiable when related to the interests of the children whose mothers were released.[265]

O'Regan on the other hand found the discrimination to be fair because she found it generally true that mothers do play a special role and they bear a great burden.[266] She further added that the social fact of the role played by mothers in child-rearing and more particularly the inequality which results from it, was troubling. She opined that child-rearing is not shared between mothers and fathers and would not be shared in the near future. In O'Regan's view, the discrimination in this case caused no significant harm to mothers and no severe harm to the interests of fathers[267].

The different rationale for arriving at the same conclusion regarding the constitutionality of the Presidential Act, is an apt example of how different perspectives can inform two judges, even if they are both women. Baines advises that 'scholars should read their judgments together as a dialogue about the existence of two distinctive approaches to analysing substantive equality'.[268] These distinct approaches could be as a result of ideological differences, or even the different backgrounds of the two Justices −despite their gender being a common factor. This is further proof that women judges do not speak with one voice, but in multiple voices that seek to 'reveal and recall the importance of multiple perspectives in the adjudication process'.[269] If a judge's individual decision-making process is strengthened by

[265] Ibid, para 106.
[266] Ibid, para 109.
[267] Fathers could still apply for the individual remission of their sentences.
[268] Baines, 'Women Judges and Constitutional Courts', p.21.
[269] Belleau and Johnson, 'Judging Gender: Difference and Dissent', p. 69.

diversity, then the next step is to connect this to impartiality. Impartiality I argue, is the external manifestation of whether a judge is substantively independent or not.

2.5 IMPARTIALITY EXPLORED

2.5.1 Impartiality and bias

The previous section extended the definition of substantive independence to include an awareness of and freedom from one's inarticulate premise. Thus, substantive independence as defined here is more concerned with the internal process of judicial behaviour, as opposed to the outward demonstration of judicial independence. I argue that this is different from impartiality, but the two go hand in hand. The tainting of the internal process leads to a lack of impartiality. Judicial independence at its root, is also concerned with impartiality in appearance and in fact.[270] Independence is not a perk of judicial office. It is a guarantee of the institutional conditions of impartiality.[271] The ability to be impartial is elevated as a central quality, indeed an imperative of judging, irrespective of jurisdiction.[272] Yet the definition of impartiality encompasses many issues and can be as broad as one allows it to be.

The judicial oath requires that judges put aside any preference for or partiality towards any parties or arguments. This necessitates that a judge does not predetermine a matter, neither does she/he decide on a matter before them based on a particular affiliation. Above all else, judges are expected to be, impartial arbiters so that legal disputes are decided according to the law free from the influence of bias or prejudice.[273] Bias is deeply abhorred in law because it favours one litigant or disfavours one litigant to the benefit of the other. A perception of bias can be formed if there is an improper relationship between the adjudicator and a litigant, if

[270] Omatsu, p.11.
[271] Ibid.
[272] Claire L'Heureaux-Dube, 'Outsiders on the Bench: The Continuing Struggle for Equality', *Wisconsin Women's Law Journal*, 16 (2001), 15–30 (p.27).
[273] Jeffrey M Shaman, 'The Impartial Judge: Detachment Or Passion?', *DePaul Law Review*, 45.3 (1996), 605–32 (p.605).

there is a past personal or business relationship, or even a proclivity based on a common ground such as gender or race. Numerous works have chronicled the rampant bias in the American, South African and Canadian judicial system amongst others based on racial partisanship.[274]

In the Zambian case of *Priscilla Mwenya Kamanga v the Attorney-General and Hon. Ng'andu Peter Magande,* the appellants argued that a decision by the High Court trial judge to call five witnesses in an election petition matter after the respondents had closed their case, amounted to bias in favour of the respondents.[275] Counsel for the petitioner argued that bias has two limbs - namely actual and perceived bias and that 'when an allegation of perceived bias is alleged and proved, then the decision by the adjudicator should be rendered a nullity'.[276] The court however, stressed that the question should be whether a fair-minded informed person could conclude that the judge was biased in favour of a party and in this case, they could not because judges were permitted to call additional witnesses.[277] The proper approach to allegations of bias is for judges to first search for personal bias and an assessment of impropriety and then assess whether the circumstances create an appearance of bias, through the eyes of the public.[278]

Though an allegation of bias may lead to a recusal application, a request for recusal on the basis of bias should not be taken lightly. This was the caution given in *President of the Republic of South Africa v South African Rugby Football Union,*[279] the leading South African case on bias and impartiality. In this matter, the issue was the constitutionality of two notices

[274] See amongst others Hamalengwa, *The Politics of Judicial Diversity*,pp. 92-106; Crenshaw, 'Demarginalizing the Intersection of Race and Sex', pp 144-48; Claire L'Heureaux-Dube, 'Making a Difference: The Pursuit of a Compassionate Justice', *University of British Columbia Law Review*, 1 (1997), 1–15.
[275]*Priscilla Mwenya Kamanga v the Attorney General and Hon. Ng'andu Peter Magand*e, 2007, p. SCZ Appeal no.182 OF 2007 <http://www.zamlii.org/zm/judgment/supreme-court/2008/20/20.pdf> [accessed on 19 September 2017].
[276] Ibid.
[277] *Priscilla Mwenya Kamanga v the Attorney General and Hon. Ng'andu Peter Magand*e, p.21.
[278] Frank M McClellan, 'Judicial Impartiality and recusal:Reflections on the Vexing Issue of Racial Bias', *Temple Law Review*, 78 (2005), 351–78 (p.355).
[279]*The President of the Republic Of South Africa And Others v South African Rugby Football Union and Others*, 1999, p. CCT16/98) [1999] ZACC 11; 2000 (1) SA 1 <http://www.saflii.org/za/cases/ZACC/1999/11.html>.

issued by the late president Nelson Mandela. There were allegations of bias against the High Court judge and five Constitutional Court justices, by the appellants and fourth respondent respectively. The Constitutional Court highlighted that a presumption in favour of a judge's impartiality must be taken into account in deciding whether such a reasonable litigant, would have a reasonable apprehension that the judicial officer was or might be biased.[280] The dangers of bias are so damaging, that there are those who promote a judicial function that stresses disengagement and calls for judges who are disinterested, detached, and dispassionate.[281]

However, this view of a dispassionate and detached judge is idealistic because impartiality cannot mean absolute objectivity. Justice Yacoob further adds that if absolute objectivity were possible, it would be bad because 'after all we are judging human beings.'[282] Graycar quotes Cardozo who succinctly opined that 'true impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.'[283] The idea of an open mind is also echoed by Erika Rackley in stating that 'judicial impartiality might be understood as an open mind rather than a blank slate, as situated rather than non-situated.'[284] It means acknowledging that one can never be truly dispassionate or detached, but one should still strive to find the correct balance between subjectivity and objectivity.

Once a judge is substantively independent as discussed in the earlier section, the pursuit of impartiality is encouraged. This is because a judge can now internally prepare themselves to see the world differently with a view to listening to what litigants have to say regardless of

[280] *The President of the Republic Of South Africa And Others v South African Rugby Football Union and Others*, para 5.
[281] Shaman, p.610.
[282] Former South African Constitutional Court Justice Zac Yacoob speaking at the DGRU Judges Forum held 21-23 October 2015 at Mont Fleur Stellenbosch.
[283] Reg Graycar, 'Gender, Race, Bias and Perspective: OR, How Otherness Colours Your Judgment', *International Journal of the Legal Profession*, Sydney Law School Legal Studies Research Paper, 15.1–2 (2008), 73–86.
[284] Erica Rackley ' Representation of the (woman) judge' p.22.

what they look like. Such a judge is more likely to make a conscientious effort at impartiality and dispassion, than one who believes that his/her elevation to the bench makes him/her at once the dehumanised instrument of infallible logical truth.[285] The conscientious effort taking place will be externally demonstrated in the way a judge treats parties before them. How the evidence is appraised, how legal representatives and witnesses are spoken to, the type of *obiter dicta* expressed by the judge and others, are an indication of whether a judge is applying partial justice or not.

A greater understanding of how diversity enhances impartiality requires that we recognise the societal context in which every judiciary operates. This is important because race, class, ability and other forms of societal attributes can influence one's vantage point, for better or for worse. Dugard opined that during apartheid, judges were drawn only from the white minority and they all had one commonality – loyalty to the status quo.[286] However a judge's inarticulate premise was exhibited in various ways, depending on the background and outlook of that judge. Some were more antagonised by 'social intercourse between races' and others by 'radical political change'.[287] While the judiciary no longer operates as it did before the democratic era, the essence of Dugard's point remains.

Judiciaries globally are operating in a new era, one where technology has given room to financial cyber-crime, international child pornography syndicates and revenge pornography. On a scrutiny of the jurisdictions in this study, Zambia a deeply conservative country must now grapple with the question of whether the morality of the country as a Christian nation, is more important than an individual's sexual orientation. South Africa is faced with unprecedented matters before the equality courts regarding hate speech and the increased judicialisation of

[285] Wilson, p.511.
[286] Dugard, p.380.
[287] Ibid, p.380.

politics before the courts. There is a greater need now for a diversity of judges who can adjudicate these matters, while informed by different backgrounds and outlooks. In the absence of this, there is a danger of undermining the judicial oath of impartiality both in and outside the court.

To illustrate this point, it is necessary to refer to the matter of former South African Judge Mabel Jansen.[288] On 8 May 2016, various messages between Judge Jansen and media social activist Gillian Schutte were shared on twitter, sparking an outcry because of the substance of the communication from the judge.[289] In Facebook posts and messages from 2015, Judge Jansen made a number of allegations about black men. She said that rape was part of black culture and that '99 percent of criminal cases I hear are of black fathers/uncles/brothers raping children as young as 5 years old'.[290] She also stated that she was yet to meet a young black girl who hadn't been raped by 12. She went on further to say:

> …murder is also no biggy. And gang rapes of baby, daughter and mother, a pleasurable pastime. That in reality is the flipside of the coin. They are simply now in a position to branch out and include white women.'[291]

Judge Jansen was placed on special leave, but strongly defended her statements saying that that was her experience in the criminal court.

Charges of *crimen injuria* were laid against Jansen and a formal complaint was made to the JSC by Vuyani Ngalwana SC.[292] In his complaint, he noted that Jansen explained on twitter that her comments had been made confidentially and were taken 'out of context'.[293]

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[288] She was formerly a judge of the North Gauteng High Court (Pretoria) appointed in late 2013 and she resigned on 2 May 2017, before she could be impeached.
[289] 'Judge Mabel Jansen Placed On "Special Leave"', *Marie Claire*, 11 May 2016 <http://www.marieclaire.co.za/hot-topics/high-court-judge-mabel-jansen-defends-facebook-comments> [accessed on 23 September 2017].
[290] Ibid.
[291] Ibid.
[292] Complaint lodged on behalf of Advocates for Transformation (a legal profession organization) Johannesburg branch.
[293] SC Vuyani Ngalwana, 'Formal Complaint to the JSC Re Judge Mabel Jansen' *Johannesburg*: *Johannesburg Society of Advocates* (2016), pp. 3–15 (p.5). A copy of the complaint is in the author's possession.

Ngalwana SC submitted that amongst others, Jansen's conduct was prejudicial to judicial independence and impartiality and a breach of her oath to uphold the Constitution and treat people alike without fear, favour or prejudice.[294] Additionally he submitted that she could not remain manifestly impartial in cases involving black men and that Jansen had shown herself to be manifestly prejudiced.[295]The Black Lawyers Association (BLA)[296] also expressed their 'disgust and disbelief' at the repulsive racist utterances'[297] made by Jansen and requested a review of all criminal cases involving rape or murder where the accused or victims were black persons.[298]

The expressions of disbelief and disgust expressed by BLA were shared by a number of South Africans and Schutte later explained why she had exposed Jansen.[299] Schutte wrote that what was outrageous was that '[a] person who is supposed to epitomise neutrality and integrity in all her cases was revealing her innermost thoughts about blackness.'[300] Jansen, in her position as a judge expressed prejudice and made pronouncements on the character and lifestyles of black men and women. Despite her objections, her impartiality had been compromised in two ways. Firstly, having decided that rape is part of black culture, any male accused of rape, sexual assault and even murder could not reasonably believe that they could get a fair trial in her court.

[294] Ibid, at pp.9-10.
[295] This was in addition to Ngalwana citing how Jansen had breached various aspects of the Code of Judicial Conduct published in terms of section 12 of the JSC Act under GG35802 of 18 October 2012.
[296] Professional organisation for black lawyers established in 1977.
[297] Lutendo Benedict Sigogo, 'Black Lawyers Association (BLA) Calls For The Impeachment Of Judge Mabel Jansen Over Her Racist Utterances' (BLA, 2016) (p.1) . Copy in author's possession.
[298] Ibid.
[299] Sisonke Msimang, 'Judgment Day: On Black Rapists and White Innocence', *Daily Maverick*, 9 May 2016, <https://www.dailymaverick.co.za/opinionista/2016-05-09-judgment-day-on-black-rapists-and-white-innocence/#.WGPBYFN96M8> [accessed 28 December 2016]; Schutte.Gillian, 'Why I Exposed Racist #MabelJansen', *Sunday Independent*, 15 May 2016, <http://www.iol.co.za/sundayindependent/why-i-exposed-racist-mabeljansen-2021723> [accessed 28 December 2016].
[300] Ibid.

Secondly, any black female victim of rape or sexual assault would already be assumed to have been 'exposed' to such behaviour from a young age or as Jansen said, 'raped by the time they were 12', and thus in her eyes would be less of a victim than a white woman in the same situation. Jansen strongly denied any impropriety, but there can be no doubt that as a judge, she has tainted her role as an impartial adjudicator who would apply the law without fear, favour or prejudice. This example was specifically selected to emphasise important aspects. Firstly, I referred to a matter involving a woman judge particularly because one's gender does not make one a less partial judge. Women bring different perspectives to the bench; these perspectives can be good or bad. Jansen who previously had succinctly narrated the challenges of sexism and discrimination that women face in the advocates' profession, was blind to her own racial discrimination and bias.[301]

Multiple perspectives in a judiciary do not only arise from women, but from men too. The essence of my argument is that until the judiciary has a large number of women, a full spectrum of perspectives will be absent in courts. Secondly, while gender places women in a unique position, the intersections of discrimination and the effect of such cannot be ignored. Jansen was a white woman whose comments were borne from the view of a woman rightly horrified by rape. However, by stating that black rapists were now able to extend their reach to white women, Jansen inferred that raping white women was a graver crime than raping black women. Thus, knowingly or unknowingly, she extended the racial discrimination to black women. Finally, the Jansen example is ample evidence that a judge is not stripped of their predilections and baggage once they take the judicial oath and ascend to the bench.[302] It is only

[301] For a quote from Jansen, see Tabeth Masengu, 'It's a Man's World: Barriers to Gender Transformation in the South African Judiciary. Perspectives from Women Advocates and Attorneys', *International Journal of the Legal Profession*, 23.3 (2016), 305–19.
[302] Numerous examples of racist, sexist and other forms of discriminatory remarks have been reported both domestically and globally.

when the existence of life experience is acknowledged, that we can propose a way of action that can strengthen the judiciary.

2.5.2 To have or not to have: Should judges bring life experience and baggage to the bench?

The acknowledgment of a judge's inarticulate premise brings into question issues of impartiality. In striving for impartiality, a common area of confusion is whether a judge's life experiences can render them less or more impartial.[303] Martha Minow's article that addresses this confusion was inspired by the American Supreme Court confirmation hearing of Justice Clarence Thomas in 1991. [304] In the hearing, he famously stated, 'as a judge [y]ou want to be stripped down like a runner,' and 'shed the baggage of ideology'.[305] This statement Minnow argues, created confusion about the links between impartiality, knowledge and experience. She further adds 'that the confusion is particularly pronounced because the ultimate goal of fairness in our society includes notions of representation as well as ideas of neutrality'.[306] Stripping down like a runner and ridding oneself of ideologies sounds correct in theory, but it actually amounts to more of an aspiration than a description - because it may suppress the inevitability of the existence of a perspective.[307]

A perspective can be borne from various life experiences and acquired knowledge, and it can enrich adjudication, if properly understood. When misunderstood, a perspective can lead to questions about a judge's impartiality. For instance, women have faced accusations of bias because of their membership in a minority group or involvement in prior civil rights struggles.[308] Globally women judges have faced a backlash for being feminist judges, making decisions that go against family values or being too sympathetic to accused persons of a

[303] Minow, p.1202 .
[304] Hearings for the position of an Associate Justice of the United States Supreme Court on 11 October 1991.
[305]Minow, p.1201.
[306]Minow, p.1202.
[307] Ifill , p.461.
[308] L'Heureaux-Dube, 'Outsiders on the Bench: The Continuing Struggle for Equality', pp 21-2.

previously disadvantaged race.[309] They have also been attacked when they point out the presence of sexism and gender discrimination in written judgments from superior courts or those written by their male colleagues.[310] In addition, women judges have also been accused of being biased if they do not conform to a 'standard'. Ironically this standard is itself partial because it is based on the notion of an objective judge who is white and male, of particular privileged background and who supposedly has no prejudices himself.[311]

Graycar expertly points out that 'whiteness or maleness are not viewed as impediments to impartiality precisely because they are not recognised as positions as all'.[312] However judges who are non-white, and therefore racialised as 'other' or those who respond to decisions that make explicit reference to gender, race or unequal race relations are viewed differently.[313] Unlike their white, male counterparts, they are seen as being positioned (as opposed to neutral and impartial) if they go against what is considered to be objective. This is the case even though there is some subjectivity in the definition of neutrality. How is the standard decided, and what is the benchmark? What classifies one form of adjudication as neutral and objective because it ignores societal factors, while the other is biased because it considers societal factors that affect a litigant's everyday life? Malleson suggests that in interpreting impartiality itself we should consider that legal decision-making has systematically favoured men and disadvantaged women.[314] If this is acknowledged, then what is contested is the application of what is considered to be impartial, rather than the principle of impartiality itself.

[309] For detailed examples see Graycar 'Gender, race, bias and perspective' pp. 77-9.
[310] See Contsance Backhouse, 'The Chilly Climate for Women Judges: Reflections on the Backlash from the Ewanchuk Case', *Canadian Journal of Women and the Law* , 15.1 (2003), 167–93.
[311] Rackley, 'Representations of the (Woman) Judge: Hercules, the Little Mermaid, and the Vain and Naked Emperor', pp. 621-22.
[312] Graycar 'Gender, Race, Bias and Perspective', p. 74.
[313] Ibid.
[314] Kate Malleson, 'Justifying Gender Equality On The Bench: Why Difference Won't Do', p.10.

If instances arise where women judges give more weight to women's perspectives, values and interests, it does not mean they are acting with favour or being biased. Rather it could be argued that they are correcting the existing partiality of judicial decision-making.[315] Simply put, if litigants were treated partially because the judicial decision-making system did not appreciate their voices, allowing those litigants a voice and giving credence to it in judgments, is arguably a means of 'putting things right.' Former justice of the International Criminal Court Sanji Monageng appears to agree with this view. When asked whether some women judges were biased towards women's rights, she responded: 'if those women do not, then who will? Some women who are not feminists will not, so I have never apologized for that'.[316]

This perceived bias I argue, is because the presence of women judges, who themselves had been outsiders on the bench, creates room for the consideration of previously unheard voices and perspectives. This does not mean that the purpose of the presence of women judges is to judge from the standpoint of their 'femaleness'. Rather, Mcrobie advances that problems are created when one gender-group dominates the system and determines what is considered to be 'just'.[317] A gender-equal judiciary she argues, 'would neutralise the problems – for justice, for fairness and for a society'.[318] The more women there are for male judges to interact with and to challenge long held previously considered patterns, the more those male colleagues will also be inclined to hear women litigants better. This may not necessarily result in decisions that will always favour women or previously disadvantaged litigants, but it will at least mean more judges who have an open mind rather than a blank slate.

[315] Ibid.
[316] Dawuni, 'African Women Judges on International Courts', p.21.
[317] Heather Mcrobie, 'When the Judge Is a Woman', *Open Democracy*, 19 November 2013, <https://www.opendemocracy.net/5050/heather-mcrobie/when-judge-is-woman> [accessed 12 September 2016].
[318] Ibid.

It will mean that judiciaries have judges who are not just able to use what they know but are able to suspend their conclusions (based on that knowledge), long enough to be surprised.[319] The same should be true of women judges who can also benefit from having their perspectives challenged by male judges. Critically, the point is that all judges must suspend their inarticulate premises long enough to consider an alternative perspective to what they have known, or what they believe they already know. Consider Rackley who refers to such judges as having 'good bias':

> that is, preferences and affections that facilitate the gathering of knowledge… and lead us to the truth... a judge with the special ability to listen with connection before engaging in the separation that accompanies judgment and who is willing to walk in the shoes of others.[320]

She acknowledges that difference can act as a catalyst for disruption. Therefore in the circumstance of reworking traditional notions of the judge and judging, she emphasises the importance of 'listening with connection' and contextualisation.[321] The crucial aspect of diversity strengthening impartiality, is that judges will still apply law, and legal doctrine is not suspended. However, it is informed by jurists who can assess the evidence before them with an open mind.

In such instances, women are not making a difference because they speak in one singular voice; but rather they are using their multiple voices (and at times not using them), in order to listen and connect with litigants. With the variety of experiences and perspectives that women bring, they can challenge male colleagues to consider that there is truth in views that had been previously dismissed. Further, that there may be an alternative way of viewing the very same evidence that they have viewed before. Sian Elias, the former Chief Justice of New Zealand remarked:

[319]Minow, p. 1217.
[320] Rackley, 'Judicial Diversity,the Woman Judge and Fairy Tale Endings', p.81.
[321] Ibid, p. 91.

> [t]o fulfil their roles, judges need insight into societies so that they can convince others of what is demonstrably justified, reasonable and fair. Women and minorities are well suited to participate in justified judging because their experiences do not prompt complacency, or certainty-they know how to listen and watch.[322]

Impartiality is not about a different type of justice for different people but rather a different way of perceiving the lives of those whose matters are in the hands of judges, in a way that acknowledges their self-worth and does not ignore the reality of their lives.

Impartiality is not 'some stance above the fray, but the characteristic of judgments that takes into account the perspectives of others in the judging.'[323] Taking into account previously excluded groups such as women, both as judges and as litigants, does not only assist in dismantling hierarchies and the gendered notion of impartiality, it also creates room for a new type of jurisprudence. One that sees the participants in the judicial system including traditionally marginalised groups, not just as subjects of inquiry but as producers of knowledge.[324]

2.5.3 Substantive independence, impartiality and the judicial appointment process

The judicial appointment process carries great risk and reward, irrespective of what type of jurisdiction is concerned. Whether judges are elected, appointed solely by the executive, as in some American states, or by appointment commissions as in some jurisdictions,[325] the risks of appointing the 'wrong' judges are grave.[326] The wrong judges could be lacking in independence, impartiality, honesty and competence and that is why van Zyl Smit emphasises

[322] Sian Elias, 'Justice For One Half of the Human Race? Responding to Mary Wollstonecraft's Challenge', *Canadian Journal of Women in Law*, 24.1 (2012), 163–79.
[323] Jennifer Nedelsky, 'Embodied Diversity and the Challenges to Law', *McGill Law Journal*, 42 (1997), 91–117 (p.107).
[324] Ibid, p.99.
[325] For a breakdown of Commonwealth appointment systems, see Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles A Compendium and Analysis of Best Practice* (London: The British Institute of International and Comparative Law, 2015).
[326] These risks include the support of oppressive systems such as slavery or Apartheid or even dictators, loss of confidence in the judiciary or the creation or proliferation of precedent that has repercussions for many years to come.

the importance of a reliable appointment process.[327] The danger is particularly acute because in most jurisdictions it is difficult to remove judges once in office. While security of tenure is an important element of an independent judiciary, it also needs to be informed by an appointment process that is legitimate in the eyes of the public and is free from discrimination. Wynn and Mazur make numerous illuminating submissions that support the connection of substantive independence and impartiality to the process of judicial appointments.

Firstly, they highlight that judicial selection issues always involve a balancing of judicial independence and accountability.[328] The former entails immunity from extra-legal pressure while the latter seeks to be responsive democratically to the public.[329] Secondly, they argue that a judge has a judicial predisposition and that any discussion touting a particular judicial selection method, is irrelevant if substantive ideological and narrative judicial diversity is absent.[330] Substantive ideological diversity is informed by a greater range of perspectives from different professional and life experiences. It cannot be present where judges are drawn from a single preferred experience, for example privately educated, and privileged, like many advocates/barristers. Narrative diversity occurs when there is a pool of different ethnic, racial, cultural, and gender applicants from which to select judicial officers.

Wynn and Mazur further contend that 'the absence of diversity creates (in fact) a judicial partiality to the values and stories of the groups over-represented − white men − in its midst'.[331] In this research, men are the over-represented group in the countries studied. South Africa has made great strides in having a more racially diverse bench[332] and Zambia is devoid of the racial history that South Africa possesses. Wynn and Mazur advise that accordingly, in

[327] van Zyl Smit 'The Appointment,Tenure and Removal of Judges', p.1.
[328] James Andrew Wynn and Eli Paul Mazur, 'Judicial Diversity: Where Independence and Accountability Meet', *Albany Law Review*, 67 (2003), 775–91.
[329] Ibid.
[330] Wynn and Mazur , p.776.
[331] Ibid, pp. 781-782.
[332] As of September 2017, the composition of black judges in the judiciary was 67%.

the pursuit to attain an independent and impartial judiciary, we cannot escape the reality and consequences that each judge brings to the bench a sum of life experience.[333] These life experiences can be used for ill or for good, but there is no denying that they inform substantive independence and impartiality which are aspects of judicial independence in its totality.

Third, they suggest also that judicial impartiality is actually not the absence of experience, but rather the presence of human experience coupled with an open mind.[334] They further elaborate that judicial independence and judicial accountability, when defined phraselogically, represent the social value of promoting impartiality in the administration of justice by seeking representation in the decision making process.[335] I propose that if applied practically, this phraseological definition of independence and accountability requires an assessment of the process that appoints judges to understand whether the process itself is impartial. Does the process encourage diverse representation and promote impartiality in the administration of justice? Finally, it requires an examination of the bodies that appoint judges, to interrogate whether they too are independent and accountable.

The examination of the judicial appointment system is also about ensuring equality both before and under the law. To Devlin et al, this type of equality also means equal opportunity to 'make and enforce the law, and not merely equal application of the law'.[336] Enabling more women to make and enforce the laws recognises the totality of women's contributions to the judiciary as a whole. Women bring something more than just 'a feminine touch' to the bench, and they contribute to judicial diversity through their experience, perspectives, opinions, skills and leadership.[337] Gender considerations in judicial appointments are not illegitimate and reforms to judicial appointment processes, whether they involve quotas or amending the criteria

[333] Wynn and Mazur , p.783
[334] Ibid.
[335] Wynn and Mazur, p.790.
[336] Devlin, MacKay and Kim , p.790.
[337] Dawuni 'African Women Judges on international Courts' p.226.

for appointment, need to be understood in this context.[338] The plausibility and effectiveness of any such reforms rest on reasserting that diversity has a meaningful (and legitimate) role in the selection of judges.[339]

If more women on the bench means strengthening substantive independence and strengthening impartiality, then one starts to appreciate the importance of the judicial appointment process. Doing so permits the examination of two very different judicial appointments processes in Zambia and South Africa, in order to inform our understanding of the formal and informal aspects of the judicial appointments process. Both jurisdictions use a merit-based type of appointment system. Appointment systems described as merit-based often involve a commission that decides on the suitability of a candidate based on their qualifications, experience and other factors such as diversity provisions, if and where they are applicable.[340]

This contrasts with the system of executive type of appointments, which are now less prevalent in Commonwealth countries. In these types of appointments, the head of the judiciary and the executive sound out potential candidates and conduct the recruitment with no engagement from other parties.[341] In this regard proponents of the merit-based system have stated that judicial commissions are more transparent, because secret soundings invariably lead to actual or perceived cronyism, political or reward appointments, gender bias and even self-selection.[342] Hence, they believe, the merit-based system will be more equitable as it appoints

[338] McLoughlin ' The Politics of Gender diversity', p.166.
[339] Ibid.
[340] For example, South Africa, the United Kingdom, Canada and the United States are grappling with transforming their judiciaries by race and gender, in more homogenous societies; race is less of an issue.
[341] Van zyl Smit 'The Appointment,Tenure and Removal of Judges', p.13.
[342] Alan Patterson, '"The Scottish Judicial Appointments Board: New Wine in Old Bottles"', in *Appointing Judges in an Age of Judicial Power ;Critical Perspectives from around the World*, ed. by Kate Malleson and Peter Rusell (Toronto: University of Toronto Press Incorp, 2006), pp. 13–38.

the most qualified person with characteristics and abilities to best perform the judicial function.[343]

The merit-based appointment system in Zambia and South Africa will be explored in detail in subsequent chapters. This will include an examination of the process from the time judicial vacancies arise to when successful candidates are appointed. This necessitates an introduction to the context of the study. Coupled with the methodological framework used for this study, the subsequent chapter provides an adequate point of departure for the rest of this thesis.

[343] Kate Malleson,'Diversity in the Judiciary: The Case for Positive Action' *Journal of Law and Society* 36,3 (2009), 376-402 (p.381).

CHAPTER 3
THE BEGINNING:
METHODOLOGY AND CONTEXT OF THE STUDY

3.1 INTRODUCTION

This chapter is divided into two distinct parts – a methodological section and a contextual section. The first part is the methodological section and it introduces the reader to the qualitative methods used in this study. Qualitative research and the process of analysis in particular, 'involve continuous reflexivity and self-scrutiny'.[344] It also requires paying particular notice to whether the research pays attention to issues of validity, reliability and triangulation.[345] In order to address these important aspects of qualitative research, the methodological section will be divided into four segments. The first segment is a brief justification of the use of qualitative research and a two-country case study. The next two segments explain the multiple methods of qualitative research used in this study. Multiple methods of data analysis are necessary because they provide more grist for the research mill, as each method exhibits different aspects of empirical reality.[346]

The methods used in this study include an extensive literature review, in-person semi-structured interviews and participant observation of JSC interviews, amongst others. I provide information on the literature used and the manner in which participant observation took place. Details of the fieldwork interviews are also furnished, which includes a breakdown of the interview participants who took part in this research. The penultimate segment of the section describes the data analysis phase, before an explanation of the limitations that were faced in this study and how they were overcome. The second part of this chapter introduces the reader to a summary of the judicial appointments background of both Zambia and South Africa. This

[344] Priscilla M Pyett, 'Validation of Qualitative Research in the "Real World"', *Qualitative Health Research*, 13.8 (2003), 1170–79 <https://doi.org/10.1177/1049732303255686>.
[345] Michael Quinn Patton, 'Enhancing the quality and credibility of qualitative analysis.', *Health Services Research*, 34.5 (1999), 1189–1128.
[346] Ibid, p. 1192.

background is not the basis of a comparative analysis. Zambia and South Africa are disparate in regard to colonial histories, demographics, legal foundations and legal professional structure.[347] Rather, the contextual framework leans towards an examination of distinct countries as case studies. The selected countries are suitable because as Gerring et al posit, they 'can provide a useful variation on the dimensions of theoretical interest'.[348] This is advantageous for this research because it is novel and seeks to make an original contribution to literature by providing data from varied points of analysis.

The contextual section commences with a brief history of both judicial systems. It is not extensive but is sufficient to provide an understanding of the backdrop from which this study takes place. Reference to the judiciary in this research is particularly in respect of judges presiding in Superior Courts, which are different from Subordinate Courts where magistrates are presiding. The second segment of the contextual section is an explication of the past judicial appointment methods in both countries, which in large part originated from the Westminster system. There, the Lord Chancellor was responsible for selecting candidates for formal appointment by the Queen.[349] In South Africa and Zambia, this translated into the Minister of Justice or the President deciding who should ascend to the bench with no recourse for objections.

This executive-driven appointment system proved both challenging and antiquated as the two countries moved towards a democratic era. Eventually many changes were put in place leading to the current appointment procedures.[350] These changes are explored in the final segment of the section, which briefly describes the foundation of the appointment process in

[347] Zambia only has one bar with Advocates, while South Africa has a split bar of Advocates and Attorneys.
[348] John Gerring and Rose Mcdermott, 'An Experimental Template for Case Study Research', *American Journal of Political Science*, 51.3 (2007), 688–701.
[349] Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles A Compendium and Analysis of Best Practice* (London: The British Institute of International and Comparative Law, 2015) p.13.
[350] The changes referred to in this research are those made from 1994 onwards.

both countries. The court structures in both past and present systems are mentioned because it is necessary to understand the hierarchy of the courts, in order to appreciate the analytical chapters that will follow. In addition, the criteria used for determining the appointment of judges will be introduced and further expanded on, in succeeding chapters.

3.2 METHODOLOGY

3.2.1 Qualitative Research or Quantitative Research?

The nature of the research question often determines the applicable methodology.[351] This study's research question asks how aspects of the judicial appointment process inform equal representation of men and women on the bench. This research seeks to describe this phenomena and carefully analyse and interpret pertitnent data for the purpose of theory building.[352] As opposed to traditional legal methods of study, this is an interpretivist approach that is socio-legal in nature. This approach focuses on the social factors that have informed the preceding theoretical chapter and that are identified in the substantive chapters to follow. Socio-legal research can be conducted using qualitative and/or quantitative methodology.

Quantitative research is used to derive a quantitative answer, study numerical changes, explain a phenomenona or test a hypothesis, with the aim of explaining an occurrence.[353] Qualitative methodologies seek to explain the particular, allow the researcher to study issues in depth and provide a theoretical explanation of a certain phenomenon and also test hypotheses.[354] Qualitative research is therefore more suitable for this study because it aims 'to give privilege to the perspectives of research participants and to illuminate the subjective

[351] Claire Bless, Craig Higson-Smith, and Sello Levy Sithole, *Fundamentals of Social Research Methods: An African Perspective*, 5th edn (Cape Town: Juta & Co.Ltd, 2013).
[352] Patricia Bazeley, *Qualitative Data Analysis: Practical Strategies* (Los Angeles: Sage Publications, 2013) p.4.
[353] Daniel Muijs, *Introduction to Quantitative Research in Education with SPSS* (California: SAGE publishing, 2010) <http://www.modares.ac.ir/uploads/Agr.Oth.Lib.23.pdf>.
[354] Kenneth F. Hyde, 'Recognising Deductive Processes in Qualitative Research', *Qualitative Market Research*, 3.2 (2000), 82–90 <https://doi.org/10.1108/13522750010322089>.

meaning, actions and context of those being researched'.[355] In order to answer the research question in this study, it was important for the participants to be heard and their roles in the process understood. Multiple methods of qualitative methodology form part of this research and will be used to answer the identified research question. These methods include case studies, participant observation and semi-structured interviews.[356]

3.2.2 Case Studies

Case studies are used to undertake a systematic inquiry into an event or a set of related events which aim to describe and explain the phenomenon of interest.[357] They are particularly well suited to new research areas or research areas for which existing theory seems inadequate.[358] Yin cautions however, that selected cases should reflect characteristics and problems identified in the underlying theoretical propositions.[359] Zambia and South Africa — the identified sites of study are on different spectrums of the judicial appointments paradigm. Prior to 2016, Zambia had limited legisltation regarding the protection of women's rights. Moreover the field of gender and judging as a research field has not previously been explored. However despite this, and despite its private opaque appointment process, Zambia has achieved gender equity on its Superior Courts.

South Africa is a jurisdiction with a strong women's rights protection framework and a more public and accountable appointment process than Zambia. However women's representation on the Superior Courts is still below 40%. In terms of research, the existing theory on gender and judging in South Africa is inadequate because of the absence of any

[355] Ellie Fossey and others, 'Understanding and Evaluating Qualitative Research', *Australian and New Zealand Journal of Psychiatry*, 36 (2015), 717–32 <https://doi.org/10.1046/j.1440-1614.2002.01100.x.Understanding>.
[356] These statistics will include statistics of the composition of both judiciaries between 2013- 2017.
[357]Donna M. Zucker, 'How to Do Case Study Research', in *Teaching Research Methods in the Social Sciences*, ed. by M Garner, C Wagner, and B Kawulich (Surrey: Ashgate Publishing Limited, 2009), pp. 171–92.
[358] Jennifer Rowley, 'Using Case Studies in Research Using Case Studies in Research', *Management Research News*, 25.1 (2002), 16–27 (p.16) <https://doi.org/10.1108/01409170210782990> [accessed 28 June 2017].
[359] Robert K Yin, *Case Study Research. Design and Methods*, 2nd edn (California: Sage, 1994).

detailed studies that interrogate how women experience the judicial appointment process. This information makes the two jurisdictions useful for examining the stated research problem because the examination of identified aspects in both jurisdictions, has the potential to extract a variety of results. If the sub-questions probed in this research are to be answered adequately, it is imperative that different normative and empirical claims about the judicial appointment process are heard and analysed. Therefore issues such as the experience of women judges, the perceptions of relevant stakeholders of their respective appointment process and the importance of a gender diverse JSC or a transparent appointment process, are best investigated with the aid of the two case studies.

Nonetheless, this is not presented as a comparative analysis. Jan van Zyl Smit has warned that any comparative analysis of diversity and judicial appointments must proceed with caution and remain sensitive to local dynamics which may cast doubt on otherwise workable diversity strategies.[360] To this end, the case studies are used only as a 'potent method of probing'[361] particular aspects of the judicial appointments process. They are the tools with which this research examines how particular aspects of the appointment process inform equal representation of women and men on the bench. They reflect contrasting, but not exhaustive methods of judicial appointments present in the region.

3.2.3 Literature

An extensive array of literature was used in this research. This includes a compilation of journal articles, book chapters and books, relevant legislation, policy documents, reports, a few cases and media statements. The first step was a global literature review of material on judicial appointments and gender in order to evaluate the extent of material already written on these

[360] Jan van Zyl Smit, '" Opening up " Commonwealth Judicial Appointments to Diversity? The Growing Role of Commissions in Judicial Selection', in *Debating Judicial Appointments in an Age of Diversity*, ed. by Graham Gee and Rackley Erika (Oxford: Routldege, 2017), pp. 60–82.
[361] Anne-Marie Ambert and others, 'Understanding and Evaluating Qualitative Research', *Journal of Marriage and Family*, 57.4 (1995), 879–93 <http://www.jstor.org/stable/353409> [accessed 16 May 2017].

topics. This was also useful in identifying an existing gap in literature in respect of research from an African perspective. The result of the literature review was two-fold; the construction of a basis for the theoretical framework proposed in chapter two and the identification of the relevant research question. The research question asks, 'how do aspects of the judicial appointment process inform equal representation of women and men on the bench'?

Second, once the research question was identified and the case study sites selected as above, literature was examined for a contextual background of each country and its appointment system. Third, the work of Cheryl Thomas was instrumental in identifying the particular themes that will be examined in order to answer the research question.[362] These include the recruitment process, composition of the appointment body, the legal profession, the role of political leadership and transparency or lack thereof of the process. While this research is not a comparative study of the two countries, the work of academics comparing different jurisdictions was nonetheless illuminating in respect of how to theorise findings when writing about more than one country. These academics include amongst others, Feenan,[363] Valdini et al,[364] Baines[365] and Gill.[366]

As different strands of themes emerged out of the data analysis, the existing literature was utilised in order to evaluate findings. In this regard it was useful to ascertain whether the findings could be confirmed by other studies or whether they provided a basis for new evidence of what was occurring in the selected jurisdictions. Finally, the array of literature was

[362] Cheryl Thomas, *Commission for Judicial Appointments Judicial Diversity in the United Kingdom and Other Jurisdictions* (London, 2005) <https://www.ucl.ac.uk/laws/judicial-institute/files/Judicial_Diversity_in_the_UK_and_other_jurisdictions.pdf>.
[363] Dermot Feenan, 'Judicial Appointments in Ireland in Comparative Perspective', *Judicial Studies Institute Journal*, 1 (2008), 37–66.
[364] Melody Ellis Valdini and Christopher Shortell, 'Women's Representation in the Highest Court: A Comparative Analysis of the Appointment of Female Justices', *Political Research Quaterly*, 69.4 (2016), 865–76, <http://ssrn.com/abstract=2492365> [accessed on 4 January 2020].
[365] Baines, ' Women Judges and Constitutional Courts: Why Not Nine Women?'.
[366] Rebecca Gill, 'A Framework for Comparative Judicial Selection Research With an Application to Gender Diversity on High Courts' (New Orleans, 2012), pp. 1–30 <http://ssrn.com/abstract=1982705> [accessed 18 October 2017].

instrumental in providing guidelines for analytical approaches and data analysis techniques, essential to the write-up of the findings.

3.2.4 Interviews

Smith and Osborne proffer that one of the best ways to obtain data for some studies is the use of semi-structured interviews. They argue that 'this form of interviewing allows the researcher and participant to engage in a dialogue whereby initial questions are modified in the light of the participants' responses'.[367] The investigator can then probe interesting and important areas which arise. With this insight, it was necessary to identify suitable participants or units of investigation that were pertinent for this study. Four of them were identified. The first was women judges because the research is essentially about gender and judicial appointments. The research question seeks to examine how aspects of the appointment process inform the ascension of women to the bench. Hence women judges who are on the bench were the first necessary group of participants.

The second group was members of the appointment body (the JSC) because they have the mandate to select judicial candidates and are constitutionally entrusted to do so in both countries. The third group was legal professionals which includes advocates, attorneys, magistrates, academics and lawyers in state institutions.[368] This group is the pool from which judges are selected. Their understanding of the process from the outside would provide a different perspective than that of those currently on the bench. The final group was members of Civil Society Organisations (CSOs) and journalists who are involved in the appointment

[367] Jonathan A. Smith and Mike Osborn, 'Interpretative Phenomenological Analysis', in *Qualitative Psychology: A Practical Guide to Research Methods*, ed. by Jonathan A. Smith (California: SAGE publishing, 2015), pp. 53–80 <http://www.corwin.com/sites/default/files/upm-binaries/17418_04_Smith_2e_Ch_04.pdf> [accessed 25 June 2017] p. 56.

[368] Zambia does not have a split-bar like South Africa, so no attorneys were interviewed there. In addition, in South Africa, judges do not get appointed from state institutions, so that only applies to Zambian participants.

process either by making submissions to the JSC or reporting on the process that unfolds at the JSC.[369]

The sampling of the interview participants was done using the purposive or judgmental method of sampling. This type of sampling rests on the assumption that 'the researcher knows what type of participants will provide the most complex and rich information that will be valuable to the research'.[370] It is aimed at a more closely defined group for whom the research question will be significant, as opposed to a random or representative sample.[371] Random sampling or representative sampling was inappropriate for this research because ordinary citizens would not possess the information sought.[372] The sensitive nature of the topic and the important roles that a number of interview participants occupy, meant that they could not all be approached personally. In those instances, snowball sampling was employed. This is a strategy 'in which participants identify others with direct knowledge relevant to the investigation being conducted'.[373] Initial participants interviewed referred me to others and made efforts to find replacement participants when they themselves were unavailable.[374] This resulted in a sample that was diverse and not as homogenous as critics of snowball sampling would suggest.[375]

3.2.4.1 Interview Participants

A total of 43 participants from both Zambia and South Africa were interviewed as depicted below.

[369] In Zambia, the interview process is private, so journalists were only interviewed in respect of South Africa.
[370] Zucker, p. 177.
[371] Smith and Osborn, p.56.
[372] The former type of sampling selects participants randomly, while the latter takes all cases on hand until a desired size is reached.
[373] Ibid.
[374] This also occurred in Zambia where the Chief Justice Irene Mambilima was unavailable for an interview, but she instructed her office to assist me in getting interviews with JSC members and judges.
[375] Fossey and others submit that snowball sampling has been criticised for relying on the quality of participant's social networks, which results in a homogenous sample.

Table 1. [376]

Country	Judges	JSC members	Members of the Legal Pool (Advocates and members of Academia)	CSO Members/ Journalists
Zambia	7 W	1 W, 3 M	4 W, 4 M	3 M
South Africa	6 W	2 W, 4 M	3 W, 2 M	3 W, 1 M

The initial number of participants was 32, with an equal number in each group. However as the interviews proceeded, the lack of saturation led to more interviews which resulted in different numbers in each allocated group. Saturation occurs when 'patterns are recurring, or no new information emerges'.[377] Only when 'major trends begin to recur and outlying or secondary themes have already emerged', should researchers stop adding new individuals to their sample.[378] Using this approach resulted in the breakdown as depicted above. Given that 43 interview participants is a relatively small sample, statistical generalization was improbable and analytical generalisation was preferred, as this would likely be relevant to other jurisdictions in the region. However, the sample size was adequate because it allowed 'all possibilities and aspects of the researched phenomenon to be identified'.[379] The inclusion of

[376] W represents Women and M represents men.
[377] Fossey and others, p.726.
[378] Anne-Marie Ambert and others, 'Understanding and Evaluating Qualitative Research', *Journal of Marriage and Family*, 57.4 (1995), 879–93 (p.886) <http://www.jstor.org/stable/353409> [accessed 16 May 2017].
[379] Bless, Higson-Smith, and Sithole,p.164.

diversity in other aspects apart from gender was another important part of sampling. A wide and diverse sample especially in non-homogenous societies, adds credibility to the research — an important aspect of assessing the internal validity of a study.[380]

From a Zambian perspective it was imperative to interview judges and JSC members in particular, who had knowledge of the appointment process both before and after the Constitutional amendment of 2016.[381] Of the interview participants, two JSC members and four women judges were appointed before the Constitutional amendment, while two JSC members and three women judges were appointed after the amendment. The judges were drawn from the High Court, Court of Appeal and Supreme Court of Appeal. For South Africa, it was necessary to interview diverse racial groups because, some were more privileged than others during apartheid.[382] This differential life and career experience had to be broadly reflected in women judges. Of the judges interviewed two were indigenous African, two were white, one was Coloured and one was Indian. The judges were also from three main tiers of the court, the High Courts, Supreme Court of Appeal and the Constitutional Court.

The legal professionals were drawn from private practice and the magistracy in both countries, with the inclusion of academics and state department lawyers for Zambia. All the interviews were conducted from November 2016 to July 2017 in Kitwe and Lusaka (Zambia) and Johannesburg, Bloemfontein and Cape Town (South Africa).[383] With one exception, all were in-person interviews, at a convenient venue for the participant.[384] Some interviews also took place at two South African JSC interview sessions in October 2016 and April 2017. The

[380] Heith Copes and Richard Tewksbury, 'Publishing Qualitative Research in Criminology and Criminal Justice Journals', *Journal of Criminal Justice Education*, 27.1 (2016), 121–39 (p.128).
[381]This amendment and the changes it brought will be discussed in more detail in the subsequent section of this chapter.
[382] Best translated as 'separateness', it was a deliberate government policy to privilege the minority race over the majority.
[383] The South African participants were interviewed in three cities for convenience, though some of them operate in Durban and Pretoria.
[384] The one exception was a senior woman attorney whom I interviewed telephonically on 11 July 2017.

average interview time was 50 minutes, with the longest lasting 93 minutes. Of the 43 interview participants, 27 opted to be anonymous and only sixteen opted for non-anonymity.

To protect the majority who chose anonymity, great care has been taken to ensure the absence of any affiliation or facts that could possibly lead to participants' identification. It was however interesting to note that of the fifteen who chose to be identified, only five are women and all South African based. The majority of the men who chose to be identified are from Zambia, where the process is very private. There appeared to be an ease about non-anonymity in Zambia which was unexpected, considering the hostile political climate that I refer to later under the section on limitations of the study.

3.2.4.2 The Questionnaire

In order to conduct interviews, I sought and was granted ethical clearance by the University of Cape Town for a period of one year. This allowed me to conduct all interviews during this period. As mentioned earlier, semi-structured interviews were preferred for this research. The difference between semi-structured interviews and unstructured interviews is that:

> unstructured interviews are usually conducted in an everyday conversational style, in which participants take the lead, to a greater extent, in telling their stories, rather than the researcher directing the interview. Semi structured interviews are used to facilitate more focused exploration of a specific topic, using an interview guide.[385]

Although the questionnaire had specific questions, the interviews were guided by the questionnaire, rather than dictated by it.[386] Bless et al suggest that these type of interviews 'presuppose some prior information, an understanding of the problem under investigation and a need for more specific information'.[387] My previous knowledge of the issue obtained from

[385] Fossey and others, p.727.
[386] Smith and Osborn, p.58.
[387] Bless, Higson-Smith, and Sithole,p.194.

working in this field of study, resulted in the choice of interview format, as I was investigating specific identified issues.

Interesting comments that arose during the interviews were probed and questions were continuously added and adapted on the basis of previous interviews. This allowed for a sequencing of what I was hearing. As compared to structured interviews, the disadvantage of semi-structured interviews, is that they reduce the control the investigator has over the situation, taking longer to carry out. [388] In my case, the nature of the research and the participants being interviewed required some deference on my part. Acknowledging the deferential dynamics in advance, meant that I was not limited by the reduction of control in my interviews, but rather aided by it. In some instances, some participants preferred a conversational dialogue that was very casual and required more participation from an interviewer than normal.

This was especially the case with judges and legal professionals who are often in a position where they are asking the questions and not vice versa. For example when I asked a question on whether the current appointment process is suitable for their respective country, a number of participants asked me to explain what other processes are used globally. In some instances, I was asked to provide details on the composition of the JSC's or asked details of interviews I had observed in South Africa. There was a concern that responses would be tainted or at least modified based on my responses to their questions. Nonetheless as I conducted more interviews, I realised that this informal style was helpful for two reasons.

Firstly, for Zambian judges it appeared to make them feel at ease that I was not only there to extract information from them but was willing to share information too. This is pivotal because they were wary about speaking to me because of the political climate. Secondly, in

[388] Smith and Osborn,p.56.

some instances with both Zambian and South African participants, my knowledge of the field and experience in it seemed to be a form of validation. It proved that not only was I qualified to interview them but, I was also experienced enough to understand the nuances of the topic. These informal interviews were longer than others but proved illuminating as they provided more insight into the research and a better understanding of what I was examining. There were also formal interviews where participants preferred a more formal and quicker approach to the process.

In respect of data collection, 'the wealth and quality of the gathered data are strongly dependent on the skill of the interviewer and the confidence'[389] that the interviewer inspires in participants. Good research skills include the creation of accurate questions that elicit relevant information from the participants. To receive an optimum outcome, the questions were divided into factual and opinion-based questions (otherwise known as empirical and normative questions). Factual questions are straightforward and do not influence the respondents; while opinion-based questions mean the participant is the only person who knows the true answer.[390] It was important to ask factual questions to establish the current practice in each jurisdiction, for example, 'how does the judicial appointments process in your country work'? I was mindful that the veracity of the responses was dependent on what the participants knew of the process or how much information they had access to. Therefore, using open-ended questions and having a large sample was of benefit in this regard.

Opinion-based questions, on the other hand, focused particularly on participants' appraisal of particular issues. Obtaining 'truthful' responses was of concern especially from judges or JSC members.[391] This is because:

[389] Bless, Higson-Smith, and Sithole,p.197.
[390] Bless, Higson-Smith, and Sithole, p.208.
[391] These two groups are higher in societal ranks and have the ones with the most to lose if any negative reports of their participating in this research came out.

> people inheriting socially privileged positions usually are very aware of the necessity of political correctness and the danger of saying 'the wrong things', in particular when the question raises issues that are (potentially) power-sensitive.[392]

Yet it was also recognised that if there were questions that were perceived to require the 'right answers', these questions were themselves useful in understanding the aspects I was exploring. Asking some indirect questions was useful, as it made the purpose of the questions less obvious and thus more satisfactory for participants.[393] For example, a question was phrased as 'do you think the appointment process creates an equal playing field for men and women'? This was considered better than asking, 'in your opinion, is the appointment process discriminatory'? Indirect questions were used in conjunction with direct questions, because 'a great number of indirect questions are needed to gauge an opinion or fact, than would be necessary if direct questions were used'.[394] The use of both types made for richer data in all interviews.

3.2.5 Participant Observation

Participant observation allows researchers amongst others, to 'observe events that informants may be unable or unwilling to share when doing so would be impolite and observe situations informants have described in interviews'.[395] The participation ranges from non-participatory (watching or reading), moderate (no active interaction just observing the scene) and active participation (where the ethnographer actively engages in the communities' activities).[396] Moderate participant observation was used in respect of the South African JSC interviews. I monitored the JSC process from June 2012 to April 2017. I was physically present at twelve of fourteen South African JSC interview sessions in this time period. They were primarily held in

[392] Thomas Diefenbach, 'Are Case Studies More than Sophisticated Storytelling?: Methodological Problems of Qualitative Empirical Research Mainly Based on Semi-Structured Interviews', *Quality & Quantity*, 43 (2009), 875–94 (p.882) <https://doi.org/10.1007/s11135-008-9164-0>.
[393] Bless, Higson-Smith, and Sithole, p.209.
[394] Ibid.
[395] Kawulich, p.4.
[396] DeWalt and DeWalt, pp. 262-263.

Cape Town, with three rounds conducted in Johannesburg.[397] At these interviews I took notes and made observations regarding how the interviews unfolded and how participants were treated.

Occasionally, I engaged in active participation using three methods. I engaged in casual conversations with JSC members in between interview sessions, participated in judiciary related workshops where judges were present, and interacted with the legal profession when I presented research at their seminars. Moderate and active participation was useful in understanding various political, personal and judicial dynamics that are sometimes present in interviews.[398] These and other intricate issues are not easily observable or understood by reading media reports or conducting interviews with different groups. Participant observation also helped in developing my questionnaire and in gaining access to members of the JSC for one on one interviews. My presence at the interviews and/or my detailed knowledge of the process was advantageous when seeking permission to interview the six members in my sample.

3.2.6 Data Analysis

The database comprised of firstly the interview transcripts. These were transcribed verbatim between July 2017 and January 2018. In addition to the transcripts, the data consisted of amongst others academic literature, notes from participant observation and data from a previous project on judicial appointments.[399] It also included notes from relevant seminars I had attended, speeches, and field notes that I had complied during the interview stage. I was constantly reflecting on what I was hearing and witnessing prior to, during and after the fieldwork interviews. These reflections were recorded in writing and this practice was also

[397] These interviews are held at hotel venues and members of the public are allowed to be in attendance.
[398] For example, the presence of opposition and ruling party members of the JSC sometimes meant that political differences were brought to the fore during JSC interviews.
[399] In November 2016, I conducted fieldwork research in Zambia for a project under the Democratic Governance and Rights research unit entitled 'SADC Principles Research'.

sustained, during and after my participant observation of the South African interviews. These write-up notes are what proponents of grounded theory refer to as memos. Holton describes memos as 'theoretical notes about the data and the conceptual connections between categories'.[400] Though this research does not fully adopt the grounded theory approach, writing memos proved productive because they helped 'raise the data to a conceptual level' and guided me in regard to further data collection and analysis.[401]

A linear approach to analysis was employed and data was only analysed after all interviews had been conducted and most other methods of data collection had been completed. The data was processed and analysed using NVivo, a Computer Assisted Qualitative Data Analysis Software (CAQDAS). NVivo was used in the analysis stage to help manage data by 'recording, sorting, matching, linking, querying data and visualising it'.[402] The primary strategy followed in the data analysis stage was a reliance on the theoretical propositions that led to this research. Yin refers to this approach as using the original objectives and design of the case study which in turn reflect in the research questions, the literature review and hypotheses.[403] The basic proposition underlying this research is that there are aspects of the appointment process that have a greater bearing on women judicial aspirants, in comparison to men. This proposition led to the research question and to the particular identified formal and informal aspects of the appointments process.

These aspects were identified as the major themes prior to the analysis and would in turn lead to chapter headings. Thus for the most part, a deductive approach was taken because

[400] Judith.A Holton, 'The Coding Process and Its Challenges', *The Grounded Theory Review*, 9.1 (2010), 21–40 <http://groundedtheoryreview.com/wp-content/uploads/2012/06/GT-Review-vol-9-no-11.pdf#page=34> [accessed 13 November 2017].
[401] Ibid.
[402] Pat Bazeley and Kristi Jackson, *Qualitative Data Analysis with Nvivo*, 2nd edn (Los Angeles: Sage Publications Inc, 2013).
[403] Robert K Yin, *Case Study Research Design and Methods*, 5th edn (California: Sage Publication Inc, 2014) p. 316.

I was looking for particular 'patterns and elucidating what appeared to be emerging'[404] from the already identified themes. Despite this, my primary approach did not exclude the possibility of discovering new or outlying themes that had not been previously considered. This open approach eventually led to the addition of a theme entitled 'the role of a judge', which is concerned with the notion of what is expected of a judge contextually and how this is demonstrated in the appointment process.[405]

The analytical process was iterative, moving back and forth between the data and relevant literature on the particular topics. All relevant data was coded in initial categories called nodes. This resulted in a thematic coding framework. This was constructed using identified themes under each jurisdiction. Coding is the transitional process between data collection and more extensive data analysis; a code can sometimes summarize, distil or condense data.[406] In doing this a researcher can see and interpret what has been said, written, or done, and can reflect on evolving categories and decide what to follow up.[407] The data coded included interview transcripts, participant observation notes, reports, media articles, and minutes of meetings. Each jurisdiction was coded separately and assigned nodes, based on what arose from the data.

For example, for Zambia, initial nodes included amongst others 'the application process', 'the JSC's performance', 'the gender composition of the JSC' and 'political involvement in appointments'. These were related to the aspects of the appointment system being examined in this study. However further reflection, exploration, reading and connecting, led to the expansion of the nodes into sub-nodes. Each sub-node referred to a constant theme that was arising from interview data and was triangulated with reports and literature. Examples

[404] Hyde, p.84.
[405] This is covered in Chapter 6 of this thesis.
[406] Johnny Saldaña, *The Coding Manual for Qualitative Researchers*, 2nd edn (Los Angeles: Sage Publication Inc, 2013) pp.4-5.
[407] Bazeley, p.15.

of these sub-nodes included 'stereotyping of women' or 'perceptions about the bench being easier than private practice'. For South Africa, initial codes were amongst others, 'the interview process', 'the composition of the JSC' and the 'legal profession'. On further analysis and reflection, a number of sub-nodes arose such as 'the race dynamics in the legal profession', 'the Mjali interview',[408] 'acting appointments' and 'presidential power'.

The creation of sub-nodes helped conceptualise information that was allocated to specific sections of the chapters herein. These sub-nodes also provided the necessary material to address the sub-questions in this study. These are addressed specifically in Chapters 4 and 5 of this thesis. To triangulate the material from the coding process, I compared existing literature where it was available and consulted other sources such as media reports and policy documents where present. This meant that I had to make connections 'across and through narrative accounts and other data' in my possession.[409] The written reflections that I used before, during and after the fieldwork interviews and JSC observations, were also relevant during the coding process. These initial impressions were useful for reinforcing, extending or challenging other sources. They were recorded as memos in the Nvivo system. Having memos, nodes and sub-nodes in Nvivo resulted in a faster method of retrieving evidence to support what was emerging from the study. The memos were also used as a measure to ascertain whether there was a growing understanding of concepts and ideas, because a number of them had been recorded in the earlier stages of this research. Referring to them provided a means of auditing any previous assumptions that had been present and allowed for a deeper interrogation of said assumptions, in order to determine how refined the process had become over the years. Finally, throughout the data collection and analysis process, I was mindful about being reflexive. Reflexivity refers

[408] This refers to a memorable interview of High Court Judge Nozuko Mjali which will be discussed in detail in Chapter 5.
[409] Bazeley, p.15.

to how the researcher constantly examines her/his actions and role throughout the research process and scrutinizes them in the same way as the rest of the data.[410]

I had been working in the area of judicial governance for four years prior to the commencement of this study. I had published and accumulated enough knowledge about South Africa by the time I commenced this research and hence I had to be mindful of acknowledging any preconceptions of what I thought this study would reveal. I had to move away from being a subjective actor, to an objective researcher who was open to being surprised by what the data provided. I was an active agent in this research and had to constantly interrogate my examination of the facts. I also had to acknowledge that as a young, African, legally trained woman, the intersectionalities of my gender, age, ethnicity, and social status would have an impact on this research. In some respects, it was positive and in others it was a limitation.

3.3 LIMITATIONS OF THE STUDY

3.3.1 Literature

The dearth of literature on gender and judging in Africa resulted in reliance on material mostly from the United Kingdom, Canada and the USA. There was also a paucity of academic material on the Zambian legal system and the judiciary, with limited material written in the last ten years. Nonetheless, the absence of material is an indicator of the novelty and original contribution to literature that this research makes. The collection of statistics for demographics in the judiciary did prove challenging in some instances. For example in Zambia, the delay in being granted access to statistics was a disadvantage because I could not refer to the actual statistics in the interviews with participants.

[410] Jenny K Rodriguez, 'Intersectionality and Qualitative Research', in *The SAGE Handbook of Qualitative Business and Management Research Methods: History and Traditions*, ed. by Catherine Cassell, Ann L. Cunliffe, and Gina Grandy (London: Sage Publications, 2018), pp. 429–61 <https://doi.org/10.4135/9781526430212>.

3.3.2 Field Work

3.3.2.1 Sampling of Interview Participants

As a researcher, I have no professional network or work experience in Zambia. In addition, I was younger than almost all of the people I encountered in this research. Consequently, this resulted in a lot of effort and time spent convincing participants to take part in the research. This limitation was mitigated however, by the snowball sampling strategy. Once I was referred by one participant to another, there was less suspicion in respect of my motives. In South Africa, where I have a professional base, this obstacle did not arise.

3.3.2.2 Zambian Political Dynamics

A large portion of the Zambian interviews were conducted in Lusaka from 10-21 April 2017. April was a very tense time in Zambia as alluded to earlier and the political restlessness was palpable. Firstly, the main opposition leader Hakainde Hichilema was arrested and charged with treason.[411] This had consequences for my research because two prominent State Counsel I would have interviewed, were retained as part of Mr Hichilema's legal team. Therefore, they were unavailable for the interviews. Secondly, the Judicial Complaints Authority (JCA) [412] tribunal was hearing complaints against all five Constitutional Court judges who sat on an electoral petition in August 2016.[413] The hearings created a climate of fear in the judiciary as judges were mindful of behaving in a manner that could have them reported to the JCA. The assistance of the Office of the Chief Justice was therefore of great assistance in navigating interview requests.

[411] Greg Mills, 'Op-Ed: Now or Never for the International Community in Zambia', *Daily Maverick*, 12 April 2017, <https://www.dailymaverick.co.za/article/2017-04-12-op-ed-now-or-never-for-the-international-community-in-zambia/#.WVuSCoSGOUk> [accessed 4 July 2017].
[412] The JCA is a constitutionally mandated body which responsibilities include investigating complaints against judges.
[413] Ironically this petition was filed by Mr Hichilema who alleged vote rigging by the ruling party.

3.3.2.3 Semi-structured and Open-ended Interviews

The semi-structured and open-ended nature of some of the questions did lead to some participants speaking for long periods. This was only a limitation when the comments were not pertinent to my research or not directly related to the question. However, I found that the information given during those moments, unknowingly fitted into a previously asked question or provided an additional angle to follow up. Sometimes, it was an angle that I had not identified prior to the interview as being pertinent. There was a notable concern amongst some men of sounding sexist or speaking in a manner that they presumed I would find offensive because I was a woman. This may have affected the sincerity of some responses but, as mentioned earlier these 'insincere' responses invoke further areas of interrogation in this research.

3.3.3 Participant Observation

Due to the nature of the Zambian judicial process, participant observation as a mode of data collection was limited to South Africa. I was unable to gather data from observing how the Zambian commission operates and occasionally interacting with JSC members where possible. However, because there are no public attendees at the Zambian JSC interviews, this is a limitation that would face anybody conducting research in this area.[414] Hence, it may only be considered as a serious limitation if this research was conducting a comparative analysis as opposed to a study of two different systems. The two systems are examined in the next section in order to provide a contextual framework from which subsequent analysis will emerge.

[414] The effects of this private system of interviews is examined further in Chapter 4.

3.4 JUDICIARIES

3.4.1 Historical legacy

Zambia and South Africa are both former imperial colonies situated in Sub-Saharan Africa. Zambia gained its independence in 1964 from Britain and had a one-party state of governance headed by Dr Kenneth Kaunda until 1991 when multi-party elections were held.[415] Its common law heritage from England meant that it applied a dual legal and judicial system, using written law (common law) in the High Courts and customary law in the lower courts.[416] The Customary law courts were used to resolve disputes between indigenous Zambians, but lawyers were excluded.[417] Consequently when Zambia gained independence in 1964, there were no indigenous Zambian lawyers who could be appointed to the judiciary as judges.[418]

The first trained Zambian lawyer appointed to the High Court was only admitted in 1970[419] and the first indigenous Zambian Chief Justice only appointed in 1975.[420] Though a post-independence Constitution was enacted in 1973, it was later repealed in 1991 by the enactment of the Constitution of Zambia Act 1991. This Constitution was declared the Supreme Law of Zambia and any law inconsistent would be void.[421] Further amendments to the Constitution were made, which will be discussed in the succeeding segment.[422]

The South African road to the globally admired Constitution of the Republic of South Africa is much more complex. South Africa is both a former Dutch and British colony resulting

[415] The elections were won by Fredrick Chiluba leader of the Movement for Multi-Party Democracy (MMD).
[416] Roger Purdy, 'The Zambian Judicial System:A Review of the Jurisidictional Law', in *Law in Zambia*, ed. by Muna Ndulo (Nairobi: East Africa Publishing House, 1984), pp. 67–90 (p.79).
[417] Nicholas A Kahn-Fogel, 'The Troubling Shortage of African Lawyers: Examination Of A Continental Crisis Using Zambia As A Case Study', *University of Pennslyvania Journal of International Law*, 33.3 (2013), 719–89 (p. 728).
[418]Munyonzwe Hamalengwa, 'The Politics of Judicial Diversity & Transformation', p.415.
[419] Ibid.
[420] Former Chief Justice Annel Silungwe served from 1975 to 1992.
[421] Chief Justice Ernest Sakala, 'Autonomy and Independence of the Judiciary in Zambia: Realities and Challenges' (University of Zambia, 1999) <http://dspace.unza.zm:8080/xmlui/bitstream/handle/123456789/929/sakala.e.l0001.PDF?sequence=1> [accessed 14 June 2017].
[422] Adopted on 24 August 1991.

in a hybrid system of Roman Dutch Law and Common Law.[423] It became an independent state within the British Commonwealth in 1931. In 1948, the National Party Government then in power introduced its legal policy of apartheid.[424] In 1990 at the dawn of political change, the judiciary was exclusively white, with only one woman.[425] Formal apartheid came to an end in 1990 after the ban on the African National Congress (ANC) and other black liberation parties was lifted.[426] Yet on the date of South Africa's first democratic election on 27 April 1994, the judiciary remained predominantly white and male, with the exception of three black males and one white female.[427] As mentioned in Chapter 1, reference to the judiciary in this study is limited to Superior Courts and excludes the Subordinate Courts.

3.4.2 Previous Superior Court Structure and Appointment Model

The 1991 Constitution of the Republic of Zambia retained the court structure established in the post-independence Constitution of 1973.[428] This judicial structure comprised of the Supreme Court as the final court of appeal with no original jurisdiction. It was led by the Chief Justice. High Courts led by a judge in charge, were established as courts of first instance for civil and criminal matters and appeals from lower courts. Unlimited jurisdiction over industrial and labour matters was given to the Industrial Relations Courts, an appendage of the High Court.[429] Further constitutional amendments were made in 1996 but the court structure remained the

[423] John Dugard, *Human Rights & The South African Legal Order* (Princeton, New Jersey: Princeton University Press, 1978) p. 8.
[424] Ibid, p.5.
[425] Murray Wesson and Max Du Plessis, 'Fifteen Years On: Central Issues Relating To The Transformation Of The South African Judiciary', *South African Journal on Human Rights*, 24 (2008), 187–213 (p.190).
[426] Dugard, p. 392.
[427] Wesson and Du Plessis, p.190.
[428]The 1991 Constitution paved the way for the re-introduction for multi-party democracy and was perceived to be transitional in nature in order to allow for multi-party presidential elections.
[429]Zambian Ministry of Justice, *The Constitution of Zambia, 1991*, Part IV <http://www.wipo.int/edocs/lexdocs/laws/en/zm/zm052en.pdf> [accessed 15 June 2017].

same. In 2005, a Constitutional Review Commission suggested the establishments of other courts, amongst them a Constitutional Court but, that was only implemented in 2016.[430]

The appointment of judges to fill the above courts was initially a function solely for the Executive with limited consultation. A JSC was initially set up in 1963 after Zambia gained independence but it was abolished in 1973.[431] In the period 1973-1991, former President Kenneth Kaunda with the assistance of an advisor, informed chosen candidates by letter that they had been appointed.[432] It was never known how the candidates were chosen and there was no constitutional foundation for the appointment of judges at the time. During the said period, Zambia had become a one-party state, so no opposition existed for any objections to judicial appointments.[433] The secret soundings of judges led to a desire for a more inclusive appointment process and the JSC returned after multi-party democracy was reintroduced.[434]

South Africa's courts also had a different arrangement prior to the introduction of democracy in South Africa and the Interim Constitution of 1993 (replaced by the Final Constitution).[435] The highest judicial authority in the land was the Appellate Division of the Supreme Court, headed by the Chief Justice and established in 1910 after the formation of the

[430] Recommendations were made by the Mungomba Review Commission, 'Report of the Constitution Review Commission' (Lusaka: Secretariat Constitution Review Commission, 2005), pp. 1–911 <http://www.ncczambia.org/media/final_report_of_the_constitution_review_commission.pdf> [accessed 15 June 2017].
[431] Winnie Sithole Mwenda, 'Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia' (University of South Africa, 2006) <http://uir.unisa.ac.za/bitstream/handle/10500/2163/thesis.pdf?sequence..> [accessed 15 June 2017].
[432] Interview with the Deputy Chief Justice of Zambia, Marvin Mwanamwamba for a research conducted for the Southern African Chief Justices Forum in his chambers at the Supreme Court of Zambia, 1 December 2016.
[433] Multi-party democracy was banned in 1973 and only introduced in 1991 to make way for Presidential elections where President Kaunda was toppled after a 27-year rule.
[434] Sydney Chisenga, 'The Adverse Effect of Lacuna on the Zambian Judicial System' (Lusaka: University of Zambia,2003), pp.1–57, (p.6), <http://dspace.unza.zm:8080/xmlui/bitstream/handle/123456789/2671/CHISENGAS0001.PDF?sequence=1> [accessed on 23 Febraury 2017].
[435] Republic of South Africa, *Constitution of the Republic of South Africa*, 1993 <http://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993> [accessed 17 June 2017].

Union of South Africa. [436] It had no original jurisdiction and heard appeals from the courts in the constituent colonies of the Cape and Natal and the former Boer republics of Orange Free State and Transvaal which were formerly referred to as Supreme Courts.[437]

Prior to 1994, the President made appointments on the advice of the Minister of Justice, though the President's decision was considered a rubber stamp of the Minister's choice.[438] Du Bois notes that the Minister seemed as a rule to have tendered such advice after consultation with, or at the initiative of, the head of the relevant court; though this was not always the case.[439] These appointments were from the ranks of Senior Counsel (SC) and were invariably white and male.[440] The process of identifying candidates and their selection was also shrouded in secrecy (known as secret soundings), lending itself to what is often referred to as the 'tap on the shoulder' appointment system.[441] Due to apartheid, this process only sought out white practitioners− male in particular, resulting in a judiciary that was unreflective of the society it served.

3.4.3 Appointments in a new Zambian Judicial era

The Zambian Constitution regulates the appointment of judges but does not create the Judicial Service Commission. [442] The JSC is rather a creature of the Service Commissions Act and its formation has undergone some changes in the last few years.[443] After executive only appointments were done away with, the Constitution of Zambia 1996 (herein referred to as the 1996 Constitution) dictated the appointment of judges. The appointment of judges was

[436] Hugh Corder, 'Judicial Authority in a Changing South Africa', *Legal Studies*, 25 (2004), 253–74 <http://doi.org/10.1525/sp.2007.54.1.23.>.
[437] Corder, 'Judicial Authority in Changing South Africa', p.254.
[438] Murray Wesson and Max Du Plessis, 'Fifteen Years On: Central Issues Relating To The Transformation Of The South African Judiciary', *South African Journal on Human Rights*, 24 (2008), 187–213 (p. 190).
[439] Francois Du Bois, 'Judicial Selection In Post-Apartheid South Africa', in *Appointing Judges in an Age of Judicial Power:Critical Perspectives from Around the World*, ed. by Kate Malleson and P H Russell (Toronto: University of Toronto Press Incorp, 2006), pp. 280–312 (p.284).
[440] Wesson and Du Plessis, p.190.
[441] Hale, p.5.
[442] Recently amended by the Constitution of Zambia Amendment Act No. 2 of 2016.
[443] Act 19 of 1994, which was later replaced by Act 2 of 2014 and then eventually Act 10 of 2016.

governed by sections 93-97 of the 1996 Constitution and a JSC was responsible for selecting judges. In 2016 the Zambian Constitution was amended by the Constitutional Amendment Act 200 of 2016 (herein referred to as the New Constitution). It confirmed the role of the JSC in the appointment process and stipulated the minimum requirements that candidates for specific judicial positions have to meet.[444]

The Judicial Authority and systems of Courts is contained in part VIII of the New Constitution. This part established new courts including the Constitutional Court which has original and final jurisdiction on constitutional matters and also hears matters relating to the election of the President, Vice President and Members of Parliament.[445] A Court of Appeal has also been established which has jurisdiction over appeals from the High Court, other matters that are not constitutional in nature and appeals from quasi-judicial bodies.[446] Finally, the High Court has now been separated into branches with the creations of Family Courts, Commercial Courts and Children's Court joining the Industrial Courts as parts of the High Court.

In respect of judges, section 140 of the New Constitution, entitled 'The Appointment of Judges' reads as follows:

> 140. The President shall, on the recommendation of the Judicial Service Commission and subject to ratification by the National Assembly, appoint the—
>
> (a) Chief Justice;
>
> (b) Deputy Chief Justice;
>
> (c) President of the Constitutional Court;
>
> (d) Deputy President of the Constitutional Court; and
>
> (e) other judges.

[444] Part VIII of the New Constitution pertains to the Judicial Authority, System of Courts and Independence.
[445] It is ranked equivalent to the Supreme Court and is established in section 121 of the New Constitution.
[446] Sections 131-132.

Section 140 differs from the relevant sections on the 1996 Constitution in two important aspects. Firstly, the New Constitution in section 140, specifically states that the President shall appoint all the judges on the recommendation of the JSC.

The wording in section 93 (1) and (2) of the 1996 Constitution is different. There, it was only stated that the President shall appoint the Chief Justice and Deputy Chief Justice subject to ratification by the National Assembly.[447] There was no requirement for the JSC to provide recommendations in these instances. Secondly, the 1996 Constitution stated that the President appointed High Court and Industrial Relations Court judges 'on the advice' of the JSC.[448] This wording was absent in regard to the appointment of Supreme Court judges and the leadership of the judiciary. The effect of the amendment in language in regard to the more senior judges as per section 140 above, is important to note. Ndulo explains the significance of this change by arguing that when the President is required to act 'on the recommendation of' or 'on the advice of' his function becomes purely formal.[449] It is only when the President is acting in 'consultation with' that his role is more substantive; in this instance it is the consultation with the JSC that is a mere formality.

This would mean that prior to the New Constitution, the Chief Justice, Deputy Chief Justice and Supreme Court judges could have been appointed solely by the President with no input from the JSC. Now the JSC is empowered to play a more substantive role in the appointment of these senior judges. The change in language was also to ensure that the President did not enjoy exclusive or overriding power over the appointment of judges.[450] It

[447] The Constitutional Court was only established in 2016; hence its leadership was not included in the 1996 Constitution.
[448] Section 95 (1) of the 1996 Constitution.
[449]Muna Ndulo, 'Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System', *Zambia Social Science Journal*, 2.1 (2011), 1–26 (p.9), <http://scholarship.law.cornell.edu/zssj> [accessed on 4 March 2017].
[450] Mungomba Review Commission, p.443.

provides some measure of protecting judicial independence and the autonomy of the courts, by reducing the role of the President.

The Zambian Constitutional framework offers guidance in regard to requirements for judicial appointments. Section 141 of the New Constitution states that:

> (1) A person qualifies for appointment as a judge if that person is of proven integrity and has been a legal practitioner, in the case of the—
>
> (a) Supreme Court, for at least fifteen years;
>
> (b) Constitutional Court, for at least fifteen years and has specialised training or experience in human rights or constitutional law;
>
> (c) Court of Appeal, for at least twelve years; or
>
> (d) High Court, for at least ten years.
>
> (2) A person appointed as judge to a specialised court shall have the relevant expertise, as prescribed.

Previously, section 97 (2) of the 1996 Constitution permitted the President or the JSC in special circumstances, to dispense of the requirement that a judge should have held qualifications for ten or fifteen years as prescribed. Special circumstances would only apply if the person was admitted as an advocate as per Legal Practitioners Act [Cap. 48] and was considered to be worthy, capable and suitable as a judge.[451] The New Constitution contains no exceptions where judges can be appointed if they do not meet the prescribed constitutional requirements. This means that neither the JSC nor the President have discretionary power to appoint persons lacking experience

In addition to the constitutional requirements, a candidate is assessed by JSC criteria in privately conducted interviews. The guiding philosophy of the JSC is that candidates should have extensive experience in legal work acquired from either private practice, on the bench or

[451] Section 97 (3) of the 1996 Constitution.

from public service. [452] The criteria also state that a record of competence must be established through recommendations or references and they must have a lengthy post-call period of legal experience before appointment.[453] Unquestionable integrity, suitable temperament, patience, an impartial disposition, objectivity and courage are also essential.[454] The criteria particularly mention the desire for candidates without strong business interests. The presence of strong business interests is considered as a potential area where conflict could arise if one is on the bench.[455]

For all positions, there is no public advertisement process and candidates apply after receiving information of a vacancy either from within the judiciary, from the Bar, the Ministry of Justice or from their peers. All candidates for the High Court are interviewed by the JSC but, there are no interviews for positions on the Court of Appeal, Supreme Court and Constitutional Court. For these positions, the President seeks recommendations from within the judiciary, before forwarding those names to National Assembly for ratification.[456] The Select Committee of the National Assembly interviews candidates there, before their names are sent to the House for ratification.[457] The efficacy of this process will be interrogated in the analytical chapters that follow.

3.4.4 The New Era of Judicial Appointments in South Africa

Corder posits that 'a number of innovations in the judicial process accompanied liberation in 1994'.[458] The Constitution of the Republic of South Africa 1996 (herein referred to as the Constitution) paved way for the Appellate division of the Supreme Court of South Africa to

[452] Zambian Judicial Service Commission, 'JSC Criteria for Appointing Judges' (Lusaka: Judicial Service Commission, 1993).
[453] The call period is the training at the Zambian Institute of Advanced Legal Studies and admission as an Advocate.
[454] Page 8 of the criteria.
[455] Interview with Deputy Chief Justice (DCJ) Marvin Mwanamwambwa on 1 December 2016 in Lusaka, Zambia.
[456] This difference in procedure will be discussed in Chapter 4.
[457] The Select Committee is comprised of members of the opposition and the ruling party and a negative appraisal from the Committee results in a candidate's name not being forwarded to the House for votes.
[458] Corder, 'Judicial Authority in a Changing South Africa', p.261.

become the Supreme Court of Appeal in 1997.[459] The previous provincial Supreme Courts became single High Courts, which were later reorganised into a single High Court of South Africa with a division in each province.[460] A Constitutional Court was also created as the highest court on constitutional matters and the arbiter of disputes between organs of state amongst other functions. [461]

The JSC, the body responsible for the selection of judges was initially enshrined under section 105 of the Interim Constitution.[462] The current JSC is a creation of section 178 of the Constitution and it publicly interviews candidates nominated for positions.[463] The JSC is guided by the provisions in section 174 of Chapter 8 of the Constitution. Section 174 reads:

Appointment of judicial officers

> 174. (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
>
> (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

Section 174 (1) is often referred to as the merit clause because, it is considered pertinent to one's competency to hold the position of a judge.[464] Section 174(2) is referred to as the transformation or affirmative action clause because of its diversity imperative and regard to the gender and racial dynamics of South Africa.[465] The application of the two clauses has been a subject of great debate. Former Supreme Court justice Louis Harms has argued that the transformation imperative 'has led to the unfortunate and often unfair division of judicial

[459] Section 166 of the Constitution.
[460] The Superior Courts Act no 10 of 2013.
[461] Section 167 of the Constitution.
[462] Act 200 of 1993.
[463] This process will be examined further in Chapter 5.
[464] Morné Olivier, 'A Perspective on Gender Transformation in the South African Judiciary', *South African Law Journal*, 13.3 (2013), 449–64.
[465] Wesson and Du Plessis, p. 194.

appointees between 'transformation' judges and 'other' judges, i.e., those appointed purely on merit'.[466] A broader discussion on the tension between merit and transformation will be explored in a Chapter 5 of this thesis.

Section 174 (3) of the Constitution prescribes the method for appointment of the Chief Justice and Deputy Chief Justice and the President and Deputy President of the Supreme Court of Appeal. Notably, the President appoints the Chief Justice and Deputy Chief Justice after consulting both the JSC and heads of parties in the National Assembly. However in regard to the President and Deputy President of the Supreme Court of Appeal, he needs to consult only the JSC. Ordinary Constitutional Court justices are appointed by the President from a shortlist sent by the JSC,[467] while all other High Court and Supreme Court of Appeal (SCA) judges (excluding the SCA leadership positions) are appointed on the advice of the JSC.[468] Irrespective of what type of judicial position is in question, the Constitution does not provide any additional definition of what it means to be 'appropriately qualified' and 'fit and proper'.

In 1998, four years after it came into operation, the JSC, chaired by former Chief Justice Ismail Mahomed, drafted guidelines as a means of supplementing the Constitutional requirements.[469] These guidelines, referred to as the Mahomed guidelines, were later reissued and published in 2010 under Chief Justice Ngcobo with no changes.[470] The JSC explained that the decision to publish the criteria was in 'line with the JSC's principle that the process of judicial appointments should be open and transparent to the public so as to enhance public trust

[466] LTC Harms, 'Transparency and Accountability in the Judicial Appointment Process', *Advocate* , 23.2 (2010), 36–38, (p.38).
[467] The list has to have three names more than the number of appointments to be made.
[468] Section 174 (6) of the Constitution.
[469] Ismail Mahomed, 'Criteria and Guidelines for Appointment', *Department of Justice Report on Activities of the Judicial Service Commission*, 1998 <http://www.justice.gov.za/reportfiles/1999reports/1999_judicial service comm.htm> [accessed 24 June 2017].
[470] South African Judicial Service Commission, 'Summary of the Criteria Used by the Judicial Service Commission When Considering Candidates for Judicial Appointments' (Johannesburg: Judicial Service Commission, 2010), pp. 1–2.

in the judiciary'.[471] The criteria anticipate a two stage enquiry. The first stage is based on three fundamental requirements in the Constitution: first is the candidate appropriately qualified; second are they fit and proper; and third, would the appointment reflect the racial and gender composition of South Africa?

The second enquiry, also referred to as supplementary criteria, includes questions about whether the candidate is technically competent and if they have the capacity to give expression to the values of the Constitution? Moerane SC, a former JSC member explained that this enquiry requires a consideration of the mind-set of a candidate, irrespective of race. He added that candidates have:

> to demonstrate a commitment to the values that underpin the Constitution, such as respect for the human dignity of each and every person, the achievement of equality, the advancement of human rights and freedoms, non-racism and non-sexism, the supremacy of the Constitution and the rule of law.[472]

In addition a two-tier approach is also utilised in assessing a candidate's experience for the job. Here technical experience is again required, in addition to an assessment of experience in regard to the values and needs of the community.

This technical experience, Moerane submits, is appraised from amongst other things, information provided in the candidate's curriculum vitae, the evaluation of comments received from various professional and other bodies, about the candidate and the candidate's reputation in his or her profession.[473] Moerane concludes that these criteria allowed the JSC (at the time he was a member of it) to recommend 'the appointment of persons across the social and

[471] Ibid.
[472] MTK Moerane SC, 'The Meaning of Transformation of the Judiciary in the New South African Context', *South African Law Journal*, 120 (2014), 708–18 (p.714), <http://doi.org/10.1525/sp.2007.54.1.23.>.
[473] Ibid, p.714.

political spectrum of South African society, including former members of the Afrikaner Broederbond'.[474]

3.5 CONCLUSION

The first section of this chapter has outlined the methodological framework for this research. Primarily a deductive approach was used, working with identified theoretical propositions in examining the two case studies. Qualitative methods which include amongst others, the use of semi-structured interviews and participant observation for the South African case study, were considered best suited to this research. This is because of the necessity of privileging the voices of those involved in or with knowledge of the judicial appointment process. The breakdown of interview participants revealed that participants were from varying groups, genders and hierarchies (in respect of judges). The desire for anonymity from the majority of participants could be considered as a reflection of the sensitivity of the research topic and an indication of just how powerful the judicial role is or is perceived to be.

The second section has provided a contextual background of Zambia and South Africa, which are my case studies. It commenced with a brief account of the histories of both systems. This revealed a colonial past that had ramifications on society and the legal systems, in both countries. An examination of the previous judicial appointment processes unveiled patronage and exclusion. This changed for both jurisdictions in the 1990's and new Constitutions ushered in judicial appointment bodies and new court structures. Finally, the chapter concluded with a brief description of the criteria for judges in each jurisdiction, emphasising that this study only focuses on appointments to Superior Courts. This contextual section provided a sound framework from which to proceed to the substantive chapters that follow.

[474] The Afrikaner Broederbond was a secret, exclusively male and Afrikaner Calvinist organization in South Africa dedicated to the advancement of Afrikaner interests.

CHAPTER 4
THE JUDICIAL SERVICE COMMISSION IN ZAMBIA: GATEKEEPER OR ALLY?

4.1 INTRODUCTION

This chapter is devoted to an examination of the Zambian Judicial Service Commission (JSC) which was earlier identified as the responsible body for appointing judges in Zambia. In chapter 2, the theoretical chapter, I introduced the notion of seeing gender diversity as a way of strengthening judicial independence and impartiality. The creation of a diverse judiciary is partially dependent on the JSC because they recruit, interview and recommend judges. Thus, if it is to instil public confidence in the appointment process, the body that selects these judges must itself be independent, diverse and impartial. In particular, the importance of the diversity of the selection body cannot be overstated. Research in corporate governance has shown that the lack of diversity in nominations committees can impact the decision of which candidates to interview, and subsequently appoint as board members.[475] Research into the absence of women in leadership found that predominantly male nomination bodies, may find it hard to 'assess the suitability of new board members without bias, whether conscious or unconscious'.[476] Galbadon and others further add that the presence of women on nomination committees, can have direct effects on biases in the selection or treatment of candidates.[477]

Thus, Iyer argues that 'the extent to which women are - or are not - appointed to the courts is a direct reflection of the institutions responsible for making appointments'.[478] The implication of Iyer's statement is that the success or failure of any initiatives to increase the number of women judges lies at the feet of the relevant JSCs. Considering that the thesis

[475] *Barriers to Progression* (London, 2016) <https://30%club.org/assets/uploads/barriers_to_progression.pdf> [accessed 6 April 2018].
[476] Ibid.
[477] Andrea C. Vial, Jammie Napier, and Victoria Brescoll, 'A bed of thorns: Female leaders and the self-reinforcing cycle of illegitimacy' *The Leadership Quaterly*, 27 (2016), 400-14.
[478] Sundeep Iyer, 'The Fleeting Benefits of Appointments Commissions for Judicial Gender Equity', *Commonwealth & Comparative Politics*, 51.1 (2013), 97–121,<https://doi.org/10.1080/14662043.2013.749673>.

research question asks how aspects of the judicial appointment process inform equal representation of women and men on the bench, it is imperative to assess the JSC's role. In order to do this effectively, it is necessary to commence the analysis by referring to international principles regarding judicial appointments. These will act as a framework of assessment for both JSCs.

4.1.1 Relevant International Guidelines

Article 10 of the 1985 UN Basic Principles on the Independence of the Judiciary states:

> Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status...[479]

The UN Principles emphasise three important aspects. First the need for judges with appropriate character and qualifications and secondly the desire for an appointment body that is free from undue influence. The third aspect is the necessity of a judiciary that is diverse and epitomises the value of non-discrimination in its demographic composition.

The Commonwealth of all Nations in 2003, further elaborated on these three aspects when they established what are known as the Commonwealth Latimer House Principles (herein referred to as the Latimer Principles). The Latimer Principles on the Three Branches of Government were a culmination of years of discussion amongst Commonwealth states.[480] Of importance to this research, is article IV on the Independence of the judiciary. It commences by stating that 'An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice'. To achieve

[479] Patricia Gabaldon and others, 'Searching for Women on Boards: An Analysis from the Supply and Demand Perspective', *Corporate Governance: An International Review*, 24.3 (2016), 371–85 <http://doi.org/10.1111/corg.12141>.
[480] D. O. Adebayo and I. B. Udegbe, 'Gender in the Boss-Subordinate Relationship: A Nigerian Study', *Journal of Organizational Behavior*, 25.4 (2004), 515–25 <https://doi.org/10.1002/job.255>.

this purpose, the Latimer Principles require that appointments to judicial office be made on 'the basis of clearly defined criteria and a publicly declared process'.[481] Further, they state that the process should ensure equal opportunities for eligible persons, as well as appointment on merit. Attention should also be given to the need for progressive attainment of gender equality.

Thirteen years later, academics from Commonwealth jurisdictions convened to agree on what became known as the Cape Town Principles in an effort to formulate norms for judicial appointments.[482] The Cape Town Principles build on the Latimer Principles and affirm the importance of an independent judiciary.[483] Principle 1 states that the principal objective of any system of judicial appointments must be to identify and secure the appointment of persons who are independent, impartial, have integrity and are professionally competent. The Cape Town Principles also emphasise the need for a fair process 'that encourages the best candidates from any background to seek a judicial career, and that generally enhances public confidence in the judiciary'.[484] They affirm the need for transparency in judicial appointments by recommending that criteria for appointments should be readily accessible to candidates and the public at large in order to inspire public confidence in the selection process. [485]

They go a step further than the Latimer principles, because they state that judicial appointing bodies must be suitably composed.[486] While they do not explicitly state what suitably composed means, it is obvious that an appointing body that is predominantly composed of men cannot be suitably composed, if gender equity in the judiciary is a desired goal. A worthy reference point is The Model Constitutional Clause on Judicial Appointment

[481] Article IV (a) of the Latimer Principles.
[482] These scholars included academics from South Africa, Kenya, Canada, The United Kingdom and India amongst others.
[483] United Nations Office of the High Commissioner of Human Rights, 'OHCHR |Basic Principles on the Independence of the Judiciary', 1985 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> [accessed 4 April 2018].
[484] Principle 2.
[485] Principle 9.
[486] Principle 9.

Commissions (Model Clause). This was formulated in an attempt to deal with practical problems which have been experienced in various Commonwealth jurisdictions, in regard to constitutional appointment clauses.[487] In suggesting a model composition of an appointment body, it recommends the appointment of five lay members who would 'broadly reflect the composition of the community in terms of gender, ethnicity, social and religious groups and regional balance'. It recognises the presence of women on an appointing body as a critical aspect of the appointments process.

A recent addition to these international norms is to be found in the Lilongwe Principles and Guidelines on The Selection and Appointment of Judicial Officers (herein the Lilongwe Principles).[488] These principles were adopted at the Southern African Chief Justices' Forum (SACJF) Conference and Annual General Meeting in Lilongwe on 30 October 2018. The overriding purpose is to safeguard the independence and integrity of the judiciary.[489] The Lilongwe Principles emphasise most aspects of the Cape Town Principles, though they surprisingly do not discuss the composition of appointing bodies. The Lilongwe Principles do however accentuate the importance of the bench reflecting the diversity of society. Therefore, the Lilongwe Principles state that 'appointment authorities may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench'. [490] Members of the SACJF are also encouraged to prioritise record keeping and transparency, in order to develop legislation, policy and practice.[491]

[487] Karen Brewer, James QC Dingemans, and Peter Slinn, *Judicial Appointments Commissions: A Model Clause for Constitutions* (London, 2013) <https://www.icj.org/wp-content/uploads/2018/01/Judicial-Appointments-Commissions-CLA-CLEA-CMJA-Report.pdf> [accessed on 3 April 2018].
[488] Southern African Chief Justices' Forum, *Lilongwe Principles and Guidelines on The Selection and Appointment of Judicial Officers* (Lilongwe, 2018) <https://www.unodc.org/ji/> [accessed 3 August 2019].
[489] Ibid, p.1.
[490] Principle viii.
[491] Southern African Chief Justices' Forum p.4.

Despite the availability of international principles regarding judicial appointments, it is difficult to suggest or agree on one way of operationalising them. This is especially true in regards to gender diversity, because of the acknowledgment that 'targeting the appointment process alone will never be an adequate way of promoting judicial diversity'.[492] Further, it has been suggested that differences in social and professional practices and attitudes relating to gender, are also likely to be relevant in addressing the underrepresentation of women but these differ between jurisdictions.[493] What is certain however in international principles and other agreements, is that there are certain standards that must be met in order for judiciaries to function optimally.

The first standard is the primacy of transparency of the process and the need for publicly known criteria.[494] The transparency referred to here, is not limited to information being accessible to the public. The information also needs to be accurate and comprehensible.[495] The second standard is the independence of the judiciary and the appointing body as a crucial aspect of a functional judicial system− this too is widely agreed on. In practice, this means that judges must be free to operate as arbiters without fear or favour, while appointing bodies need the same freedom to select the correct judges. Wynn and Mazur refer to this as the ability to be

[492] *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges* (Cape Town, 2016) <https://www.biicl.org/documents/868_cape_town_principles_-_feb_2016.pdf?showdocument=1> [accessed 3 April 2018].
[493] Jan van Zyl Smit, '"Opening up" Commonwealth Judicial Appointments to Diversity? The Growing Role of Commissions in Judicial Selection', in *Debating Judicial Appointments in an Age of Diversity*, ed. by Graham Gee and Rackley Erika (Oxford: Routldege, 2017), pp. 60–82.
[494] This was affirmed in what is known as the Nairobi Action plan, a means of promoting and advancing the Latimer Principles. The action plan was signed by members of the executive, the judiciary, the legislature, Commonwealth partner organizations and representatives of civil society from 18 African countries. See Patricia Gabaldon and others, 'Searching for Women on Boards: An Analysis from the Supply and Demand Perspective', *Corporate Governance: An International Review*, 24.3 (2016), 371–85 <https://doi.org/10.1111/corg.12141>.
[495] Marieke van den Brink, *Behind the Scenes of Science: Gender Practices in the Recruitment and Selection of Professors in the Netherlands* (Amsterdam: Pallas Publications, 2010) (p.65) <http://repository.ubn.ru.nl/bitstream/handle/2066/82590/82590.pdf?sequence=1> [accessed 6 April 2018].

institutionally immune from inappropriate extra-legal pressures, in the decision-making process.[496]

The third standard that appears indisputable is the importance of a diverse judiciary which requires that judges are of different genders and diverse backgrounds. In practice, this requires that judicial appointment bodies publicly state their commitment to diversifying the judiciary and if necessary, actively recruit rather than merely vet candidates for appointments.[497] I submit that the commitment to diversity also starts with a commitment to have a diverse appointment body. Action needs to be taken to recruit and appoint women to selection bodies. It is suggested that this is valuable for the process for three main reasons. First, there is symbolism in having a powerful body such as the JSC exhibiting gender equity. It is a sign that there are no more areas in the judiciary related sphere that women cannot enter. It is also symbolic of a commitment to include women in decision-making processes, as mandated by the Latimer Principles and the Cape Town Principles.[498]

The second reason is that diversity is important for the JSC as a decision-making body. Article 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (better known as the Maputo Protocol), specifically requires state parties to ensure that 'women are represented equally in the judiciary and law enforcement organs'.[499] Article 9 of the Maputo Protocol requires that state parties ensure the increased and effective representation of women at all levels of decision making. To further bolster efforts in the region, Article 12 of the Southern African Community Development (SADC) Protocol on

[496] United Nations Office of the High Commissioner of Human Rights, 'OHCHR: Basic Principles on the Independence of the Judiciary', 1985 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> [accessed 4 April 2018].
[497] Principle VIII of the Lilongwe Principles.
[498] Principle V (b) of the Latimer Principles requires public office holders to reflect the composition of the community in terms of gender and the related Edinburgh Action Plan requires measures to be taken to ensure holders of public office are gender diverse. Principle 2 of the Cape Town Principles requires an appropriately diverse appointing body.
[499] African Union.

Women, mandated state parties to 'endeavour that, by 2015, at least fifty percent of decision-making positions in the public and private sectors are held by women […].'[500] The SADC Protocol recognises the need to change discriminatory attitudes, norms of decision-making structures, and procedures and it calls for the enhancement of gender mainstreaming in all structures.[501]

Members of JSCs are in decision-making positions, as envisaged by these protocols, because of their responsibilities and the power they possess to recommend candidates to the President. Gender mainstreaming in the JSCs would require more than merely appointing more women as members. It also necessitates that the JSC has a clear understanding of the sexism and biases that are sometimes present in male dominated decision-making bodies. Doing this will strengthen the body's ability to act independently and impartially and instil public confidence in the process.

Thirdly, diversity on appointing bodies may have the effect of encouraging more women to apply for positions in the judiciary, because of a belief that women commissioners are more likely to interrogate the challenges that women face in the legal fraternity.[502] The three standards of transparency, independence and diversity are not applicable to the JSC alone but, for the purposes of this chapter, the focus is on the appointing bodies.[503]

This chapter is divided into five segments. The first segment introduces the Zambian JSC in terms of composition, responsibilities and modalities of operation. It also provides statistics of the judges appointed in this research period, which is 2013-2017. The second segment looks at the value of transparency, by examining the application process and investigating different facets of the process that can affect women's ascension to the bench.

[500] Southern African Development Community, 'SADC Protocol on Gender and Development'.
[501] Article 13(c) and (d).
[502] See Masengu, 'Gender Transformation as a Means of Enhancing Impartiality on the Bench', p.487.
[503] Further chapters will explore the role of the legal profession and political leaders.

The third segment highlights the value of independence by discussing the JSC's performance, from the perspective of the interview participants. The participants' responses elicited two main themes, which will be discussed in this segment. The first is the consideration of the Constitutional Court election petition as a turning point and the second is the scepticism regarding the feminisation of the judiciary.[504] Both these points are underpinned by a view that the appointment process is not sufficiently independent.[505]

The fourth segment highlights what I argue is prejudice against women judges in Zambia. I submit that this prejudice arises from illegitimacy perceptions of women's leadership. Since judgeship is a position of leadership, women judges are therefore regarded as illegitimate holders of power. The last segment before the conclusion, focuses on the values of representativeness. As mentioned earlier, gender diversity on the JSC as a decision-making body is valuable for both the body as a structure and for the process outcomes. Nonetheless, in the final segment, I examine arguments that more women on the JSC will lead to the appointment of more women judges. This is an examination of the process outcomes of a gender diverse bench, while acknowledging that equal representativeness on the JSC, should not be dependent on outcomes.

4.2 THE ZAMBIAN JSC IN SUMMARY

4.2.1 Composition

As mentioned in the preceding chapter, the JSC in Zambia was initially created by Chapter 259 of the Service Commission Act of 1994 and this act was later replaced by Act 10 of 2016.[506]

[504] The term feminisation is used in this research to denote the increased participation of women on the bench and not a feminist influence in the practice of law.
[505] The Constitutional Court petition which will be discussed in this chapter is Commonwealth Secretariat, 'Plan of Action for Africa on The Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government' (Nairobi, 2005), pp. 1–13 <https://www.agora-parl.org/sites/default/files/plan_of_action_for_africa_on_the_commonwealth_principles_on_the_accountability...-_en_-_pace_0.pdf> [accessed 6 April 2018].
[506] Marieke van den Brink, *Behind the Scenes of Science: Gender Practices in the Recruitment and Selection of Professors in the Netherlands* (Amsterdam: Pallas Publications, 2010) <http://repository.ubn.ru.nl/bitstream/handle/2066/82590/82590.pdf?sequence=1> [accessed 6 April 2018].

Section 219 of the New Constitution establishes the JSC but does not contain details of its composition. The details are found in section 5(1) of the Service Commission Act (2016), which states that the JSC shall consist of eight designated members. The JSC must be chaired by someone who is qualified to hold 'high judicial office' and this is currently former Chief Justice Mathew Ngulube.[507] This new requirement of 'high judicial office' was introduced in 2016; previously the JSC was chaired by the sitting Chief Justice according to the 1994 Act.

The removal of the sitting Chief Justice as head of the JSC elicited mixed reviews. Several interview participants expressed the view that the absence of the Chief Justice as the chair of the JSC, is a disadvantage to the entire process. A former JSC member explained that it would be difficult for the Chief Justice to get results from people she did not have a role in selecting.[508] There were a few participants however, who argued that the deputy represents the Chief Justice on the JSC and that her absence allows for an impartial process.[509] The rationale of excluding the sitting Chief Justice from chairing the commission is unknown. There is speculation, that it pertains to the interference in the process from former Acting Chief Justice Lombe Chibesa-Kunda who acted in the role from 2012-2015.[510]

This interference was also alluded to by current JSC Chair Justice Ngulube who mentioned that under the chair of acting Chief Justice Chibesa-Kunda, there were some unusual occurrences. For example, the JSC only has one stage of interviews for candidates, but in one selection process, the candidates had to undergo two interview stages.[511] He stated that this was because the former acting Chief Justice was unsatisfied when some candidates did not score highly in the initial interviews, so another round of interviews was added. The inference was that there were people whom the former Chief Justice wanted as judges and who did not

[507] Justice Ngulube was the Deputy Chief Justice from 1982 -1992 and Chief Justice from 1992-2002.
[508] Interview with Mr Fraser Chishimba, 12 April 2017.
[509] Interview with a Legal Professional 5, 20 April 2017.
[510] Ibid.
[511] Interview with former Chief Justice Ngulube on 12 April 2017.

initially make the grade. Justice Ngulube was quick to point out that he thought it was unfortunate that the current Chief Justice does not chair the commission. He added that he had personally made presentations to the authorities to give the chair of the JSC back to the sitting Chief Justice, because she is the head of the judiciary[512]

In addition to the chair of the JSC, other members include the following: a judge nominated by the Chief Justice, currently Deputy Chief Justice Marvin Mwanamwamba; the Attorney-General (with the Solicitor-General as the alternate);[513] the Permanent Secretary responsible for public service management; and a magistrate nominated by the Chief Justice. As at November 2017, the representative of the Law Association of Zambia (LAZ) on the JSC was Mr Mwikisa Mukande and the Dean of a Law school was Mr Frederick Mudenda.[514] The final member of the JSC is appointed by the President, who at present is retired Judge Bobby Bwalya. As of November 2017, there were no women on the JSC. The last woman who sat as a JSC member was Chief Resident magistrate Aridah Chulu who was the magistrates' representative on the JSC.[515] She left the JSC in January 2017.

4.2.2 Responsibilities

The JSC's role is not limited to the appointment of judges but it also includes the appointment, confirmation, promotion and discipline of all employees of the judicial service.[516] This includes but is not limited to all magistrates, registrars, deputy registrars and the Chief Administrator. It also performs other functions incidental to the regulation of human resources and determines complaints and appeals from the employees of the Judicial Service.[517] However, it does not deal with any complaints or disciplinary issues relating to judges. The Judicial Complaints

[512] Ibid.
[513] Mr Likando Kalaluka and Abram Mwansa respectively.
[514] Currently Dean of Law at the University of Zambia law School.
[515] Mrs Chulu has since been appointed Deputy Registrar at the Lusaka High Court.
[516] Section 6(b) African Union.
[517] Section 6 (d) and (e).

Commission, an independent quasi-judicial body, handles complaints against judges.[518] The members of the JSC are paid an honorarium for their services, as they only operate as and when needed.[519]

4.2.3 Appointments and Modalities of Operation

Zambia is a small jurisdiction with only 72 judges as of April 2018.[520] In the period 2013-2017, 57 judges[521] were appointed.[522] The appointments are divided as follows:

Table 2

Court	**Appointments**
Constitutional Court	4 women, 3 men
Supreme Court of Appeal	3 women, 8 men
Court of Appeal	5 women, 4 men
Specialised High Court Divisions	16 women, 13 men
Total	50% women, 50% men

The new courts have only been in existence since 2016 and appointments to the courts is an ongoing project.[523] As of December 2017 there were still several vacancies which included at least 28 more High Court positions, twelve Court of Appeal positions and six Constitutional Court positions.[524] Justice Ngulube stated that one of the challenges preventing the appointment

[518] The body derives its power from the Judicial (Code of Conduct) Act No. 13 of 1999 as amended by the Judicial (Code of Conduct) (Amendment) Act No. 13 of 2006 and the New Constitution.
[519] Interview with Chief Justice Ngulube.
[520] Statistics obtained from the website of the Zambian judiciary, http://www.judiciaryzambia.com/.
[521] All judges in the Zambian judiciary regardless of ranking are referred to as justices and will be referred to as such, when being referred to individually.
[522] Official statistics sent from the Zambian judiciary in August 2017, with additional amendments made using the Zambian judiciary website.
[523] The establishment of new courts was discussed in Chapter 3 under the section 'Appointments in a New Zambian judicial Era'.
[524] Interview with Justice Mathew Ngulube.

of more judges is the lack of infrastructure, particularly regarding chambers and accommodation for judges.[525]

In respect of the appointment of judges, the recruitment process commences with the JSC. It operates privately and does not advertise vacancies publicly, but rather relies on two methods; internal communication sent to various identified bodies and head hunting. For the former method, an internal document is sent to the government institutions that employ lawyers, the National Prosecuting Authority, Attorney General's chambers and to the Law Association of Zambia (LAZ) to circulate it to their members.[526] Mr Chishimba confirmed that during his time on the JSC,[527] this method of circulating vacancies resulted in a pool of candidates from different backgrounds in terms of careers and experience.[528] For the headhunting method, senior members of the judiciary identify potential candidates and approach them directly encouraging them to apply. Though appointed at different times, the seven women judges interviewed for this research, reflected this dual method of recruitment.

Two of them had been recruited from private practice having been encouraged by the LAZ to apply. Another two had been in the government service - one worked for the Ministry of Justice, another was previously at Legal Aid - and they received news of the vacancies through internal communication. The fifth and sixth judges had been in the judicial service, rising from magistrates to registrars and then judges, while the final one went directly to the High Court from the magistracy. For these last three judges, their ascension to the bench was considered a natural progression, although they were specifically encouraged by senior judges to apply. Ordinarily, candidates send in their application using a prescribed application form together with relevant documents.

[525] Ibid.
[526] Ibid.
[527] His term was from March 2007 to October 2015.
[528] Interview on 12 April 2017.

A shortlisting process is conducted by the JSC to narrow down the candidates.[529] While the short-listing process includes assessing whether they meet the prescribed constitutional criteria, there is an extra level of vetting involved. The names of all applicants are sent to specific security agencies such as the Zambian Police Service, the Anti-Corruption Commission (ACC), the Drug Enforcement Commission, and the Zambia Intelligence Service.[530] These agencies conduct background checks to verify amongst others, the candidate's citizenship, financial dealings, and any criminal record and whether they have been involved in any corrupt activities. One interviewee stated that she knows a number of people who had not been shortlisted or in her words 'stopped from crossing over' because of the background checks.[531] Those who are cleared are interviewed on an appointed date, with individual interviews lasting up to an hour.[532]

The judges whom I interviewed spoke of the rigour of the interview process, with three of them commenting on the difficulty of some technical legal questions posed by the commissioners. While for interview candidates this was the most memorable aspect, the commissioners seemed to emphasise the necessity of going beyond the purely legal questions as they assessed candidates. However, it was also necessary to discern whether they were 'clean'.[533] The commissioner proffered:

> That perhaps is something, which is not so obvious, but which we did look for was whether they had any skeletons, like some scandals. Yah we tried to avoid people who were scandalous.[534]

The notion of desiring candidates without scandals is considered an integral part of the process. It helps to ensure that those who are passing judgement on others, are above reproach

[529] Interview with Justice Ngulube.
[530] Tabeth Masengu, '*Research Report on the Zambian Judicial Appointment System*' (Cape Town: Democratic Governance and Rights Unit, 2017), pp. 1–20.
[531] Interview with Legal professional 4 on 19th April 2017.
[532] Interview with Justice Ngulube.
[533] Interview with JSC Commissioner 1 on 21 April 2017.
[534] Ibid.

themselves. It is worth noting though, that this rigorous process is limited to candidates aspiring for High Court positions.

For those already on the High Court aspiring for promotion, the process works differently. For the Supreme Court and the newly established Court of Appeal, candidates are specifically identified and encouraged to apply. One does not solicit appointment but rather, the senior judicial officers deem that one is worthy because they see one's performance and decide that one is ready to be promoted.[535] The Chief Justice and the Deputy Chief Justice are involved in the process of head hunting, with the chair of the JSC also included.[536] The candidates encouraged to apply have to submit ten of their best judgments for scrutiny and the selected candidates' names are sent to the other JSC members, but they are not interviewed.[537] One senior judge confirmed that when she was in the High Court, she was advised to submit her CV for ascension to one of the higher courts. She was of the opinion that this invite was based on her performance over the years and the same advice was given to at least twelve of her colleagues.[538]

The recruitment process for the Constitutional Court seems to have operated differently. Several people are said to have applied both upon solicitation and of their own volition. Some were disqualified due to age and adverse information provided from security agencies. Only three applicants who were not members of the judiciary at the time they applied were interviewed, before the Chief Justice, Deputy Chief Justice and the JSC chair selected the others.[539] For all positions (including High Court), the recommended names are sent to the President for appointment, subject to ratification by the National Assembly as per section 140

[535] Ibid.
[536] Interview with Deputy Chief Justice Marvin Mwanamwamba for the Research Report on the Zambian Judicial Appointment System on 1st December 2016.
[537] Ibid.
[538] Interview with Justice 4, 18 April 2017.
[539] Interview with Deputy Chief Justice Marvin Mwanamwambwa.

of the New Constitution. A more detailed examination of the President and National Assembly's role in the process, will follow in Chapter 8.[540]

4.3 IS THE JSC PROCESS TRANSPARENT?

4.3.1 Relevance of transparency in Judicial Appointments

Handsley and Lynch posit that 'in public law and political theory, the value of transparency is almost axiomatic'.[541] Nevertheless, they consider it worthwhile to remind us that if procedures are transparent resulting in their workings being readily visible to outsiders, then it is likely for them to operate as intended.[542] They further add that 'if there is no general agreement on how a procedure should work, keeping it transparent at least leaves room for an effective debate on this question, leading ultimately to the establishment of some optimal process".[543] This is because a legitimate appointments process is determined by how transparent the selection process is.[544] Transparency and openness is also considered as an effective mechanism to address principles of good governance.[545] It is a critical standard found in the UN Principles, the Latimer Principles and the Cape Town Principles. The Model Clause also highlights that, regardless of the method established to ensure transparency, there must be a public system of assessing the qualification of candidates.[546]

4.3.2 How transparent is the appointment system in Zambia?

To analyse the transparency of the Zambian process, one must look at the relevant stages where the JSC is involved. Rafael Pardo differentiates between two types of transparency− process transparency and candidate transparency. Process transparency is about whether the decision-

[540] Chapter 8 will be focused on political and other determinant factors.
[541] Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity ? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13', *Sydney Law Review*, 37 (2015), 187–215.
[542] Ibid.
[543] Ibid.
[544] van Zyl Smit, 'The Appointment and Removal of Judges pp 1-2.
[545] Article 2.3.1 of the Nairobi Action Plan of the Latimer Principles.
[546] Pp.12-13 of the Model clause.

making process of the selecting body should be visible to the public and judicial candidates.[547] This would include information on how the recruitment is conducted, when the interviews are held and how recommended candidates are assessed. This can also include how the interviews are conducted, whether it be publicly televised as in the Kenyan appointment system or whether the interviews should be open for public attendance as in the South African system. The latter system however is not recommended by the Model Clause, because reports have shown that although candidates are prepared to put themselves through an open and fair process, they are less willing to share their candidature, and any lack of success, with the public at large'.[548]

Candidate transparency refers to the extent to which a candidate's views should be made visible and to whom. This also requires that information on the candidates is publicly available before the selection process. This information can include a history of their legal experience or expertise, any previously held positions that may be in conflict with the office of a judge, or any ideological beliefs that could be considered as relevant for the candidate's application.[549] Pardo argues that process and candidate transparency do not operate in concert, and an appointment process can be transparent, even if it complies with just one of the definitions.[550]

Using the descriptions provided above, the Zambian scenario has insufficient transparency. If one considers process transparency: there are no public advertisements of vacancies, there is no publication of interview dates and the names of applicants and short-listed candidates are never made public. Several participants expressed the view that the process is an enigma, with one particularly proffering 'the whole thing is flawed and a mystery,

[547] Rafael I. Pardo, 'The Utility of Opacity in Judicial Selection', *New York University Annual Survey of American Law*, 64 (2009), 633–52 <http://doi.org/10.1525/sp.2007.54.1.23.>.
[548] Jan van Zyl Smit, *Judicial Independence in Latin America :The Implications of Tenure And Appointment Processes* (London, 2016), p.22 <www.binghamcentre.biicl.org> [accessed 4 February 2017].
[549] The latter point is especially relevant in jurisdictions like the United States, where appointments to some courts are openly partisan.
[550] Ibid at p.639

there is no space for advertising, no one who knows how to apply and how people get appointed'. [551] One judge referred to it as being 'a closed shop and once you're called in, you just hear whispers, and that "there are judges being appointed"'.[552] This view was not only expressed by judges, legal professionals, and Civil Society Organisations (CSOs) but even by a current commissioner. This aspect of the appointment process goes against the Lilongwe Principles call for a standardised, transparent process.[553]

Mr Fredrick Mudenda specifically referred to the Latimer Principles and bemoaned how the current process falls short of the principles [554] His complaint centred particularly on the recommendation to advertise judicial vacancies for the sake of preserving judicial independence. Further, the principles advise that in order to reach gender and diversity targets, jurisdictions should 'through public information programmes, broad advertising of judicial vacancies […] encourage women and those from diverse backgrounds to apply for judicial appointments'.[555] The Cape Town Principles also emphasise that readily accessible information on the process, provides a foundation for public confidence in the selection process.[556] Mr Mudenda stated 'I have been saying, can we advertise, can we try to make the process more transparent. Let us advertise, interview these people, whoever has applied and recommend'.[557] His recommendations have not been taken up.

There is an absence of candidate transparency in Zambia because the shortlisting and interviews are conducted privately. Nobody knows how many people are being interviewed, who they are, and there is no post-interview publication of candidate's responses. There is also no way to ascertain how candidates responded in the interviews, which has led to a questioning

[551] Interview with Mr O'Brien Kabaa, 19 April 2017.
[552] Interview with Justice 5, 3 December 2017.
[553] Southern African Chief Justices' Forum, p.9.
[554] Interview with Dean of University of Zambia Law School, Fredrick Mudenda on 20 April 2017.
[555] Ibid, p.43.
[556] Principle 9.
[557] Interview on 20 April 217.

of the rigour of the JSC interviews.[558] An interview participant who works within the judiciary as a registrar remarked on how quiet the JSC is and how the privacy of the process makes it less transparent.

> People do not get to know who is aspiring for that position, their background, their credibility, and their competence those factors are not known, and you just get to hear that someone has been appointed as a judge. If an interview, an open interview was conducted like in South Africa I believe that is the position, whosoever is aspiring for that position of High Court judge has to be interviewed publicly, so if we had adopted that mode, I think it would be transparent.[559]

The view of the appointment process and specifically the JSC's role as a mystery was a constant theme in most of the interviews conducted.

Lack of information about the process was equated to lack of transparency, which was considered a negative aspect of the process. It was particularly interesting that the majority of participants did not know the identity of the current JSC commissioners, including former commissioners and judges. While the Service Commission Act provides the designations of who the members must be, the participants submitted that the identity of the commissioners was not publicly available.[560] The absence of basic information such as the identity of the commissioners, encourages the view that the process is a mystery and only for a selected few persons. The necessity for both process and candidate transparency was expressed repeatedly in interviews. Interview participants' responses on what would make the process more transparent, ranged from having public advertisements, publishing short-listed names and providing reasons why shortlisted candidates qualified. A smaller number of participants were of the view that the interview process should be publicly aired on television.[561]

[558] Interview with Mr Lee Habasonda, 20 April 2017.
[559] Interview with Legal Professional 3, 14 August 2017.
[560] The information is not easily accessible, and I was only provided with the information when I interviewed the JSC chair.
[561] The participants who were in support of public interviews argued that since the role of a judge is public office, the judges should be subject to public scrutiny.

Transparency does not necessarily require severe publicity and a process can provide sufficient information of its operations, without the need to be publicly televised. Pardo is sceptical about public interviews, because he believes that the process is susceptible to politicisation.[562] This may be the case, as has been experienced in South Africa and Kenya.[563] The perils of public interviews are acknowledged and I have spoken to a number of candidates in South Africa, who are not willing to put themselves through a publicly aired process that has the potential of harming their reputation.[564] Thus, van Zyl Smit submits that 'the interests of individual applicants, may be better served by making provision for targeted and confidential scrutiny of commission proceedings'.[565]

This thesis agrees with van Zyl Smit and it is submitted that the absence of public interviews alone, is not a determinant of the lack of transparency. Other ways to achieve process transparency include publicly advertising the vacancies,[566] allowing members of the public to comment confidentially on candidates and making the JSC members and their selection criteria known. This would increase the number of people applying for judicial office and ensure a larger pool of applicants, which increases the chances of getting good candidates. Further, as Brink opines 'by providing insight and internal information, the idea is that openness will reduce the scope for corruption or unethical practices'.[567] This in turn gives the impression that people will be appointed on merit, as should be the case.

[562] This he argues, can occur when appointing politicians increasingly feel the need to satisfy constituencies who either are responsible for or will facilitate their re-election and thus, they become less independent in deciding who is an appropriate candidate to be appointed to the bench.
[563] This will be expanded on further in the succeeding chapter on the South African process.
[564] These discussions have been in judicial forums I have attended and in personal conversations with judges.
[565] van Zyl Smit "'Opening Up" Commonwealth judicial appointments to diversity?', p.80.
[566] Ibid.
[567] Brink, p.65.

4.3.3 Effect of Lack of Transparency on Women Judges

One could argue that since Zambia has achieved gender equity on the bench, the lack of transparency described above has not been harmful to women. Despite the private system and the opaqueness of the process, the number of women judges provides an indication that perhaps the lack of transparency, is not a barrier to women ascending to the bench. It is understood that transparency in a judicial appointments process is necessary if people are to consider the process as legitimate and the recommended candidates as meritorious. However, perhaps it is but one relevant factor amongst others. Some interview participants were of the view that the lack of transparency, especially process transparency, has facilitated the increase of the number of women on the bench. The argument was that if the process was made public by having a publicly known shortlist, allowing public comments on candidates and having publicly aired interviews, women's shortcomings, such as their lack of litigation experience, would be revealed. This would then make them less appointable.[568]

The other view was that women are judged by a different standard and that a more public process would be more damaging to them and they would be less likely to apply.[569] As one legal professional put it 'if you're a man and I'm a woman and we're political appointments they'll attack you on something else, but they'll attack me on my marriage, they'll attack me on how I look, you know'.[570] She further explained that evidence in politics has shown that questions of integrity become skewed when women are vying for office, resulting in unwarranted personal attacks that discourage other women from seeking office.[571]Another senior advocate offered a similar view on the utility of the public process for women.

> I do not know; it depends on the perception and women are less likely to be prominent in the way that men are. You know for example you see in the newspaper very often ' 'One prominent Lusaka lawyer', it is almost inevitably a man, you don't see those

[568] Interviews with O'Brien Kabaa and Legal Professional 1, 15 August 2017.
[569] Interviews with Legal Professionals 5 and 6, 20 and 19 April 2017 respectively.
[570] Interview with Legal Professional 6.
[571] Ibid.

> headlines for women, so they're less visible as well. So, I am not sure that, it would work in women's favour to be honest.[572]

Her argument was premised on a view that the public acts, on what or whom they know, and women are less prominent and less likely to be considered as the 'ideal' judge. For this reason, having a process where members of the public comment on candidates and /or attend public interviews of potential judges, would perhaps be a disadvantage for women.

Jan van Zyl Smit confirms this reasoning by suggesting that there is a concern that publicising the identity of individuals or having public interviews, would deter potential candidates.[573] In particular, he states that 'in a divided society it is possible that candidates of disadvantaged groups may be deterred to a greater extent, if they consider themselves more likely to be rejected by the commission'. [574] Nevertheless, there was a suggestion from a senior judge that a more public process would be useful to justify to other judicial colleagues why the successful candidates have been chosen. This suggestion was particular to appointments to courts beyond the High Court, where this particular woman judge presides. Regarding her ascension to the higher court, she described the dilemma in the following way:

> You see, those who were not appointed, were aggrieved. [They questioned the criteria that were used]. People have a way of measuring their work. In their own eyes, they measure themselves and they begin to think, "But how has that one qualified?" So, internally, there was a problem because we did not know what was going on, we didn't know what was being considered when people were appointed to this position [and] to that position.[575]

The lack of transparency in her case seemed to create some form of resentment from colleagues who had been left behind, particularly male colleagues.

Providing reasons for appointments is not only useful for judges, but also for lawyers and the public. A former commissioner suggested that if people knew what was involved and

[572] Interview with Legal Professional 5.
[573] van Zyl Smit "'Opening up Commonwealth Judicial appointments to Diversity'", p.80.
[574] Ibid.
[575] Interview with Justice 4.

how the interview process really worked, 'they would not be suspicious of what comes after the end'.[576] Another judge added that transparency was critical, but it should be encouraged in a manner that was suitable for Zambian society. This she argued, meant that one should be careful of adopting practices from other jurisdictions, when the Zambian context was different.[577] A third opined that more transparency would be important for building trust, because there were various allegations circulating about how recent appointments had been made (the majority of them being women).[578] These allegations had resulted in an unflattering perception of the JSC. Therefore, the lack of transparency in the process is not only harmful to those who have judicial aspirations and to the judiciary, but to those whose responsibility it is to recommend judges for appointment. How the JSC operates primarily defines how the entire judicial appointment process is viewed.

4.4 JUDICIAL APPOINTMENTS AND THE INDEPENDENCE OF THE JSC

The independence of a judicial appointment body is a critical aspect of the independence of the judiciary. The 'independence of a commission can arguably be instrumental to promoting both judicial independence and judicial diversity by giving a wider range of potential candidates the confidence that their application for judicial office will be impartially assessed and considered'.[579] Challenges to a JSC's independence can include obvious interference such as clear instructions from the executive or other influential powers. However, even when there are no obvious challenges to independence, perceptions of interference in the process can be damaging.

[576] Interview with Commissioner 1.
[577] Interview with Justice 2.
[578] Interview with Judge 6 on 1 December 2016.
[579] van Zyl Smit, '"Opening up Commonwealth Judicial appointments to Diversity"', p.78.

4.4.1 The Constitutional Court Ruling on the Election petition

A pivotal moment for the Zambian judiciary and what a number of interview participants consider as an indictment of the JSC and the appointment process arose in September 2016. This pivotal moment concerns the dismissal of a presidential election petition by the newly established Constitutional Court. This ruling changed the country, both jurisprudentially and politically, and to date is still considered a legal anomaly.[580] The decision and its effects were a prominent theme throughout the field research in Zambia and therefore, it is necessary to provide a brief description of the case, before explaining how it impacts on this research.

On 11 August 2016, Zambia held its tightly contested presidential and general elections. These elections were more significant than previous ones because for the first time, a successful candidate had to amass more than 50% of the votes to avoid a run-off.[581] The gravity of this new requirement was visible in a pre-election period that saw an unprecedented level of violence, resulting in a decision by the Electoral Commission of Zambia (ECZ) to suspend campaigning in the capital city Lusaka for ten days.[582] The country was deeply divided along tribal lines and allegiances when citizens went to the polls on 11 August.[583] The incumbent President Edgar Lungu who had won the previous election by less than 28 000 votes, was declared the winner, by a margin of 100 330 votes.[584] He polled 50.35 of the total votes, while Hakainde Hichilema had 47.63%.

The main opposition party United Party for National Development (UPND) alleged that there had been election fraud and various election petitions were filed contesting the election

[580] It also revealed a lacuna in the Constitutional Court Rules and the election petition articles in the Constitution.
[581] The previous system referred to as 'First past the Post' required a successful candidate to get the majority vote, which could be under 50%.
[582] Aljazeera, 'Zambia Suspends Election Campaigning over Violence', *Aljazeera Africa*, 10 July 2016, <https://www.aljazeera.com/news/2016/07/zambia-suspends-election-campaigning-violence-160710141136702.html> [accessed 13 March 2018].
[583] Ibid.
[584] Official statistics from the Electoral Commission of Zambia.

results.[585] The presidential election petition was filed in the then newly established Constitutional Court, by UPND leader Hichilema and his running mate, Godfrey Bwalya Mwamba. They challenged the re-election of Edgar Lungu and Inonge Wina as President and Vice President of the Republic of Zambia, respectively.[586] The petition was filed on Friday 19 August 2016 under article 103(1) of the new Constitution, which provides for a nullification of the election of a President based on two main grounds.[587] Article 103(2) read with article 101(5) mandates that the Constitutional Court shall hear an election petition relating to the president-elect within fourteen days of the filing of the petition.

The interpretation of this fourteen day clause proved to be the Achilles heel of the entire process, as the preliminary process of filing the petition consumed most of the fourteen days.[588] According to Owiso, by the time the preliminary processes were dispensed with, it was 2 September 2016, the last day of the fourteen days.[589] The petitioners' lawyers frustrated by the process, then withdrew their services. The court then adjourned to Monday 5 September to allow the petitioners to appoint new counsel and gave each side two days to present their case. However on the said morning, the court had a written judgment issued before the matter could be heard in full. In *Hakainde Hichilema & Others v Edgar Lungu & Others*, the majority held that the required time limit within which the court could hear an election petition had prescribed on 2 September 2016.*[590]* The majority also held that article 105(1) of the Constitution was clear and unambiguous and the court had no discretion to enlarge the time for hearing a petition.[591]

[585] These included parliamentary seats around the country.
[586] President Edgar Lungu garnered 1,860,877 votes against Hakainde Hichilema's 1,760,347 votes.
[587]If the person was not validly elected or if a provision of the Constitution or other law, relating to presidential elections was not complied with.
[588] The Rules of the Constitutional Court state that the respondent to file an answer to the petition within five days of service and the petitioner to reply within five days of being served with the answer. Thereafter, a process of discovery is done which is followed by a status conference before the hearing can commence.
[589] Roger Owiso, 'Zambia : The 2016 Zambia Presidential Election Petition: How Not to Handle Election Petitions', *Lusakatimes.Com*, 20 Septermber 2016, <https://www.lusakatimes.com/2016/09/20/2016-zambia-presidential-election-petition-not-handle-election-petitions/> [accessed 12 March 2018].
[590] *Hakainde Hichilema & Others v Edgar Lungu & Others*, 2016, CC/0031, 1–16.
[591] Ibid, p.1208.

Accordingly, the court found that the petition failed on a technicality and not because there was no substantive case to be heard.

There were two dissenting judgements written by Justices Hildah Chimbomba and Margaret Munalula. Justice Munalula held that the primary purpose of article 101(5) is to hear a petition and make one of the pronouncements as in article 101(6). If the process of hearing has not been concluded, 'complying with a deadline without the intended purpose taking place is an absurdity'.[592] She further added that a purposive interpretation of the Constitution was deemed necessary, because the issue of a presidential petition was too heavy for a mechanical response from the court.[593] She added that such an interpretation would have helped heal the nation. Justice Chibomba, the President of the Constitutional Court agreed with Justice Munalula's dissenting judgment and stated that she would have allowed the hearing to proceed.[594] She further added that, the timeframe given in article 105(1) was not practical or workable and it needed to be revised, in order to ensure that the intention of giving parties a fair hearing and adequate time to be heard, which is a fundamental right, could be achieved.[595]

The decision to dismiss the petition without hearing the merits caused shock waves in the country and led to two complaints to the Judicial Complaints Authority, demanding the removal of the judges.[596] The public expectation was that the parties would be given two days each to make substantive arguments, because this is what the court had decided on Friday 2

[592] H*akainde Hichilema & Others v Edgar Lungu & Others* dissenting 1, 2016, CC/0031 <https://www.zambialii.org/zm/judgment/constitutional-court/2016/4/Election petition dissenting Munalula.pdf> [accessed 13 March 2018].
[593] Ibid.
[594]*Hakainde Hichilema &Others v Edgar Lungu & Others*,dissenting 2, 2016, CC/0031 <https://www.zambialii.org/zm/judgment/constitutional-court/2016/4/Election petition dissenting Chibomba.pdf> [accessed 13 March 2018].
[595] Ibid, p. J4.
[596] 'Zambia : Judicial Commission to Table Complaint Demanding Removal of Concort Judges', *LusakaTimes*, 7 September 2016 <https://www.lusakatimes.com/2016/09/07/judicial-commission-table-complaint-demanding-removal-concort-judges/> [accessed 13 March 2018].

September. Consequently, the decision to abruptly dismiss the petition was not received well. The Carter Centre also issued a statement saying that:

> legal and judicial processes surrounding the presidential petitions failed to meet Zambia's national and international obligations under the Zambian constitution, the African Charter for Human and People's Rights, and the International Covenant on Civil and Political Rights to ensure due process, a fair hearing, and effective legal remedy.[597]

This decision appeared to have had an impact both domestically and regionally.[598]

4.4.2 Controversy surrounding the appointment of the Constitutional Court justices

It is important to understand that the appointment of the justices who heard the election petition was not without some controversy. The Constitutional Court was newly established in 2016 and its justices were handpicked. When the news of the recommended candidates was made known, a prominent State Counsel John Sangwa wrote a public memorandum to the President. He declared that the six candidates (four women and two men) appointed by the President subject to ratification, were all unqualified for the position.[599] In a lengthy and what can be described as scathing document, he gave a historical overview of why the Constitutional Court was established, before submitting that all six candidates did not have the requisite number of years of actively practising law.[600] He alleged that they lacked active experience in prosecuting constitutional or human rights law related cases.[601] This memorandum was also published in national newspapers and on online forums.

The National Assembly proceeded to ratify the appointments despite opposition from the LAZ and the judges were sworn in on 21 March 2016.[602] In an interview with advocate

[597] *Hakainde Hichilema & Others v Edgar Lungu & Others*, CC/0031.
[598] The election petition judgement was brought up by a judge from Botswana and discussed at the SADC Judges Forum organised by the Democratic Governance and Rights Unit in Mangochi, Malawi in October 2016.
[599] There were Justices Hildah Chibomba, Mungeni-Mulenga, Anne Sitali, Professor Margaret Munalula, Ambassador Palan Musonda, and Mr Enoch Mulembe.
[600] SC John Sangwa, *'Brief to the President of the Republic of Zambia on the Constitutional Court Appointments*' (Lusaka: Advocate John Sangwa, 2016), pp. 1–22.
[601] Ibid, p.17.
[602] Owiso, p.2.

John Sangwa SC, he explained that he sent the memorandum to the President prior to the appointments, specifically because he knew that they did not qualify for appointments as justices of the court.[603] He stated that he wrote to the Speaker of the National Assembly expressing his concerns and even sought an audience with the Parliamentary Select Committee of the National Assembly, but his request was denied.[604] The Constitutional Court decision and the resultant debacle was considered by many as proof of advocate Sangwa's allegation, that the justices were not ably qualified for the role. [605] One magistrate argued that the best of the Supreme Court judges should have been chosen for the Constitutional Court, with nobody from the outside being appointed.[606]

There was a shared view amongst interview participants that nobody really knew how applications for the positions were made and how the JSC selected the justices. It was felt by a number of participants that the opaqueness in the process resulted in the highest court in the land having some justices with limited litigation experience. As one judge proffered:

> I think they tried to make practice a prerequisite qualification for one to be appointed to the Constitutional Court, except when they drafted the clause, it was porous. They did not quite achieve what they had set out to do. The intention was that it is a person who had appeared before court, argued cases that qualified, but because of the clumsy way it was drawn, they still had people who had not practiced being appointed to that court and you know the confusion that ensued.[607]

In reference to the same, Mr Habasonda opined 'if you asked me, I will tell you that it is a mistake to have a Con-Court. I don't feel proud that my tax goes to pay people who can't take a decision or who change their mind'. [608] Mr Mweenge believed that the whole judiciary had been cast in a bad light since the Constitutional Court election petition. He added that while

[603] Interview with Advocate John Sangwa SC on 13th April 2017.
[604] The Parliamentary Select Committee discussed in detail in Chapter 8, is the committee that interviews prospective candidates and hears reports from various bodies, before it decides to forward names to the house for ratification
[605] Advocate Sangwa was initially one of the advocates representing the petitioners in the said case.
[606] Interview with Legal Professional 1.
[607] Interview with Justice 4.
[608] Interview on 20 April 2017.

there had been previous issues with appointments to other courts, the Constitutional Court appointments and the problems that followed, magnified the JSC's shortcomings.[609]

The Constitutional Court appointments and how they have been used as a yardstick to measure the JSC's performance reveal the challenges of the appointment process. Dodek and Devlin submit that 'if impartiality is a state of mind, an orientation, a capability, in other words "an end", then independence is the "means" to that end.'[610] In the Zambian instance, lack of clarity on how or why the Constitutional Court justices were appointed, appears to have created perceptions of the JSC's lack of independence. This in turn undercut its perceived impartiality. This then raised questions about 'who' was really recommending candidates for appointment. The JSC's independence or lack thereof was essentially measured by the output, in this case the Constitutional Court judgment. They recommended justices who are deemed 'unappointable' by some, and consequently, they too are not seen as fit for their task. Had the court decided to hear the petition in full, perhaps the perception of the court and the appointments would have been different.[611]

Former JSC Commissioner Mr Chishimba highlighted how perceptions work by advancing the argument that people determine what a good judge is based on whether their decision is popular or not.[612] Thus, these perceptions affect the court's legitimacy because, as Solanke opines, the legitimacy of a court can arise from a single source or from a combination of sources.[613] In this instance, for the Constitutional Court, these sources would include publicly known information on which candidates applied for the positions, the nature of how

[609] Interview on 13 April 2017.
[610] Devlin, MacKay, and Kim, p.746.
[611] The Judicial Complaints Authority issued a decision in 2017 that said the court had erred in the interpretation of the fourteen day period and that it issued contradictory information regarding whether the petition would be hear.
[612] Interview with on 12 April 2017.
[613] Iyiola Solanke, 'Diversity and Independence in the European Court Of Justice', *Columbia Journal of European Law*, 15 (2008), 89–121, <https://www.copyright.com/ccc/basicSearch.do?> [accessed 19 July 2016].

the judges were selected and appointed and how the JSC arrived at a decision to recommend the incumbent judges over and above other applicants.

The establishment of judicial appointment bodies in African countries was part of the design for securing an independent judiciary.[614] Therefore if the Constitutional Court appointments resulted in a negative perception of the independence of the Zambian JSC, this may have damning effects. The first being that perceptions of an institutionally legitimate judiciary are tainted because of suspicion of how the judges in that court and others are appointed.[615] Secondly, it also affects what Gloppen has referred to as social legitimacy in Zambia.[616] The element of social legitimacy is about whether the courts can draw input and support from groups in society. If this is lacking, it may impact on the court's ability and willingness to stand up to other arms of government.[617] Thirdly, for judges appointed in the future, it can tarnish or detract from the honour of their appointment and create scepticism and doubts about whether they are competent and capable. This is particularly a problem for women judges.

4.4.3 Scepticism about the appointment of women judges

In the interviews I conducted, there was a unanimous opinion that the government is actively seeking to appoint more women to the judiciary. Former President Michael Sata appointed a number of women into various decision-making positions in all sectors.[618] This included appointment of the first acting woman Chief Justice and a woman deputy at the same time.[619] His successor Edgar Lungu continued this commitment by appointing the first ever, permanent

[614] Smit, p.59.
[615] This was confirmed by a number of participants I interviewed.
[616] Siri Gloppen, *How to Assess the Political Role of the Zambian Courts?* (Bergen, 2004) <https://www.cmi.no/publications/file/1927-how-to-assess-the-political-role-of-the-zambian.pdf> [accessed 22 March 2018].
[617] Ibid at p.113.
[618] 'Zambia's Sata Picks Women Judges to Head Judiciary', *Africa Review*, 2012 <http://www.africareview.com/news/Zambias-Sata-picks-women-judges/979180-1427910-format-xhtml-ggrv2pz/index.html> [accessed 9 April 2018].
[619] Justices Lombe Chibesa-Kunda and Florence Mumba respectively.

Chief Justice in Irene Mambilima and he went on record promising to appoint more women to various portfolios.[620] Thus, the government's decision to appoint more women appears to have seeped into the JSC process. Dawuni and Kang have highlighted the role of gatekeepers in the appointment and promotion of women to judiciaries.[621] Gatekeepers include nominating commissions and professional organisations involved in appointments.[622] In Zambia however, women would consider the JSC as an ally rather than a gatekeeper, in their quest for gender equity in the judiciary.

At the time of writing, the Chief Justice Irene Mambilima is one of only three active women Chief Justices in Africa.[623] Before she took office, another woman, Justice Lombe Chibesa-Kunda was acting Chief Justice for just under three years.[624] While some women are new appointees to the bench, others have risen through the ranks to the Court of Appeal, Supreme Court of Appeal, and the Constitutional Court. They have been in the judiciary for a long time.[625] It is uncommon to find the top three highest courts in a country headed by women, even in societies that are considered as champions of gender equity and yet, that is the current situation in Zambia. In this research period, The Presidents of the Constitutional Court, Supreme Court, and Court of Appeal were all women.

Women are said to perform well in the interview process and according to a former commissioner, outperform men in terms of post-graduate qualifications.[626] Justice Ngulube also added that, after interviewing a large batch of candidates in 2016, 'the women did

[620] 'Sata Wins Praise over Women Appointment', *Zambia Daily Mail Ltd*, 28 August 2014, <https://www.daily-mail.co.zm/sata-wins-praise-over-women-appointment/> [accessed 9 April 2018].
[621] Dawuni and Kang, p.60.
[622] Ibid.
[623] The others are Chief Justice Nemat Abdallah of Sudan and Mathilda Twomey of Seychelles. Justice Ntomeng Majara has been suspended since 11 September 2018.
[624] Part of her reign as Chief Justice as after she had reached the legal retirement age which became a contentious political issue.
[625] Interview with Commissioner 1.
[626] Interview with Commissioner 1.

exceptionally better than the men'.[627] One lawyer advanced that this is proof that the JSC process has fared well for women and that the process is devoid of any formal discrimination.[628] However, this has not prevented some scepticism around the appointment of more women to the bench and the view that the JSC is not acting independently. Rather, it is seen as appointing women to pander to the Executive's desire to have more women judges.[629]

The notion of a dependent JSC making recommendations to please the executive has resulted in varying views regarding the appointment of women in the last few years. There were four views from participants that questioned the competency and capability of the women appointed. The first view was that there were many better-qualified men who should have been appointed in the same period.[630] There is no indication however that the men referred to did apply for the positions and were not selected. The second participant submitted that he felt there were more women on the bench, because they had failed to succeed in private practice.[631] The third view was that there was a certain threshold one could reach in public service and that, because there were more women in public service, judicial appointments were being used to 'move officers around and to get desired political appointees in specific public offices'.[632] The final view was that while women were being appointed to high positions, they really did not have the autonomy to work independently. 'An invisible hand' that made them more likely to 'play out some favours' impeded their autonomy.[633] Effectively, the judges would not be individually independent, because they would owe allegiance to others.

I was unable to collect sufficient data to test the third view which could be proved or disproved by examining the number of women judges who have come from the public service

[627] Interview on 12 April 2017.
[628] Interview with Legal Professional 3.
[629] Interview with Legal Professional 1.
[630] Ibid.
[631] Interview with Legal Professional 3.
[632] Interview with Legal Profession 2 on 19th April 2017.
[633] Interview with Mr Mweenge.

in a particular period of time (in comparison to men).[634] A perusal of the biographies of the justices of the Supreme Court however, showed that there were both men and women justices who worked in public service before appointment to the bench.[635] In regard to the three other views, I submit that they contain hints of sexism. Scepticism around the appointment of women to important positions, is not unique to Zambia. Zambia like many other societies is largely patriarchal and there is generally still an idea of a 'woman's place'. Mr Habasonda captured this by explaining that:

> The women participating on the bench [are] also informed in the traditional lenses that we find in the society that we are anchored in. The fact that those women are not necessarily able to resolve conflict within society. I think that our chiefdoms are in such a way that men take the lead, even in situations where the woman is the chief; it is the men surrounding her that make the decision.[636]

Olivier opines that men are probably more likely to be selected as judges because of the high value which judicial selectors place on the ability to appear authoritative.[637] People's intuitive and preconceived notions of what leaders look like, in addition to reflecting personality traits and behaviours, often also reflect social identities associated with traditional leaders.[638] The judicial robe is traditionally associated with neutrality, assertiveness, confidence, an ability to be objective and stoic. These characteristics are still associated with men and therefore, people are still uncomfortable with having women as judges. Margaret Thornton argues that prejudice that exists towards women is because the public and work sphere has always been delineated as the male sphere.[639]

[634] Despite numerous efforts, the judiciary was unwilling to provide me with further details in this regard, because it is considered as personal information.
[635] The website for the Zambian judiciary only contains short biographies of the judges of the Supreme Court justices.
[636] Interview on 20 April 2017.
[637] Olivier, 'A Perspective on Gender Transformation', p. 458.
[638] Ibid.
[639] Thornton, 'Affirmative Action, Merit and The Liberal State', p.29.

This traditional exclusion has served the myth of intellectual inferiority and given rise to the view that the appointment of women is synonymous with a decline in efficiency.[640] Women have also been judged on different standards when it comes to leadership positions[641] and have constantly had to justify their presence on the bench.[642] In this Zambian case study, the response from some participants was to attribute the increased presence of women on the bench to executive interference and invariably, this negates the intellectual capacity and experience of the judges. Even when women have succeeded in entering a previously male dominated field and theoretically managed to break the glass ceiling, they still encounter other obstacles. Andrea Vila et al argue that historical low legitimacy perceptions mean that powerful women, relative to powerful men are less likely to be perceived as legitimate authorities.[643] Thus, occupying a high-rank position while simultaneously belonging to a group that occupies a subordinate role in society, leads to negative reception.[644]

For example, in the Philippines, the appointment of the first ever woman Chief Justice was met with complaints about management style which, so the argument goes, would never been made about men.[645] Further, numerous studies have shown that individuals who are seen as atypical in a given context, attract more attention and are more easily singled out for criticism.[646] In Zambia, it would seem that the higher women have risen in the ranks of the judiciary, the more atypical their journey has become and thus, they have attracted more

[640] Crystal L. Hoyt and Susan E. Murphy, 'Managing to Clear the Air: Stereotype Threat, Women, and Leadership', *The Leadership Quarterly*, 27.3 (2016), 387–99. See also 'Sata Wins Praise over Women Appointment', *Zambia Daily Mail Ltd*, 28 August 2014 <https://www.daily-mail.co.zm/sata-wins-praise-over-women-appointment/> [accessed 9 April 2018].
[641] Masengu, 'A Perspective on Women and Leadership in the South African Judiciary'.
[642] Rackley, 'Judicial Diversity,the Woman Judge and Fairy Tale Endings', p.80.
[643] Vial, Napier, and Brescoll p.400.
[644] Ibid at p.402.
[645] See Emily Sanchez Salcedo, 'A Five-Year Gender Equality Score Card for the Philippine Supreme Court under its First Woman Chief Justice: Opportunities Seized and Missed', *International Journal of the Legal Profession*, 0.0 (2019), 1–15 <https://doi.org/10.1080/09695958.2019.1646655>.
[646] Rackley, 'Judicial Diversity,the Woman Judge and Fairy Tale Endings', p.80.

attention. The judges and the JSC are thereby singled out or identified as parties succumbing to interference and lacking institutional and personal independence.

It was interesting to note that the interview participants who were critical of the JSC's performance and of the rise of women, were all quick to affirm the appointment of the Chief Justice Irene Mambilima. She was described as a hardworking, fearless, resolute woman of integrity who had proved her worth, while presiding at the Electoral Commission of Zambia.[647] Justice Florence Mumba was also mentioned as a woman considered 'worthy' of her senior status, while others were not.[648] Advocate John Sangwa specifically identified High Court justice Nicola Sharpe-Phiri and Supreme Court justice Rhoida Kaoma as women worthy of their positions, because they were truly focused on being judicial officers, as opposed to being interested in the perks of office.[649] These women who were singled out for mention, all underwent the same process that judges do no − albeit appointed by different JSC compositions.

There was an absence of clarity regarding what was used as a benchmark, to exclude these women from the negative views of women candidates due to the JSC's lack of independence. Advocate Sangwa was one of the few participants who did point out though, that the JSC's performance has largely been poor across the board and according to him, it is not only the women appointees who have proved to be incompetent or lacking in practical experience.[650] Regardless of the mixed views about whether the incompetence is limited to women judges only, the scepticism of women judges remains and with it, the lingering questions about judicial independence.

[647] Interviews with Legal Professionals 1 and 3.
[648] Justice Mumba a former justice of the Supreme Court has presided on the International Criminal Tribunal for the former Yugoslavia and now sits on the Extraordinary Chambers in the Courts of Cambodia.
[649] Interview on 13 April 2017.
[650] Ibid.

4.5 THE PRESENCE OF GENDER PREJUDICE

4.5.1 Using the Appointment of Women to Assess the JSC

Before proceeding to the segment on the gender composition of the JSC, it is necessary to comment on one striking aspect of the interviews that I conducted. The appointment of more women to the bench in Zambia could be a sign that women face no discrimination regarding judicial aspirations. Rather, it could even be argued by some that they are the recipients of affirmative action initiatives, in the form of the government's pro-women stance. However, there was a subtle bias underlying a number of comments provided in interviews. Take for instance the view that the quality of women appointed to the bench has been a sign of the JSC's incompetence. The allegation of this incompetence centred on two main points, the Constitutional Court Judgment and the quality of jurisprudence. The Constitutional Court election decision was repeatedly mentioned as symbolic of the JSC's general failure, to appoint the 'correct' people to the bench. The case was considered by some participants as an exhibition of the JSC's flawed process, especially regarding the appointment of women. This they argued, was because most of the justices on the court at that time were women.

At the time, the court was comprised of two men and four women, although only five members heard the election petition case. I would submit that the argument is flawed for the following reason. The majority judgment that was roundly criticised was written by one woman justice and two male justices. Both dissenting opinions which held that the petition should have been heard, were written by women. Therefore, by apportioning blame to the women justices, the critics absolve the men who co-wrote that majority judgment of any responsibility. This inconsistent treatment led an interview participant to opine that the Constitutional Court is not respected, simply because it is considered to be a 'woman's' court.[651] The second reason given for the criticism of the JSC was the quality of decisions being handed down by the courts. At

[651] Interview with Commissioner 1.

least nine of the interview participants (seven of them legal professionals) complained about what they perceived as the reduction in standards of jurisprudence. The participants spoke generally about falling standards and in two instances, gave examples of bad experiences in court.

There was no specific evidence of this being the result of more women being appointed to the bench, despite some of the participants alluding to such a link. In the period of this study, there was only one reported investigation probing judicial misconduct, arising from delayed judgements. In September 2013, then President Michael Sata suspended High Court judges Emelia Sunkutu and Timothy Katanekwa and instituted a tribunal to probe them for professional misconduct.[652] They were eventually cleared of the charges and the suspension was lifted. The tribunal held that they were not at fault, as the delays in judgments were occasioned by the fact that they were constantly transferred from one town to another.[653] Of the judges investigated by the tribunal, one judge was a woman and one was a man.

Further, there is currently no research available that chronicles the decline in the standards of jurisprudence or that directly links unpopular court decisions, to a particular period of appointment. Hence it is difficult to appraise the JSC's performance based on this argument. A research project on court efficiency and justice is currently underway by a reputable research institution, which seeks to provide policymaking, research capacity, and governance.[654] While preliminary results indicate that there are some issues with performance and case mismanagement, there is no evidence as yet, that this is attributable to the feminisation of the judiciary.[655] Consequently, I submit that using the appointment of women as a yardstick for

[652] Susanne Bruckmüller and others, 'Beyond the Glass Ceiling: The Glass Cliff and Its Lessons for Organizational Policy', *Social Issues Policy Review*, 8 (2014), 202–32.
[653] Interview with Mr Frederick Mudenda.
[654] I am unable to identify the organisation as it would compromise the anonymity of the interview participant working on this project.
[655] Interview with Legal Professional 6.

determining that the JSC is underperforming, is a form of gender prejudice. In the absence of credible evidence to support the view that standards have dropped because of women, one can not dispute the presence of prejudice in some of the opinions I heard. This prejudice it is argued, arises because women are perceived as illegitimate power holders.

4.5.2 Legitimacy Perceptions and Women Judges

Andre Vial et al use a model centred on legitimacy to explain the persistence of the gender gap in leadership positions.[656] In this argument Zambian women judges are positioned as leaders, because they are in decision making positions, which are supported by principles of judicial independence. In effect, whether sitting as lone judges or on panels, women are pioneers and leaders as they perform adjudicative duties, previously reserved for men. Legitimacy is described as the sense of obligation or duty to comply freely with the decisions and directions of authorities.[657] Vial et al posit that the difficulties that female leaders face often stem from low legitimacy perceptions—i.e. powerful women relative to powerful men, are less likely to be perceived as legitimate authorities. Unlike other models that see women as norm-violators which results in bias, Vial et al examine the questions that emerge when bias against female leaders is thought of as a special case of bias against an illegitimate leader. This contrasts with bias occurring because of women being considered as norm-violators more generally.[658] The focus is not on the women as 'disruptors' and unusual power holders which results in prejudice, but rather the perspective that the women are undeserving of the authority that they wield.

Power, status, and legitimacy are distinct, but intimately related constructs. Power comes attached to the leadership role, but legitimacy is a state in which a leader's power over others is seen as deserved and justified.[659] The mismatch between traits seen as typical

[656] Andre Vial, Jamie Napier and Victoria Brescoll, 'A bed of thorns: Female leaders and the self-reinforcing cycle of illigitimacy', *The Leadership Quarterly*, 27 (2016), 400-14.
[657] Vial, Napier and Brescoll, p.400.
[658] Ibid at p. 401.
[659] Ibid.

behaviours of leaders and those considered to be typical of women, drives expectations that women will be less competent than men with identical credentials.[660] This mismatch between the behaviour of 'typical' leaders and '(stereo) typical' women results in bias towards women.[661] The potential for prejudice against women leaders stems from expectations that people typically have about leaders. In particular, people do not associate women with leadership positions. Prejudice can therefore arise when perceivers judge women as actual or potential occupants of leader roles. The judgment stems from the inconsistency between the predominantly communal qualities that perceivers associate with women and the predominantly agentic qualities they believe are required to succeed as a leader[662].

In short, because women are not ordinarily considered as powerful, authoritative, independent and assertive actors, any role which affirms these qualities results in prejudice. Thus, the idea of a woman taking the lead is historically incompatible to what is expected of her.[663] Worse yet, the role of a judge. This is because it requires a woman to take charge of a court room, adjudicate matters—which can sometimes be matters of life and death, and admonish lawyers when necessary. This involves a large amount of power and authority that women did not previously experience. If one compares the statistics of women in the three arms of government, the judiciary is an outlier on statistical terms alone. At the end of 2018, only 18.8 % of the Members of Parliament were women and only 30% of cabinet ministers

[660]Vial, Napier and Brescoll, p.403.
[661] Eagly and Karau, 'Role congruity theory of prejudice toward female leaders', *Psychological Review*,109 (2002), 573-98.
[662] Susanne Bruckmüller and others, 'Beyond the Glass Ceiling: The Glass Cliff and Its Lessons for Organizational Policy', *Social Issues Policy Review*, 8 (2014), 202–32.
[663] Alice Evans, '"Women Can Do What Men Can Do": The Causes and Consequences of Growing Flexibility in Gender Divisions of Labour in Kitwe, Zambia', *Journal of Southern African Studies*, 40.5 (2014), 981–98 <https://doi.org/10.1080/03057070.2014.946214>.

were women.[664] A judiciary with 53% women judges, evokes suspicion as it is considered 'abnormal' in comparison to other branches of government.

So we see that historical perceptions of women have not disappeared, as women have entered politics, governance and other professions. Rather they have morphed into prejudice and illegitimacy perceptions of women in respect of women leaders. Studies suggest that traditional sex role stereotypes are imperative for understanding the dynamics and expectations for women and men in leadership.[665] In the Zambian scenario, some interview participants perceive women judges as illegitimate holders of power, because they assume that these women are lacking in the required competency and capabilities.[666] The low legitimacy perceptions of women mean that even though they have the power to preside, it is seen as power that is unjustified and undeserved.

4.6 GENDER DIVERSITY ON THE JSC, AS A MEANS TO ACHIEVE GENDER EQUITY ON THE BENCH

4.6.1. Background

The theoretical chapter in this research explains the importance of diversity to enhance impartiality on the bench. The desire for diversity is not only limited to judges, but it is also relevant for the bodies that select the judges. In the narrow sense, facial diversity is about seeing equal numbers of men and women on a body. However, in the introduction, I highlighted three important reasons to have a more diverse JSC. These reasons offer a wider justification for gender diversity. The first was the symbolic importance of have more women on the appointing body. The second was that the body would be strengthened by diversity, which would enhance its ability to act independently and impartially, because it would be more likely to identify

[664] Statistics obtained from http://www.parliament.gov.zm/members/gender and http://www.parliament.gov.zm/ministers/cabinet.
[665] D.O.Adebayo and I.B Udegbe 'Gender in the boss-subordinate relationship: A Nigerian study', *Journal of Organizational Behaviour*, 25.4 (2004), 515-525.
[666] For example, the arguments regarding women's' capabilities in regard to the Constitutional Court judgment or complaints about a fall in jurisprudential standards were evidence of these illegitimacy perceptions.

gender biases. The third was that a more diverse JSC would encourage women applicants, because of the expectation that other women would understand the challenges they have faced.

There is also a theory that a gender diverse JSC leads to more gender diversity among judges. Studies have shown that although appointments commissions are considered more beneficial for women judicial candidates, because of the lack of patronage, this is contingent on the diversity of the appointment commission itself.[667] Kenney argues that bodies such as the JSC are capable of discriminating against women candidates.[668] The antidote to this she submits is having more women members on the JSC, providing training to avoid discrimination and stereotyping, and ensuring that a gender-diverse bench is a priority.[669] Yoon Mi Yung has suggested that in order for courts in Tanzania to materialise gender equality, there have to be women members of the JSC.[670]

The main thrust of this argument is that people in appointing bodies replicate themselves and thus are more likely to perceive people who look like them, as being more competent. Hamilton describes this as merit lying 'in the eye of the beholder' and submits that this has not served women well in the past.[671] With these studies in mind and the paucity of research in this area in the African region, I sought to establish whether the arguments above were applicable to the Zambian case study. As this research is not quantitative, the focus was on using available information about the JSC and assessing the views of the 22 interviewees.

[667] *Commentary on The Bangalore Principles of Judicial Conduct* (Vienna, 2007) <https://www.icj.org/wp-content/uploads/2014/10/Commentary-bangalore-principles.pdf> [accessed 3 April 2018].
[668]Sally J Kenney, 'Which Judicial Selection Systems Generate the Most Women Judges? Lessons from the United States', in *Ulrike Schultz and Gisela Shaw*, ed. by Ulrike Schultz and Gisela Shaw (Oxford: Hart publishing, 2013).
[669] Ibid.
[670] Mi Yung Yoon, 'Democratization and Women's Legislative Representation in Sub-Saharan Africa', *Democratization*, 8.2 (2001), 169–90.
[671] Hamilton, p.228.

4.6.2 The Gender Composition of the JSC

As of December 2017, there were no women on the Zambian JSC with the last woman commissioner having sat in early 2017. In the period 2016 to early 2017, the two women who sat on the JSC represented the Permanent Secretary responsible for public service management and the magistracy.[672] Upon their departure they were replaced by men. Prior to their appointments in 2016, there were not more than three women on the JSC during this period of study. This includes, former Acting Chief Justice Chibesa-Kunda and current Chief Justice Mambilima, who was previously the Deputy Chief Justice from 2008-2015.[673] During the period of study, the JSC was initially comprised of ten members, before it was amended to eight members.[674]

4.6.3 Has the Gender Composition of the JSC made a difference?

All the interview participants were of the view that the gender composition of the JSC has no bearing on women being appointed. Most of the participants pointed to the current statistics as proof that the paucity of women on the JSC, was not irreconcilable with achieving gender equity on the bench. There were three thematic areas in which their responses fell. The first was merit. It was argued that appointments were made on merit; so therefore, the identity of the selectors was irrelevant.[675] Mr Chishimba stated that because it is a professional screening process, people look at the professional principles of the job and not at gender.[676] He pointed out how more women have been appointed during a time when the JSC remains male dominated. Another former commissioner explained that the lack of women on the JSC was

[672] These were Dr Velepi Mtonga who retired and Mrs Aridah Chulu who was promoted to Deputy Registrar.
[673] Interviews with justices 3 and 5.
[674] The Service Commission Act of 2016 amended the Service Commission Act of 1994.
[675] The current JSC Chair and previous commissioners proffered this view.
[676] Interview on 12 April 2017.

irrelevant, because when the JSC recognised the capabilities and qualifications of women candidates, there was no other option but to recommend them for appointment.[677]

The judges were also of the view that they were appointed because they performed well in their interviews and were capable of assuming that office. One senior judge particularly emphasised her capabilities by saying 'you see when you are capable and able; you know it matters not who sits on the commission'.[678] She further added that while some women might be intimidated by the all-male JSC that interviewed her, she was not intimidated at all.[679] The emphasis on merit for appointments from the judges is understandable. To assign their own appointments to the gender or any other status of the commissioners, would be suggesting that they did not deserve appointment based on their capabilities alone. In addition, any suggestion that women JSC members would assist women potential judges may be considered as partiality, which goes against the grain of an appointment system, and a judiciary that strives for impartiality.

The idea that women in authority in one area, did not equate to more women in another, was the second thematic area. Mr Mudenda submitted that more women on the JSC would not mean more women being appointed because, 'women are jealous of each other generally'.[680] The idea behind this reasoning is the view that women are reticent to give each other special treatment. Instead, so the view posits, women are more inclined to do the opposite; to ensure that other women do not ascend the ladder. This is referred to as the 'queen bee syndrome', where particular women who have been individually successful in male-dominated environments, are likely to oppose other women's movement.[681] Ellemers et al explain that

[677]Interview with Commissioner 1.
[678] Interview with Justice 1 on 19 April 2017.
[679] Ibid.
[680] Interview on 20 April 2017.
[681] Naomi Ellemers and others, 'The Underrepresentation of Women in Science: Differential Commitment or the Queen Bee Syndrome?', *British Journal of Social Psychology*, 43 (2004), 315–38 <http://dare.ubvu.vu.nl/bitstream/handle/1871/16524/Ellemers_British?sequence=2> [accessed 15 March 2018].

from a social identity point of view, women in male-dominated environments can been seen as pursuing some form of individual mobility.[682] Thus the progress of two women is considered mutually exclusive.[683]

Though one judge did mention that when she was interviewed, the women on the JSC asked her the more difficult questions, there is insufficient evidence to merit that it was the 'queen bee' syndrome. Mr Mudenda's use of the 'queen bee' syndrome as a reason why more women would not be appointed, is not supported by any evidence. With the prevalence of women being appointed to decision making positions even outside the judiciary, it would be difficult to believe that women commissioners would become gatekeepers. [684]

The third theme was that the gender composition of the JSC might be a factor but not a determinant one. One legal professional stated that while there may be a natural bias towards women from women, it is not automatic.[685] Another one offered the view that in the Zambian context, 'one could argue that actually a male dominated panel at the moment has actually influenced and facilitated for women to sit on the bench'.[686] This facilitation infers that male commissioners are aware of gender biases and are actively seeking to suppress them. One judge referred to it as the JSC needing to have gender inclinations even if it were male dominated.[687] These gender inclinations apply to both men and women and require that they be willing to 'work from a gender perspective with a commitment to advance women's rights and equality between men and women'.[688] This would mean that even when the majority of the JSC is male, the fundamental question all members should be asking, is whether their assessment of women

[682] Ibid.
[683] This is also colloquially referred to as the PhD − Pull her Down syndrome.
[684] Women are currently occupying high positions even outside the judiciary, such as the police and intelligence department and the office of the Public Prosecutor.
[685] Interview with Legal Professional 6.
[686] Interview with Legal Professional 2.
[687] Interview with Justice 3.
[688] Baines, pp.7-8.

candidates is advancing the rights of women. This approach would ensure that the commissioners are impartial enough to perform their duties competently, but open enough to recognise bias where it exists.

4.6.4 The Value of More Women on the JSC

The current statistics and the data provided above from Zambia, appear to dispute arguments in literature regarding the effect of a more gender diverse appointment body, on the appointment of women judges. There is insufficient evidence in this case to suggest that the gender composition of the commission does influence the number of women being appointed. However, there were three main views about the importance of having more women on the JSC, irrespective of whether it affects the appointment of women as judges. Two would fall under a wider interpretation of diversity while the third is a narrower view. The first reason is that it makes male commissioners more cautious about being sexist. A former commissioner argued that her presence on the JSC opened the male commissioners' minds, because she would caution them when they asked inappropriate questions.[689] She added further:

> I think that sort of opened people's minds because you know you can be doing something for years and years and this is the normal way of doing it and you see nothing wrong with it. Suddenly, the dynamics have changed, and it is in your face really. So once that change happens, there is no going back.

This is similar to the submission made in Chapter 2 of this thesis, where I argued that women can help identify prejudice and bring new narratives into a previously male dominated space.

The second reason for a desire to have more women on the JSC, is the symbolic value of doing so. Mr Mweenge advanced that it was important to have more women on the JSC to show that it is not only men making practical decisions about appointments.[690] Here Mr Mweenge was expressing the importance of having gender equity, not just amongst those who

[689] Interview with Commissioner 1.
[690] Interview with 0n 13 April 2017.

are chosen as judges, but also amongst those who do the choosing. More diverse appointment bodies can help candidates feel more comfortable in interviews and it is argued that a symbolic commitment to diversity, may attract a diverse group of applicants.[691] The final reason for desiring more women on the Zambian JSC was an equality argument advanced by Mr Kabaa. He stated that because women are a large part of society, they should be represented in equal measure in all areas including the JSC.[692] Thus despite the agreement that the composition of the JSC had not affected women's appointment as judges, there were a number of views that having more women on the JSC would be beneficial for the process.

4.7 CONCLUSION

This chapter commenced with an overview of the JSC and the appointments that have been made in this period of study. Subsequently, it explained the privacy of the Zambian appointment process and analysed the negative perceptions regarding transparency, provided by several interviewees. A distinction was made between process transparency and candidate transparency to highlight the challenges with the current appointment process. Thereafter it examined the JSC in respect of independence, by using the Constitutional Court election petition and the appointments to that court as a focal point. The chapter interrogated the scepticism directed at the increase in women judges and the effect that this has had on how the judiciary is perceived.

Penultimately, an argument was advanced that there is some prejudice against women judges. It was argued that this prejudice could be that of women being considered as illegitimate power holders. Finally, this chapter concluded with an assessment of the JSC in terms of diversity, by examining the argument that more women on the JSC will lead to the appointment of more women judges. My findings are that in Zambia, there is currently no evidence to

[691] Van zyl Smit, ' "Opening up" Commonwealth judicial appointments to diversity?, p.76 .
[692] Interview on 19 April 2017.

suggest that this is the case. The increase in women judges could be a result of the existence of more influential factors on the process.[693] Similar lines of inquiry in relation to South Africa follow in the next chapter.

[693] A possible influential factor is political influence/willingness, which will be discussed in Chapter 8.

CHAPTER 5
SOUTH AFRICA'S JUDICIAL SERVICE COMMISSION−FRIEND OF FOE?

5.1 INTRODUCTION

The previous chapter on the Zambian Judicial Service Commission (JSC) was focused on analysing the body that appoints judges. This chapter is focused on assessing the South African JSC's role, in informing the equal representation of men and women on the bench. The discussion herein is enriched by participant observation data, a source unavailable for the previous chapter, due to the private nature of the Zambian interviews. The relevant international principles outlined in detail in Chapter 4, are applicable here and shall not be duplicated. [694] However, it is necessary to repeat the three standards that I argued, were relevant for an examination of the operations of a JSC.

The first standard is that the process must be transparent and the criteria for judicial appointments must be publicly known.[695] In order to ensure adequate levels of transparency, information about the judicial appointment process must be accurate and comprehensible.[696] The second standard is that the judiciary and the appointing body must be independent. Independence is a critical element for the healthy functioning of the judiciary. For judges, independence means the ability to adjudicate without fear, favour or any undue influence. For appointing bodies like the JSC, independence is connoted by the absence of undue pressure or interference in the judicial selection process. Wynn and Mazur refer to this as the ability to be institutionally immune, from inappropriate extra-legal pressures in the decision-making

[694] The International Principles referred to in the previous chapter, were the UN Basic Principles of 1985, the Commonwealth Latimer House Principles of 2003, the Cape Town Principles of 2016 and the Model Constitutional Clause for Judicial Appointments of 2018.

[695] This was affirmed in what is known as the Nairobi Action plan, a means of promoting and advancing the Latimer Principles. The action plan was signed by members of the executive, the judiciary, the legislature, Commonwealth partner organizations and representatives of civil society from 18 African countries. See Brewer, Dingemans, and Slinn, p.4.

[696] Brink 'Behind the Scenes of Science: Gender practices in the recruitment', p. 65.Is this a correct title? Why 'the recruitment'?

process.[697] The third standard requires that representativeness is emphasised, in the judicial appointment process. Representativeness includes the need to diversify judiciaries by gender and diverse backgrounds. In practice, this requires that judicial appointment bodies publicly state their commitment to diversifying the judiciary and if necessary, 'actively recruit rather than merely vet candidates for appointments'.[698] It also means that the JSC has to commit to ensuring that the recruitment process is non-discriminatory and free of any barriers that would harm the aspirations of women candidates.

To analyse the JSC considering the three standards mentioned above, this chapter is divided into five parts. The first segment provides detail on the operations and composition of the JSC. Due to the public nature of the interviews, I am also able to provide statistics of all candidates interviewed in this research period, including a breakdown of those who were appointed. The second segment centres on transparency and sheds further detail on the specific parts of the process and how much information is available to the public. I will use two cases to highlight the challenges of transparency in the South African process. Namely, *Cape Bar Council v The Judicial Service Commission and Others* [699] and *The Helen Suzman Foundation v The Judicial Service Commission & Others.*[700]

In the third segment, the independence of the JSC will be analysed primarily using two major themes that emerged from the interviews. The first is the tension between the merit provision and the transformation provision of section 174 of the Constitution. The second theme focuses on instances where political dynamics are present in interviews. The fourth

[697] Wynn and Mazur, p.775.
[698] Marieke van den Brink and Yvonne Benschop, 'Gender Practices in the Construction of Academic Excellence: Sheep with Five Legs', *Organization*, 19.4 (2012), 507–24 (p.520)<https://doi.org/10.1177/1350508411414293>.
[699] *Cape Bar Council v The Judicial Service Commission & Others (11897/2011) [2011] ZAWCHC 388; [2012] 2 All SA 143 (WCC) (30 September 2011) [accessed on 24 November 2019].*
[700] *The Helen Suzman Foundation v Judicial Service Commission & Others*, ZASCA, 2015, CXLV <http://www.saflii.org/za/cases/ZASCA/2016/161.pdf> [accessed 29 March 2018].

segment will focus on women's experiences at the JSC interviews and highlight one particular interview, which revealed the depth of gender bias present in interviews. In the final section, I examine gender diversity on the JSC. I argue that as in the Zambian case, there is no direct evidence that an improvement in the gender composition of the JSC will lead to the appointment of more women.

5.2 A PERSPECTIVE OF THE SOUTH AFRICAN JUDICIAL SERVICE COMMISSION

5.2.1 The composition of the JSC

The South African JSC has been described as the most important body for assisting and protecting the independence, impartiality, dignity, accessibility and effectiveness of the courts.[701] One of the JSC's primary responsibilities is the transformation of the judiciary. This transformation requires a change in the way judges are appointed, a change in the demographic of judges and a change in underlying attitudes of the judiciary, to see them embracing the principles of a fundamentally new legal order.[702] The JSC is also tasked with sitting as a disciplinary committee in regard to judicial misconduct and advising the national government on any matter relating to the judiciary or the administration of justice.[703] The composition of the JSC is outlined in section 178 (1) of the South African Constitution and it consists of between 23-25 members. It has been chaired by current Chief Justice Mogoeng since October 2011 and it comprises of judges, practising lawyers, a law professor and politicians.

Prior to the formation of the JSC, Hugh Corder predicted that the composition of the JSC would probably involve lay members.[704] This he argued would be in order to attain popular

[701] Koos Malan, 'Reassessing Judicial Independence and Impartiality against the Backdrop of Judicial Appointments in South Africa', *Potchefstroomse Elektroniese Regsblad*, 17.7 (2014), 1965–2040 <https://doi.org/10.3366/ajicl.2011.0005>.
[702] Wesson and Du Plessis, p.192.
[703] As per section 178 (5) of the Constitution.
[704] Corder, 'The Appointment of Judges: Some Comparative Ideas' p.227.

legitimacy and fair representation of regions, gender and class.[705] However, when the JSC was eventually established, there was no room for lay members. The current JSC is a fairly large body, whose members represent competing interests as the politicians and lawyers come from different constituencies.[706] The political component includes six members of the National Assembly, of whom three are from the opposition,[707] four permanent delegates of the National Council of Provinces (NCOP)[708] and the Minister of Justice and Constitutional Development. Further, if the appointment relates to a specific division of the High Court, the Premier of the province where that division is located, or an alternate, also sits in.[709]

The President also appoints four additional members of the JSC and in the last ten years, all the President's appointees have been lawyers. In 2017, these were Advocates Thandi Norman SC, Thabani Masuku SC and Lindiwe Nkosi Thomas SC and Mr Sofiso Msomi.[710] If added to the political complement described above, there could potentially be sixteen members who are politically inclined or appointed on a political mandate. Du Bois has suggested that South Africa's inclusion of a sizable block of politicians in the JSC aims to ensure that appointments are the product of collective decision-making, involving all major interested parties, as this fosters debate among them.[711]

Oxtoby offers another explanation, suggesting that the extensive mandate given to the courts to strike down unconstitutional legislation or conduct, may be another reason for the

[705] Ibid, p.227.
[706] For example, some lawyers are appointed by the President while others represent professional law bodies and organisations.
[707] Julius Malema from the Economic Freedom Front (EFF), Narend Singh from the Inkhata Freedom party (IFP) and Hendrik Schmidt of the Democratic Alliance (DA).
[708] The NCOP is akin to an upper House of Parliament and its representatives on the JSC are all from the ruling party.
[709] A premier is the political leader of a designated province.
[710] Prior to April 2017, Advocates Ismail Semenya SC and Dumisa Ntsebeza SC and Ms Andiswa Ndoni sat with Advocate Lindiwe Nkosi-Thomas SC.
[711] Du Bois, 'Judicial Selection In Post-Apartheid South Africa',pp. 280–312.

large complement of politicians.[712] He opines that 'age-old concerns about counter-majoritarianism might be seen to be mitigated by giving the elected branches of government a say in the process of appointing the judges vested with that power'.[713] On the contrary, Hoexter submits that many are convinced that the JSC's woes are because of its unwieldy size, which detracts from its effectiveness and efficiency.[714] Indeed, the size of the JSC was identified as a particular area of reform, by the National Development Plan 2030 (Development Plan).[715] The Development Plan stated that it could be argued that the JSC is too large to function effectively, and is hamstrung by political interests.[716] This view was also expressed in 2012, when a private member's Bill was introduced in parliament in an attempt to reduce the size of the JSC; it eventually 'fizzled out'.[717]

In interviews with different participants, there were very strong and different opinions on the composition of the JSC, in particular the utility of having a large number of politicians on the JSC. Former Judge President Kgomo was very clear in his views when he said 'I make no bones about it, the JSC is not properly constituted because it is overloaded with politicians'.[718] Advocate Ngalwana SC also agreed with this view, stating that the JSC was too top heavy and even suggested an amendment to section 178 of the Constitution to reduce the number of politicians on the body.[719] Other participants opined that politicians do not ask the right questions, that different interests at play amongst politicians affect the entire process and

[712]Chris Oxtoby, 'Managing a Fraught Transition: The Practice of the South African JSC', in *Securing Judicial Independence. The Role of Commissions in Selecting Judges in the Commonwealth*, ed. by Hugh Corder and Jan van Zyl Smit (Cape Town: Siber Ink CC, 2017), pp. 152–75.
[713] Ibid, p.166.
[714] Cora Hoexter, 'The Judicial Service Commisison: Lessons from South Africa', in *Debating Judicial Appointments in an Age of Diversity*, ed. by Graham Gee and Erika Rackley (Abingdon: Routledge, 2018), pp. 83–100.
[715] The Presidency, *'National Development Plan 2030: Our Future - Make It Work'* (Pretoria: The South African Government, 2012), pp. 1–489. This is a plan to eliminate and reduce inequality by 2030. It has a section focused on judicial governance and the rule of law.
[716] Ibid.
[717] Hoexter, p.91.
[718] Interview with former Judge President Frans Kgomo, 7 April 2017.
[719] Interview with Advocate Vuyani Ngalwana SC, 7 July 2017.

that their mandate, even in a legal process, would always be political, because they were incapable of fully shedding their "political hats".[720]

On the other hand, Thandi Modise MP responded to the view that the JSC is too politically heavy, as follows:

> I think there are more people in the country than lawyers. Aren't there more people who are at the mercy of courts than the people who are running the courts? Aren't they more poor people who we represent, than the lawyers? I think that the balance is good, and I think that if you look at the number of politicians alone, they would not be able to put one person in.[721]

Another view in support of the presence of politicians on the JSC was that politicians play a vital role by asking non-legal questions and that having them is a way of maintaining checks and balances on the judiciary.[722] At least three interview participants emphasised that there must have been a valid reason for the drafters of the Constitution to include such a large complement of politicians.[723] One of the three explained that with the benefit of inside information of the process, she now realises that during deliberations, the politicians are deferential towards the legal camp. This, she mentioned, negates the fear that politicians are only pursing political agendas.[724] This was confirmed by a politician on the JSC who stated that different groups were able to influence each other. He added that it was necessary to have politicians on the body because they have their feet and ears on the ground, which is very different from jurists.[725]

[720] Views from a JSC member, a sitting Judge, a retired judge and a senior advocate.
[721] Interview with Thandi Modise MP, 15 June 2017.
[722] Interview with Legal Professional V, 12 October 2016.
[723] Views from two senior judges and a legal professional.
[724] A discussion on political agendas will be discussed in the segment on the JSC's independence.
[725] Interview with Commissioner B, 18 May 2017.

5.2.2 How the JSC Operates

The regulations governing the JSC's procedure require that the Chief Justice, President of the Supreme Court or a responsible Judge inform the JSC when a vacancy arises.[726] The JSC then publicly announces judicial vacancies and calls for nominations to be made a by a specific date.[727] The regulations further set out specific requirements for what a nomination must contain, including the requirement that there be a letter of nomination specifically identifying the nominator, nominee, and for High Court candidates, the division of the court to which a candidate is nominated.[728] A screening committee (also known as sifting committee) shortlists candidates who qualify for appointment and who in the opinion of the screening committee or any of its members, have a real prospect of selection for appointment.[729] The shortlist is released to the public and selected organisations and members of the public are invited to comment on candidates by a specified date.[730] The JSC publishes the interview schedule with the time and venue of all the interviews, so as to allow members of the public to attend. Prior to April 2017, the interviews were mostly held in Cape Town, but they have now been moved to the Office of the Chief Justice in Midrand, Johannesburg.[731]

At the end of each day after deliberations, the JSC announces which candidates they will be recommending for appointment. As per section 174 (6) of the Constitution, the President must appoint these candidates on the advice of the JSC.[732] For the Constitutional Court vacancies, its leaders and the leaders of the Supreme Court of Appeal (SCA), the process

[726] *Judicial Service Commission Act 9 of 1994,* Procedure for Commission GN R 423 in GG 7616 of 27-03-2003.
[727] Regulation 2(b) deals with Constitutional Court judges and Regulation 3(b) with High Court and Supreme Court of Appeal judges.
[728] Regulations 2 and 3.
[729] Regulations 2(e) and 3(e).
[730]As per 2(g) and 3(g) of the JSC regulations.
[731] The interviews in Cape Town were often held in expensive hotels hence, the move to Johannesburg was justified on budgetary grounds.
[732] This also included candidates for leadership positions on the High Courts, such as the Judges President and Deputy Judges President.

works differently. For an ordinary Constitutional Court vacancy the nomination process is as described above, however the JSC must prepare a list of nominees with three names more than the number of appointments to be made.[733] The President may make appointments from the list or request a supplemented list from which he must make appointments.[734] The President nominates candidates for the Chief Justice, Deputy Chief Justice, President and Deputy President of the SCA. After they are interviewed, he appoints them after consultation with the JSC and leaders of the parties represented in the National Assembly.[735]

What emerges from the above is that the JSC has more control and influence over appointments not concerned with the Constitutional Court and the Supreme Court of Appeal. The President has to appoint on their advice, as he has no discretion and his appointing role is purely formal. Contrast this to the Constitutional Court and the SCA, where the President's substantive role limits the JSCs influence, because all he has to do is consult them. Nevertheless, this public process described above is far removed from the apartheid era system, where appointments were made secretly, which resulted in a judiciary entirely lacking in diversity in terms of demographic representation, social background and professional career paths.[736]

5.2.3 Candidate Numbers

Since the Constitutional dispensation in 1994, significant progress has been made by the JSC in improving the racial composition of the bench. The proportion of black judges has increased from 1.4% in 1994 to 67% as of September 2017.[737] However gender transformation has lagged behind, with the representation of women on the bench increasing from 1.2% to 37% over the

[733] For example, if there is one vacancy, the JSC must send at least four names to the President.
[734] Section 174 (4) (a)-(c).
[735] He acts in his capacity as Head of the National Executive as per section 175(3).
[736] Oxtoby and Masengu, p.540.
[737] The term black refers to African, Coloured and Indians, also known as Previously Disadvantaged Individuals.

same period.[738] The table below depicts the number of candidates interviewed in the period 2013-2017. [The Constitutional Court is referred to as ConCourt, Supreme Court of Appeal as SCA and Highs Courts as HCs.]

Table 3 – Number of Candidates Interviewed from 2013 to 2017 [739]

Year	**Vacancies available**	**Total candidates interviewed**	**Gender breakdown**	**Total Candidates appointed**
February 2013 (ConCourt)	1	5	M-5	M-1
April 2013 (SCA and HCs)	10	23	W-14 M-9	W-5 M-5
October 2013 (HCs)	10	22	W-12 M-10	W-7 M-3
April 2014 (SCA and HCs)	21	26	W-4 M-22	W-2 M-10 (9 vacancies left open)
October 2014 (HCs)	5	13	W-9 M-4	W-4 M-0 (one vacancy left open)
April 2015 (SCA and HCs)	6	20	W-3 M-17	W-1 M-5 (Land Claims Court

[738] Statistics provided by the Department of Justice and Constitutional Development, on file with the author.
[739] M refers to Men and W refers to Women.

				interview cancelled)
July 2015 (ConCourt and SCA)	2	5-	W-5	W-2
October 201(HCs)	17	40	W-14 M-26	W-8 M=5 (Six positions not filled)
April 2016 (SCA and HCs)	13	34	W-14 M-20	W-4 M-7
October 2016 (ConCourt and HCs)	19	40	W-7 M-33	W-5 M-12 (ConCourt interviews cancelled and one other appointment not filled)
April 2017 (ConCourt, SCA and HCs)	13	29	W-12 M-17	W-5 M-4 (No appointments to six vacancies and one extra person appointed to Labour Court)

October 2017 (HCs)	18	33	W-13 M-20	W-3 M-15 (Three vacancies not filled and extra person appointed to HC)

In total the JSC interviewed 290 candidates for 135 vacancies, in the given period of research (2013-2017).[740] Of the interviewed candidates, 183 have been men (63%) while 107 have been women (37%). Of the 113 successful candidates, 67 have been men (59%) and 46 have been women (41%).[741] When one compares the percentage of women candidates interviewed versus the number of women candidates appointed, it is clear that the percentage of women appointed is slightly higher than men. Therefore women have not fared badly. However, the total number of women being interviewed is still incomparable to the number of men interviewed, which then affects the total number of women being appointed.

5.3 HOW TRANSPARENT IS SOUTH AFRICA'S PUBLIC PROCESS?

5.3.1 The New Democratic Era

The current appointment process is a far cry from the previous system pre-1994. In regard to the Latimer Principles and UN guidelines, South Africa could be said to be faring well when

[740] In some instances, some candidates have interviewed for the same position as many as three times.
[741] Five of the successful women were appointed to leadership positions such as the Judge President of a provincial division and the Deputy and then President of the Supreme Court of Appeal.

one considers what is required for a legitimate appointments process. The public can watch the interviews in person or live streamed.[742] In terms of candidate transparency, the appointments system is faring well and meets requirements of most international guidelines. In the interviews, a candidate's views on various topics are tested and they are also given an opportunity to respond to any adverse complaints about them.[743] There have however been complaints that candidates are not asked enough jurisprudential questions and that the focus is rather on 'political' questions.[744] This aspect will be examined further in the subsequent section on the independence of the JSC. In respect of process transparency, the vacancies are announced ahead of schedule, the procedure for nomination is publicised and a shortlist is released for comments from interested people. Shortcomings in the process have been identified in the criteria or rather, how they are used when assessing candidates. As mentioned in Chapter 3, in respect of judicial appointments, the South African Constitution has two specific requirements.

The first is section 174(1) which requires that the candidate must be a fit and proper person. The second requirement is found in section 174(2) which states that the need for the judiciary to reflect the racial and gender composition of society must be considered. These constitutional criteria have been supplemented over the years. First, by the Mahomed guidelines from 1998, which though appearing in an official government document, were never officially released.[745] These guidelines discussed in detail in a previous chapter, required amongst other things that an enquiry be made into whether the candidate is appropriately

[742] The streaming service is provided by Judges Matter, a loose coalition of civil society organisations who believe in the importance of judges.
[743] Such complaints have been varied in nature, including complaints about professional misconduct, financial irregularities and even personal matters such as, a candidate's failure to pay maintenance for his three children.
[744] For example, see Richard Calland, 'JSC's Attitude Opens Door to Conservatism', *Mail & Guardian*, 12 April 2013, <https://mg.co.za/article/2013-04-12-00-jscs-attitude-opens-door-to-conservatism> [accessed 20 April 2018].
[745] South African Judicial Service Commission, '*Mahomed Guidelines'* (Johannesburg: Judicial Service Commission, 1999), pp. 1–3 <http://www.justice.gov.za/reportfiles/1999reports/1999_judicial service comm.htm>.

qualified, fit and proper, and if their appointment would reflect the racial and gender composition of South Africa as per the Constitution. Secondly, an enquiry was also made into amongst others: whether the candidate possesses technical competence, technical experience and an ability to give expression to the values of the Constitution.

In 2009, in response for a request for access to information, the JSC identified other factors to be considered when deliberating on a candidate's suitability for appointment. These included: the recommendation of the relevant head of court; support from professional bodies, the judicial needs of the relevant court; a candidate's age and range of experience; including experience as an acting judge and the merits of candidates in relation to each other.[746] Albertyn critiqued this approach as paying 'surprisingly little attention to judicial character and the content of merit'.[747] She has argued that it focused on external factors and seemed to elevate these above the actual abilities of a judge.[748] The 2010 guidelines referred to as the Ngcobo guidelines earlier, were made public after a special sitting of the JSC.[749] These guidelines are strikingly similar to the Mahomed guidelines and they emphasise both the Constitutional and the supplementary requirements.

The JSC in issuing these criteria stressed that the decision was in line with the JSC's principle that the process of judicial appointments should be open and transparent to the public.[750] However these criteria have also been criticised as being too open ended and lacking in specificity. For example, the criterion of 'necessary energy and motivation' is not detailed

[746] Judicial Service Commission, *Request for Access to Record of Public Body in Terms of Section18(1) of PAIA* (Johannesburg, 2009).
[747] Catherine Albertyn, 'Judicial Diversity', in *The Judiciary in South Africa*, ed. by Cora Hoexter and Morné Olivier (Cape Town: JUTA, 2014), pp. 245–87, (p.281).
[748] Ibid.
[749] South African Judicial Service Commission, 'Summary of the Criteria Used by the Judicial Service Commission When Considering Candidates for Judicial Appointments'.
[750] Ibid.

making it difficult to assess.[751] The broad nature of the supplementary criteria and the failure of the JSC to elaborate on the criteria in the Constitution, has also been observed as a shortcoming of the JSC's efforts to be transparent.[752]

There are two parts of the appointment process described above that are not open to the public. The first is the screening process of candidates, often referred to as the shortlisting process. After the deadline for nominations has passed, the JSC members receive a list of all the applicants from the screening committee. The members can make additional nominations or inform the screening committee of any candidates they strongly feel should be shortlisted.[753] When the screening sub-committee completes its process, it circulates the list of shortlisted candidates to the members of the JSC who have an opportunity to ask that a candidate who was not shortlisted, but is deemed worthy, be added to the list.[754]

I was informed that while the JSC screening sub-committee does assess candidates based on its publicly available criteria for judicial appointments, it does not apply the same stringency as it does in the public interviews.[755] The identity of those applicants who were nominated (long list), but not shortlisted is never known. Andrews submits that this sub-committee phase has raised questions 'about how the choices are made and whether political and other inappropriate influences play a part in the decision'.[756] These possibly inappropriate influences are what I have identified as power and partiality dynamics. They are able to fester because of the secrecy around this aspect of the process.[757] Former JSC member Advocate

[751] Commission for Gender Equality (CGE), '*CGE Investigation Inquiry into Gender Transformation In the Judiciary'*, p.20 (Cape Town, 2016).
[752] Oxtoby, p.156.
[753] Regulations 2 (d) (i) (ii) and 3 (d) (i) and (ii).
[754] Regulations 2(f) and 3(f).
[755] Interview with Gauteng Judge President Mlambo, 4 April 2017.
[756] Penelope E Andrews, 'The South African Judicial Appointments Process', *Osgoode Hall Law Journal*, 44.3 (2006), 565–72.
[757] For a detailed discussion of this, see Tabeth Masengu, 'The Judicial Service Commission and the Appointment of Women: More to It than Meets the Eye', *International Journal of the Legal Profession*, (2019), 1–14 <https://doi.org/10.1080/09695958.2019.1622547>.

Leah Gcabashe SC stated that the purpose of not publicizing the long list is to prevent unsuccessful candidates from feeling disgraced.[758] She opined that there should be areas in the process where the dignity of the candidate is respected, by not publicizing certain information and the screening process was one of them. The second part of the appointment process that is private is the JSC deliberation, when candidates are being selected. To date, the recommendation of successful candidates and the results of the private deliberations process, have proven to be the most controversial aspect of the JSC interviews. The two cases that I now turn to, shed more light on this.

5.3.2 The Selection of Candidates and the Cape Bar Litigation

On 12 April 2011, the JSC interviewed seven candidates for three vacancies on the Western Cape High Court (herein referred to as WCHC) bench.[759] Of the seven candidates, one was a black male, five were white men and only one was a woman. Only one candidate Robert Henney, was recommended for appointment, leaving two vacancies unfilled. The Cape Bar, the society representing advocates in the Western Cape, took umbrage with the decision and it approached the WCHC for an order declaring, amongst other things, that the proceedings were inconsistent with the Constitution, unlawful and consequently invalid.[760] The basis for the order sought by the Cape Bar was that the first respondent (the JSC) was not properly composed on the day in question due to the absence of the President of the Supreme Court of Appeal and his Deputy. The Cape Bar also stated that the JSC did not say that the three unsuccessful advocates namely, Michael Fitzgerald SC, Owen Rogers SC and Sven Oliver SC lacked the required criteria. [761]

[758] Interview with Advocate Leah Gcabashe SC, 2 April 2017.
[759] JSC Interviews held at Cape Town International Convention Centre.
[760] *Cape Bar Council v The Judicial Service Commission & Others, para 31* .
[761] The Cape Bar as the professional body representing advocates, was not concerned with the other three unsuccessful candidates who were not advocates.

Thus it was incumbent on the JSC to account for the failure to appoint them. The answering affidavit from the JSC acknowledged that all three candidates were excellent in terms of competence but that they did not acquire the sufficient number of votes to be recommended− which is thirteen.[762] The court held that as a public body created to serve the public's interest, the JSC must perform its functions openly and transparently and only reach decisions which are not irrational or arbitrary.[763] Judge Koen also held that the JSC had not been properly constituted when the interviews and deliberations occurred and that the JSC had a duty to provide reasons as to why candidates were unsuccessful.[764] It was further decided that the voting procedure of one vote per vacancy, as advanced by the JSC, was irrational and that the failure of the JSC to fill the two vacancies was unconstitutional and unlawful and it fell to be set aside.[765]

The decision in the High Court was hailed as a reminder that the JSC is bound by the principle of legality and that it will not be allowed to exercise its power arbitrarily.[766] An appeal to the SCA by the JSC was unsuccessful. The SCA confirmed the decision of the lower court.[767] The SCA however, declined to prescribe to the JSC what format their reasons to unsuccessful candidates should take, stating that 'how extensive, who can ask and under what circumstances will depend on the facts of each case'.[768] The court did express concern that the JSC's voting procedure was shrouded in obscurity, but was unwilling to make 'a finding of constitutional

[762] Ibid, paras 10-11 of the judgment.
[763] Ibid, para 29.
[764] Ms J I Cloete, Mr S J Koen, and advocate Rogers SC were later interviewed in October 2011 and Ms Cloete and advocate Rogers were recommended for appointment.
[765] *Cape Bar Council v The Judicial Service Commission & Others*, paras 122-142.
[766] Pierre Vos de, 'Another Legal Lesson for the JSC ', *Constitutionally Speaking*, 2011 <https://constitutionallyspeaking.co.za/another-legal-lesson-for-the-jsc/> [accessed 8 May 2018].
[767] *Judicial Service Commission and Another v Cape Bar Council and Another* (818/2011) [2012] ZASCA 115; [2013] 1 All SA 40 (SCA) <http://www.saflii.org/za/cases/ZASCA/2012/115.pdf> [accessed 16 January 2018].
[768] Para 45.

validity which would be both redundant and based on uncertain facts', [769] and for that reason it declined to confirm the finding of the High Court in that regard.

This case provides useful information in regard to improving process transparency. Firstly, requesting the JSC to give reasons when they do not appoint candidates helps with process transparency, because those who are unsuccessful, have an opportunity to work on their faults (if any) and perhaps try again. Secondly, previously the JSC was only required to 'distil and record the Commission's reasons for recommending the candidates selected' in reference to Constitutional Court interviews.[770] Now the JSC has to ensure that it does the same for all other interviews, because of the responsibility to provide reasons when requested to do so. This will help with improving the legitimacy of the process because the JSC is forced to be more accountable, about its recommendations. Thirdly, by interrogating the voting system, the courts provided some insight into how the JSC deliberations operate. Yet, even this has not been enough, to dissuade further litigation.

5.3.3 The JSC Deliberation Process and Helen Suzman Foundation Litigation

On 17 October 2012, the JSC once again interviewed eight candidates to fill five vacancies at the WHCH. Amongst the eight, were Mr Stephen Koen, advocate Owen Rogers SC, and Ms Cloete who had been unsuccessful in the earlier interviews described above. The latter two were recommended for appointment[771] and amongst the three unsuccessful candidates was advocate Jeremy Gauntlett SC.[772] In a letter dated 6 November 2012, former Justice Harms who had nominated Gauntlett requested reasons from the JSC as to why Gauntlett was not appointed.[773] The JSC obliged and noted that while Gauntlett's technical experience and

[769] Para 53.
[770] Regulation 2(l).
[771] As were Ms Babalwa Mantame, Mr Mokgoatji Dolamo, and advocate Ashton Schippers SC.
[772] Ms Nonkosi Saba and Mr Stephen Koen were not recommended.
[773]Gregory P Solik, 'Who Should Judges Be in a Transforming Society? An Analysis of the Constitutional Requirements for Judicial Selection in South Africa' (Unpublished Master's Thesis, University of Cape Town,

competency was not in doubt, there were concerns about his temperament.[774] They added that commissioners expressed strong reservations 'as to whether, as part of his attributes, he has the humility and the appropriate temperament that a judicial officer should display'.[775] The final reason given was that considering the demographics of the court and the large number of white males in it (compared to other races), the JSC would not be doing diversity justice, if they appointed two white males.

The Helen Suzman Foundation (HSF) took exception to this response and approached the High Court for a declaration that the decision to appoint some candidates over others, or the process followed before making the decision, was unlawful and/or irrational and invalid.[776] The HSF also averred that amongst the legal issues to be determined, was the correct interpretation of sections 174(1) and (2) and whether the JSC considered irrelevant factors, or failed to consider relevant factors when making recommendations to the President.[777] Before the main matter could be heard, the HSF made an interlocutory application to compel the JSC to comply with Rule 53(1) (b) of the Uniform Rules of Court and to deliver the full recording of the proceedings (the JSC decision) sought to be reviewed in the main application.[778]

The JSC provided HSF with full application packs of all candidates, transcripts and a summary of the deliberations− written by the Chief Justice. The HSF argued that access to the full deliberations (audio recordings) was indispensable to any proper determination of whether there was a rational connection between the deliberations, the decision taken, and any reason

2014) <http://open.uct.ac.za/bitstream/handle/11427/9174/thesis_law_2014_solik_gp.pdf?sequence=1> [accessed 19 October 2017].

[774] Sello Chiloane, 'Why We Didn`t Appoint Jeremy Gauntlett', *Politicsweb*, 7 November 2012, <http://www.politicsweb.co.za/documents/why-we-didnt-appoint-jeremy-gauntlett--jsc> [accessed 8 May 2018].

[775] Ibid,p.1.

[776] 'Founding Afidavit of the Helen Suzman Foundation' (Cape Town: Helen Suzman Foundation, 2013).

[777] Section 14 of the affidavit.

[778] *Helen Suzman Foundation v JSC & Others,* WHCH,(8647/2013) [2014] ZAWCHC 136 .

provided by the JSC.[779] Such a decision they argued would enhance the constitutional rights of access to information and advance transparency and accountability. The JSC countered that the HSF was not entitled to the deliberations, because they do not form part of the proceedings as per the Rule, and that non-disclosure was reasoned and justifiable.[780] The court agreed and emphasised that the JSC followed their procedure in Regulation 3(k), to deliberate in private and that the rest of the process until deliberations satisfies transparency and openness requirements.

HSF appealed the decision to the Supreme Court of Appeal which dismissed the appeal and agreed with the judgment of the High Court.[781] Deputy President Maya (at the time), writing for the majority, emphasised the confidentiality of the process as outlined in the JSC regulations and found that there was no absolute requirement of disclosure of JSC proceedings. The court held that the rules of court must be construed and applied in the manner enjoined by s 39(2) of the Constitution and there can be no objection to a limitation of the record if that is reasonable and justifiable.[782] She added that the relief sought would undermine the JSC's constitutional and legislative imperatives. A further appeal was made to the Constitutional Court by the HSF and this time they were successful. In a judgment handed on 24 April 2018, the Constitutional Court took a different approach from the two lower courts.

Writing for the majority, Justice Madlanga found that the JSC's blanket ban on disclosure is unjustifiable in an open and democratic society, in which the rule of law and the values of accountability, responsiveness and openness are paramount.[783] It held that disclosure

[779] Ibid, para 8.
[780] Amicus also involved in proceedings included the National Association of Democratic Lawyers (NADEL) and the Democratic Governance and Rights Unit (DGRU).
[781] T*he Helen Suzman Foundation* v *Judicial Service Commission & Others, ZASCA*, (145/2015) [2016] ZASCA 161 <http://www.saflii.org/za/cases/ZASCA/2016/161.pdf> [accessed 29 March 2018].
[782] Ibid, Paras 27-28.
[783] *Helen Suzman Foundation* v J*udicial Service Commission & Others*, 2018, ZACC 08, 1–33 <https://collections.concourt.org.za/bitstream/handle/20.500.12144/3903/Full judgment Official version 24 April 2018.pdf?sequence=30&isAllowed=y> [accessed 24 April 2018].

would not be a dampener to deliberations as the Supreme Court of Appeal had decided. It added that JSC members worth their salt ought not to be deterred from deliberating freely and honestly, purely because of the prospect that the content of the deliberations might be disclosed.[784] The first separate dissenting judgment written by Justice Jafta held that the rules of the court would not entitle a party to the deliberations of the JSC, as such deliberations do not form part of the record of proceedings as contemplated in the rule.[785] The second dissenter, Acting Justice Kollapen, found that deliberations should only form part of the record, if they satisfy the test for relevance and even if the test for relevance is satisfied, the deliberations could still be excluded if there was a justifiable reason for their exclusion.[786]

Central to all three judgments were the values of transparency and accountability. The difference between the two lower courts and the Constitutional Court was how they defined the need for transparency. In other words they differed on how to approach, the JSC's insistence that a refusal to hand over full deliberations was reasonable and justified. The Constitutional Court stated that truly confidential information could adequately be protected by a suitably couched confidentiality regime, which limited access to the deliberations.[787] While this sounds like a reasonable measure, it would not immediately come into operation until the JSC determined the regime, which then needs to be gazetted by the Minister of Justice before it comes into effect.[788] In the meantime, the HSF will have access to the full audio deliberations from the 2012 JSC interviews which it is submitted, goes beyond the requirements of transparency.

The Supreme Court of Appeal judgment emphasised both the need for the commissioners to deliberate candidly and that adverse remarks made 'may yet be hurtful to a

[784] Helen Suzman Foundation v Judicial Service Commission & Others, (2018, ZACC), Paras 35.
[785] Ibid, paras 84-154.
[786] Ibid, paras 155-214.
[787] Ibid, paras 73-75.
[788] Section 178(6) of the South African Constitution allows the JSC to determine its own procedure.

candidate and cause reputational damage harmful to his or her professional career'.[789] Having attended the interviews over the years, I have witnessed some robust engagement in the actual interviews, so it is not hard to imagine that in private deliberations, discussions could possibly get quite heated or painfully honest. The commissioners I interviewed emphasised the need to have a safe space for open and candid discussion. I suggest that allowing access to the full deliberations will diminish this candid engagement, because commissioners will be careful about what they say. Some may agree with Justice Madlanga and say that 'real' or 'worthy' commissioners would not baulk at the idea, but the reality is that these commissioners are not merely fiduciaries sitting on a public body. They are representatives of the body they belong to, be it a political party, the judiciary, academia or a legal professional body. As such, their input is informed by their vantage point and it is suggested that their input may also affect the body they represent.

As Acting Justice Kollapen held, commissioners may express views that are damaging to a candidate and ultimately the member who expressed it will remain the source of that damage, with all the attendant consequences that go with it.[790] There are limits to transparency and I agree with Justice Kollapen that in this case, 'preserving the confidentiality of the JSC deliberations not only served as a justifiable reason for the exclusion of the deliberations from the record, but was also necessary to safeguard multiple constitutional values'.[791] These values also include the rights of the candidates to human dignity and privacy.

5.3.4 Perspective from Participants

One of the participants, advocate Vuyani Ngalwana SC, was counsel for the first *Amicus Curiae* in the HSF Supreme Court of Appeal proceedings.[792] He insisted that his argument as

[789] Para 28.
[790] He suggested that they could even face delictual liability for defamation.
[791] *Helen Suzman Foundation* v *Judicial Service Commission & Others* (2018, ZACC), Para 91.
[792] He acted for the Police and Prisons Civil Rights Union.

counsel in the Supreme Court of Appeal and his personal belief were one and the same. He advanced that providing full deliberations to the public would limit commissioners from freely expressing themselves in the private deliberations, which in turn would take away from what is meant to be a rigorous and robust process.[793] He added further, that this limitation was especially restrictive for those commissioners who personally knew candidates vying for judicial positions. He argued that the commissioners would be in a difficult position if it was later publicised that they genuinely felt that the particular candidates they knew personally, were not ready for the judicial role just yet.

A member of Civil Society, Alison Tilley appeared to support the view that transparency did not mean publicising everything. She stated that:

> Transparency is about giving you the facts that will allow you to put the puzzle together, but in any situation where there are facts, there is the interpretation of the facts. Therefore, there are people who take those facts and put them together and analyse them and create narratives and create explanations of all those parts of the puzzle and the more parts to the puzzle they have access to, the more accurate they picture those generally. The act of making information available, is only one side of the coin.[794]

She submitted that we 'should not fetishize transparency, beyond its correct and necessary role' and that more transparency was needed around other processes such as acting appointments.[795]

Judge President Frans Kgomo, a previous member of the JSC, expressed the view that the private nature of the deliberations allowed people to be brutally frank which was important for the process.[796] This view seemed to be supported by a majority of participants amongst the four groups. Journalist Aarti Narsee stated that she appreciated why the deliberations needed to be private, in order to preserve frank conversations, but she suggested that JSC provide reasons or at least some details of why they chose particular candidates.[797] There was a contrary

[793] Interview with Advocate Vuyani Ngalwana SC, 7 July 2017.
[794] Interview with Alison Tilley, 4 October 2016.
[795] This will be discussed further in the section on the JSC interviews.
[796] Interviews with Judge Kgomo, 6 April 2017
[797] Interview 6 August 2017.

view from a senior attorney who advanced that since most of the process was public, it was important to open up the deliberations too.[798] She suggested that it was important because the public watched the interviews and thought some candidates were worthy.[799] When these candidates were not appointed, no explanation was provided, and this led to suspicion about how the process worked. She did acknowledge the potential harm that could occur because of public deliberations. Nonetheless, when asked about the repercussions of public deliberations and the harm they would bring to candidates, she opined that such harm was part of the process of becoming a judge in South Africa.

A senior advocate suggested that if the idea behind the public process of appointment is that 'sunlight is the best disinfectant', then there would be consequences, which would affect people senior in their careers.[800] He however cautioned that it was necessary to reflect on whether legal professionals who have worked for years to build their careers and reputations, should be exposed to a process that could undermine everything they had worked for. The necessity of reflecting on this statement cannot be understated. There is no doubt that relevant information about the interview process, the deliberation process and the eventual outcome, is critical for potential candidates and the public. However, if not handled wisely, public JSC deliberations may deter candidates and provide the public with deliberations that are superficial in nature. It must be noted that transparency alone is not a sufficient guarantee that the JSC will operate optimally. In addition to having a transparent process, the JSC needs to show that it is an independent body.

[798] Interview with Legal Professional K, 6 July 2017.
[799] For an example of the extent of public interest, in 2017, the highest viewed JSC interview had 330 000 views on Youtube.
[800] Interview with Legal Professional S, 18 July 2017.

5.4 ANALYSING THE INDEPENDENCE OF THE JSC

The JSC's central role in recommending candidates makes it an important political body. This is because it arguably neutralises executive control over judicial appointments. The envisaged role of the JSC is essential for the enhancement of the transformation project, in order to maintain the credibility of the judiciary as an independent body that reflects South Africa's diversity.[801] Undue influences that may undermine the independence of the JSC are not limited to the executive and can appear in both blatant and subtle forms. For the purposes of this discussion, I will focus on two particular aspects: the JSC's efforts to transform the judiciary as an alleged conduit of interference, and the power dynamics that arise when political representatives on the JSC have their own interests.

5.4.1 Can Efforts to Transform the Judiciary Undermine the Independence of the JSC? The Merit v Transformation Debate.

From inception, the JSC was tasked with changing the appointment process and transforming the judiciary. The JSC has been criticised in particular, for its interpretation of what transformation in terms of demographics and judicial mind-set looks like. In 2005, renowned advocate Geoff Budlender who himself has appeared before the JSC,[802] highlighted that there was no need to be 'squeamish' about the necessity of changing the demographics of the bench.[803] However, he warned against the appointment of compliant judges 'who would not rock the boat' and would be deferential to government in cases where policy questions were involved.[804] He also warned against well qualified persons being unwilling to make themselves available for JSC interviews, because of the view that the JSC was insufficiently open- minded. The implication of his statement was that JSC commissioners would be insufficiently open-

[801] Nomthandazo Ntlama, 'The Transformation of the South African Judiciary: A Measure to Weaken Its Capacity?', *New York Law School*, (2014).
[802] He was interviewed for a Constitutional Court vacancy in 2009 and mentioned that his applications for a position on the Western Cape High Court had been rebuffed three times.
[803]Geoff Budlender, 'Transforming the Judiciary:The Politics of the Judiciary in a Democratic South Africa', *South African Journal on Human Rights*, ?22.4 (2005), 715–24 <https://doi.org/10.3868/s050-004-015-0003-8>.
[804] Ibid, p.722.

minded, if they were perceived to have an 'agenda' that was informed by other factors such as politics.

Years later, Budlender may have been proved correct because there has been some reluctance from qualified candidates to be nominated for judicial positions.[805] The topic of transformation of the judiciary has been heated and often polarising, because it has been centred on race. This has been most acute in the context of the non-appointment of some white men in favour of black candidates.[806] In this context, the transformation debates to date have been centred on the fear that merit, which is supposedly defined as technical experience and competence, has been sacrificed at the altar of transformation.[807] Section 174(1) is considered by some as the merit provision, because it requires that candidates be appropriately qualified and fit and proper. Section 174(2) is seen as the diversity provision and is often regarded as a competitor to merit.[808]

Ntlama argues that 'there are commentators in position of authority and influence, who are determined to label the whole process of transformation as nothing more than a measure designed to weaken the capacity of the judiciary'.[809] The weakening of the judiciary referred to here, often implies a loss of judicial independence in order to be more deferential to government. Retired judge Louis Harms is one of these commentators that Ntlama refers to and he has stated that, 'the requirements for racial and gender composition have led to the unfortunate and often unfair division of judicial appointees between 'transformation judges'

[805] For example, in 2016, the JSC struggled to have enough nominations to interview for the vacancy left by the retirement of Justice Van der Westhuizen.
[806] Bonthuys, p.138.
[807] See former Justice Johan Kriegler's address, available at https://constitutionallyspeaking.co.za/can-judicial-independence-survive-transformation-a-public-lecture-delivered-by-judge-johann-kriegler-at-the-wits-school-of-law/.
[808] Morné Olivier, 'A Perspective on Gender Transformation in the South African Judiciary', *South African Law Journal*, 13.3 (2013), 449–64 (p.450).
[809] Ntlama, p.11.

and 'others''.[810] In essence, he argues that in order to have more black judges, the JSC has forgone the need for experts and highly trained lawyers for incompetent (malleable) or at least inexperienced black judges. The implication is that the black judges appointed are not experts or highly trained and those passed over (predominantly white males) are.

The result is the classification of diversity candidates as unmeritorious, a phenomenon not unique to South Africa. Malleson, Thornton and others have chronicled how this debate often makes unfair insinuations about minority candidates and women.[811] Malleson writes that 'almost without exception, official expressions of support for proactive measures to encourage diversity, have been qualified by a statement of commitment to a strict application of the merit principle'.[812] This she argues, maintains a strong maximalist approach to merit and 'a clear divide between the idea of positive action to encourage a wider candidate pool and the sacrosanctity of the role of merit in selecting between those candidates'.[813]

As mentioned earlier, McLoughlin has argued that merit is determined in the context of power'.[814] Thus we need to ask, how is merit defined? And more importantly, who is defining it? The previous South African system was dominated by white men from the advocate's profession and therefore merit is still defined by that standard. We are made to believe that the definition of merit is neutral, because merit is the quality of excellence and great worth.[815] Yet, Davis and Williams submit that:

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[810] Harms p.38.
[811] See Kate Malleson, 'Rethinking the Merit Principle in Judicial Selection', *Journal of Law and Society*, 33.1 (2006), 126–40 <https://doi.org/10.1111/j.1467-6478.2006.00351.x>; Margaret Thornton, 'Otherness on the Bench: How Merit Is Gendered', *Sydney Law Review*, 29 (2007), 391-413,<http://heinonline.org/HOL/Page?handle=hein.journals/sydney29&id=391&div=23&collection=journals> [accessed 7 September 2016]; Erika Rackley, 'Representations of the (Woman) Judge: Hercules, the Little Mermaid, and the Vain and Naked Emperor', *Legal Studies*, 22.4 (2002), 602–24;
[812] Malleson, p.131.
[813] Ibid.
[814] McLoughlin, 'The Politics of Gender Diversity' p. 168.
[815]Rachel Davis and George Williams, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia', *Melbourne University Law Review*, 27 (2003), 819–63.

> The "best person" to occupy a position of authority has tended to be unproblematically defined in masculinist terms that reflect the values of the "public sphere", making it virtually impossible for women and differentiated others.[816]

In South Africa, despite the majority of the population being black, decades of apartheid resulted in the best candidates for the job often defined not only in masculinist terms, but in racial terms too. Thus white men are more likely to be perceived not only as more technically sound or competent, but also as less likely to be influenced by political or other non-judicial factors.[817]

This thinking is evident when one examines the uproar over candidates, who have not been successful in their applications. The most common example is the non-appointment of advocate Gauntlet, mentioned in the earlier section.[818] Other examples, have been the initial non-appointment of well-respected Judge Clive Plasket to the SCA[819] and the initial failures of advocates Owen Rogers and Willem van der Linde's applications for vacancies on the Western Cape and Gauteng Court respectively.[820] There has barely been any outcry when respected black senior male advocates such as advocate Gcina Malindi SC and advocate Takalani Madima SC, have not been appointed, despite their seniority at the Bar.[821]

In respect of women, the lack of attention to those who have fallen through the gaps is even worse. This is not surprising considering the intersectionality of race and gender discrimination that is common in society.[822] Gender often takes the backseat to race. Despite her solid reputation and the paucity of women at the court, there were hardly any complaints when the current SCA President Mandisa Maya was not appointed to the Constitutional Court

[816] Ibid.
[817] For an example of this narrative, see the article Malan, pp.1979-1980.
[818] He has been unsuccessful at attempts to be appointed to the WHCH and the Constitutional Court.
[819] He was since appointed in 2019 after he failed in 2013.
[820] After a second attempt they were appointed in 2013 and 2015 respectively.
[821] A full discussion on which men are appointed and why, is outside the ambit of this paper.
[822] For a detailed discussion, see in its entirety, Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination '.

in 2012. Thereafter, there were also interviews conducted by the JSC for the KwaZulu-Natal Deputy Judge President position, and the Free State Judge President position. Despite the impressive interviews of judges Fikile Mokgohloa in 2012, Connie Mocumie in April 2014 and Kate Pillay in 2015, none of these three women were appointed.[823] The failure to appoint any of them did not evoke any reaction from those who lead the merit versus transformation debate.

All this begs the question, is recognition of merit or the non-appointment of meritorious candidates, only limited to unsuccessful white men?[824] The JSC's primary criteria require that a candidate be appropriately qualified, be a fit and proper person, and that their appointment reflect the racial and gender composition of society. These requirements are to be read in tandem. Suitable qualifications and diversity are not mutually exclusive. Albertyn submits that:

> Race and gender are not envisaged as screening or trumping criteria but are relevant to a wider set of judicial qualities. There is not a simple equation between a judge's race or gender and his or her ability to adjudicate fairly … The JSC nevertheless allows itself space to advance a black or female candidate over a more qualified white or male candidate should the former lack experience but display competence and ability in relation to the criteria under s 174(1). This reading redefines merit, to include an appreciation of South Africa's different communities and an understanding of the values of the Constitution, while s 174(2) enables a flexible approach to appointing black and women judges when presented with promising candidates.[825]

Albertyn and Bonthuys further submit that a more substantive approach to professional merit and demographic representation, views race and gender representativeness as mandatory, but they locate this within a wider understanding of multiple axes of difference including class, background, ethnicity, culture, sexual orientation and religion.[826]

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[823] Judges Mokgohloa and Pillay interviewed for the Kwazulu Natal Court, while Judge Mocumie interviewed for the Free State High Court.
[824] For a more detailed discussion on this, see Oxtoby 'Managing a Fraught Transition', p.70.
[825] Albertyn 'Judicial Diversity', p.279.
[826] Cathi Albertyn and Elsje Bonthuys, 'Gender and the Judiciary in Africa: From Obscurity to Parity?', in *Gender and the Judiciary in Africa: From Obscurity to Parity?*, ed. by Gretchen Bauer and Josephine Dawuni (Routledge, 2015), pp. 49–66 <https://doi.org/10.4324/9781315719603>.

Such an approach they argue balances both merit and transformation, while simultaneously interrogating and expanding the traditional concepts of judicial merit.[827] I submit that in order to answer the question of whether a transformation agenda can be used as a means of undermining the JSC's independence, it is necessary to interrogate what qualities are seen as meritorious. Such an approach requires an expansion of the traditional concepts of merit, so that one can better evaluate the JSC's actions. It is suggested that the secondary criteria proposed by the JSC are helpful in this regard. Firstly take for example, the distinction made between two types of competence: technical competence and the ability to give expression to the values of the Constitution.[828] This distinction alone reveals that technical competence in terms of the ability to write good judgments and analyse cases thoroughly, is not enough to be described as competent. This is especially so because in the apartheid era, judges used that type of competence, to buttress an abhorrent system. In the new democratic era, candidates should be able to demonstrate not only that they understand constitutional values, but also that they espouse them in their professional and private life.

This would include a commitment to transforming the legal profession in ways such as mentoring previously disadvantaged persons, being involved in causes that seek to improve South African society or even providing pro bono services to those less privileged. De Vos submits that those who hold views 'out of kilter with the values embodied in the Constitution do not possess the requisite merit'[829] and therefore cannot be appointed, despite how technically sound they are. It is also submitted that the definition of competence, should include the ability to bring diverse views to a judicial panel that are necessary in order to reach

[827] Ibid.
[828] Section 3(b) of the JSC criteria.
[829]Pierre Vos de, 'The JSC Must Redefine Merit to Advance Judicial Transformation » Constitutionally Speaking', *Constitutionally Speaking*, 11 April 2013 <https://constitutionallyspeaking.co.za/the-jsc-must-redefine-merit-to-advance-judicial-transformation/> [accessed 8 May 2018].

a fair outcome in a case. An example of this is a case that was explained by Justice Mocumie who sits on the SCA.

Justice Mocumie remarked on a matter where she sat with four other justices.[830] It was a contractual dispute concerning household repairs and in the application, there was constant reference to the word 'tarp'. The other justices had no idea what it was. It turned out that tarp, was a reference used to describe a particular lamination on the floor that was often found in houses in the townships (high density poor areas). Her underprivileged background in that moment provided her with information that the other justices did not have and assisted them in understanding the case much better, because she was able to explain the importance of this material for people in the townships. This knowledge and other information that people from different social backgrounds and classes can offer, can also be considered as a form of competence. This is because the ability or expertise to grasp elements of the daily social life of a large number of South Africans is a form of knowledge and expertise on its own.

Another helpful definition in the JSC criteria, is the distinction between technical experience and experience in regard to the values and needs of communities. This too is crucial, because 25 years of experience at the Bar is of no value, if one cannot adjudicate with the necessary decorum, patience, objectivity and sensitivity to the socio economic conditions of South Africa, and its painful history of apartheid.[831] It is submitted that the needs and values of South African communities, especially given the historical backdrop, require a judge with the ability to recognise the necessity of an approach to litigants that is respectful and recognises that those who were previously disadvantaged, often experience a lack of power. The JSC's ability to be independent, must include an ability to make appointments that are based on the

[830] Lunchtime Talk on 8 August 2017, hosted by the Centre for Law and Society at University of Cape Town, Law faculty.
[831] Constance Baratang Mocumie, 'Gender Transformation of the Judiciary in South Africa through the Eyes of a Woman Judge.' (Unpublished, 2017).

needs of the court and the society they serve− even if others will deem them as 'unmeritorious'. These appointments it is argued, could be considered 'as advancing the JSC's strategic transformation objectives at a particular point in time'.[832]

Inspite of the above suggestions, it is clear that the definition of 'merit needs to be re-engineered' and this requires the development of a modern judiciary with a skill set to meet the requirements of a wider group of stakeholders.[833] A wider interpretation of merit or the re-engineering of it, will allow for the recognition of 'other' attributes that women can bring, that had not previously been considered as merit. That being said, Ntlama is correct in stating that 'the quest for transformation does not mean that anyone can be appointed to the bench and it is not an entitlement or a privilege of the categories of persons that suffered discrimination to be appointed to the judiciary'.[834] The necessity of legal expertise, judicial craftsmanship, relevant experience (which includes that of non-advocates) and an intellectual ability, are non-negotiable requirements for appointment.

It is therefore argued that unless commentators stop pitting merit against transformation, the definition of merit will remain by and large trapped in its historical roots.[835] Invariably, this will mean that the value and contributions of women candidates before the JSC will not be given their due respect or support. The institutional and substantive independence of the JSC not only requires that they be free from political influence, but it also necessitates that they have the courage to apply their minds fully to transforming the judiciary. Their efforts to do so will be appreciated, if there is a broader understanding of the definition of a meritorious candidate.

[832] Yvonne Mokgoro, 'Judicial Appointments', *Advocate*, 23.3 (2010), 43–48 (p.45).
[833] John Morison, 'Beyond Merit: The New Challege for Judicial Appointments', in *Debating Judicial Appointments in an Age of Diversity*, ed. by Graham Gee and Erika Rackley (Abingdon: Routledge, 2018), pp. 223–39.
[834] Ntlama, p.15.
[835] Solik,p.41.

5.4.2 When Politics and Power Collide on the JSC

The JSC interviews have been an opportunity to see some of the best and brightest of South Africa's legal community. There have been interviews of women in particular, where women have impressed the JSC and the audience watching them. Current Gauteng High Court Judge Lebogang Modiba, narrated how she grew up in a poverty-stricken home with no mother and how she later found solace in the library. Her journey to the bench included a Master's in public administration from Harvard University and setting up her own law firm in Johannesburg.[836] The General Council of the Bar (GCB) who are often highly critical of candidates, were glowing in their comments on her candidacy. They stated that she showed that with effort and commitment, achievements such as appointments to the bench were now possible for any South African, regardless of gender or race.[837]

In her interview for the WCHC bench, now Judge Nolwazi Boqwana at 40, proved that age should not be a consideration for appointment; she had JSC members visibly enamoured with her poise, confidence, intelligence and impressive legal background.[838] There have been various other examples where judges seeking elevation to a higher court have been both an encouragement to women who aspire to judicial office and a reminder that women are not lacking in the skills and competence required for judicial office.[839]

However on occasion, the political composition on the JSC has been a cause for concern. Power and privilege dynamics have arisen in the interviews, providing evidence for the scepticism that a number of interview participants had about the large political composition

[836] JSC Interview, 5 October 2015 at the Radisson Blu Le Vendome Hotel in Sea Point, Cape Town.
[837] Full transcript of the interview available at http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/ModibaM.pdf.
[838] JSC Interview, 8 October 2013 at the Cape Town International Convention Centre, Cape Town.
[839] Other examples include Mandisa Maya's interview for Deputy Judge President of the Supreme Court of Appeal in 2015, Leona Theron and Dhaya Pillay's interviews for the Constitutional Court in 2015 and the interview of Mahube Molemela for the position of Judge President of the Free State in 2014.

on the JSC.[840] In the period of this research, the year 2013 particularly stands out, because some politicians on the JSC, particularly former ministers Fatima Chohan-Khota, and Ngoako Ramathlodi were hostile to those who had issued judgments considered as undermining the Executive's authority.[841] These politicians from the ruling party, the African National Congress (ANC), were replaced in 2014, but political questions still seep into the process on particular occasions. One such occasion arose on 9 July 2015, when four candidates were interviewed for a Constitutional Court vacancy.[842] They were all women. In addition, Justice Mandisa Maya was also interviewed for the position Deputy President of the Supreme Court of Appeal; she became the first woman to ever be nominated for the position.[843]

This historical moment was particularly poignant because critics of transformation had argued that merit was being sacrificed at the altar of transforming the judiciary.[844] Yet before them, the JSC had five well respected women judges, with strong jurisprudential records, stellar careers and very impressive Curricula Vitae. The moment was however overshadowed by then Minister Michael Masutha's questioning on judicial deference and in particular whether judges needed to consider the effects their judgments could have on society at large before they made them. These statements were thinly veiled attacks on the judiciary for a Gauteng High Court decision that held that government had ignored its constitutional obligations when it allowed Sudanese President Omar Al-Bashir to leave.[845] The South African government did this,

[840] Masengu, 'The Judicial Service Commission and the Appointment of Women: More to It than Meets the Eye', pp.3-6.
[841] For more details, see Malan., p.1978-1979.
[842] Interviews held at the Southern Sun O.R Tambo International, Johannesburg.
[843] For the Constitutional Court the JSC interviewed Justices Leona Theron, Zukisa Tshiqi, Nonkosi Mthlantla, and Judge Dhaya Pillay.
[844] Tabeth Masengu, 'Lady Justice and the Road to Equality', *City Press*, 7 July 2015, < https://city-press.news24.com/Voices/Lady-justice-and-the-road-to-equality-20150707> [accessed on 24 November 2019].
[845] See *Southern African Litigation Centre v Minister of Justice and Others* (27740/2015) [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP).

despite a previous court order to detain him under a warrant issued by the International Criminal Court (ICC).

It was clear that the thinly veiled attacks on the judiciary made some members of the commission uncomfortable. As one journalist put it:

> the Minister of Justice kept pushing this thing about consequences and how judges should consider the consequences of their judgements on the outside world, kind of setting the impression that judges should like in a way be compromised in making their decisions. The Minister of Justice has not been, I go as far as saying independent in a way, and he has been very biased.[846]

The Chief Justice tried to defend the judiciary, which resulted in moments where the interviews were more about the tension between the judiciary and the executive, than about the candidate being interviewed.[847] The political agitation present in the interviews, was essentially about power: the power that the executive has; the power that they felt was being exercised unjustifiably by the courts; and the power of politics to enter a judicial interview and dominate what is meant to be a professional process.

This was a clear instance where the JSC's independence as a body, was effectively undermined. The presence of politicians on the JSC means that invariably, there will be political dynamics at play. However, the undue use of political power indirectly negates the JSC's independence. The focus on the Al-Bashir judgment detracted from the opportunity to critically engage with candidates' judicial philosophies or enquire how they perceived their role in a constitutional democracy. This diminished the JSC's institutional independence. The substantive independence of the Minister was also weakened because his objective was to put the judiciary in its place. As opposed to utilising his role for the purposes of the actual task at

[846] Interview with Aarti Narsee.
[847] Tabeth Masengu, 'Small Steps in the Journey Towards Gender Equality on the South African Bench',(*Oxford Human Rights Hub Blog)*, 21 July 2015 <http://ohrh.law.ox.ac.uk/small-steps-in-the-journey-towards-gender-equality-on-the-south-african-bench/> [accessed 22 March 2018].

hand – the administration of objective interviews, to ascertain whether the candidates before him, were fit for a Constitutional Court position.

In another instance, a decision handed down by a judge in a criminal case, earned her the ire of some of the politicians. Judge Violet Phatsoane of the Northern Cape High Court had sentenced former Northern Cape ANC provincial chairperson, John Block to 15 years imprisonment[848] because she found him guilty of corruption and money laundering following an arduous four-year trial.[849] Members of the ANC took her to task by inferring that she had been partial and that Mr Block did not deserve his sentence.[850] Former Minister Faith Muthambi a staunch member of the ANC, further added that Phatsoane's refusal to recuse herself from the trial showed bias.[851] Mr Nyambi an ANC NCOP member, on more than one occasion stated that Judge Phatsoane had been compromised and suggested she had acted in a legally reprehensible manner. Judge Phatsoane was visibly upset and her respite came in the form of opposition MP Julius Malema. He suggested that because the case had gone on appeal, it was still *sub judice* and therefore should not be discussed any further.

Having frequently observed the JSC interviews, it was expected that Judge Phatsoane's interview would not run smoothly because of this particular case. Over the years, I have discerned that any politically connected judgments always come to haunt the person who made a decision that was not in the favour of the ruling party − the ANC.[852] An argument could be made that a politician on the JSC represents their constituency and invariably the party that they belong to. Therefore, politicians cannot be expected to shy away from interrogating candidates when there is a political interest at stake. Rather, as representatives of the people,

[848] JSC Interviews, held 3–7 April 2017, Office of the Chief Justice in Noordwyk, Midrand.
[849] See *National Director of Public Prosecutions v Scholtz and Others* (2027/2012, KS20/2013) [2016] ZANCHC 37 at http://www.saflii.org/za/cases/ZANCHC/2016/37.html.
[850] JSC interview round of 3-7 April, Office of the Chief Justice in Noordwyk, Midrand.
[851] There was an allegation that then Judge President Frans Kgomo had influenced her decision.
[852] For instance in October 2013, Judge Clive Plasket was taken to task over decisions he had made against government in regards to social security in the Eastern Cape.

they should be entitled to openly declare their preference for candidates who make favourable decisions. After all, 'if actual and potential political implications are taken into account, the composition of the JSC and its decisions pertaining to recommendations of candidates are of political significance'.[853] The validity of this argument is noted, because the composition of the JSC does seek to balance different interests.

So perhaps the issue is not that politicians are expected to behave like legal professionals and not have partisan interests. Instead it is how politicians balance accountability, with their role as members of an independent JSC. A JSC who are a critical part of a national transformative project. If the idea is to hold judges accountable for their decisions, then there is need for a consistent pattern of questioning on all types of judicial decisions.[854] Accountability should not be selective and all JSC members politicians included, have to try and restrain their personal agendas. Failure to do this will result in an approach that is solely focused on promoting 'compliant' or deferential candidates. It is submitted that such an approach is not much different from the previous executive type of appointment model, where 'individual merit had not always been the decisive factor'.[855]

Dodek and Devlin suggest a possible solution to ensuring institutional independence on an appointment body with various stakeholders.

> Processes and procedures must be designed in such a way that participants in the selection process do not operate as, or perceive themselves to be, agents/representatives of a constituency. Rather, they are fiduciaries whose responsibility is to select judges who will generate public confidence in the administration of justice.[856]

[853] Malan, p.1968.
[854] For agreement on this aspect see Oxtoby 'Managing a Fraught Transition', p.161 and Richard Calland and Chris Oxtoby, 'Rational, Consistent Process for Choosing Judges Needed', *Business Day*, 18 April 2013.
[855] Du Bois, p.5.
[856] Devlin and Dodek, pp 45-66.

When politicians act as fiduciaries, a candidate's merit has to be viewed holistically and not just in a narrow sense where past judgements in a political case determine whether a candidate will get sufficient votes. If the task is to appoint judges who will generate public confidence, then it is submitted that the judges who are brave enough to make hard decisions, in the face of political pressure are the type of judges that the public needs. Judge Phatsoane was not appointed and we are not privy to the reasons why. Nonetheless, it is certain that such a politically charged interview can only serve to discourage other judges who have ruled against the ANC from applying for promotion. Even worse it would also discourage judges who want promotion, from ruling against the ANC.

5.5 GENDER BIAS IN THE JSC INTERVIEWS

5.5.1 The Interviews as a Traumatic Experience

Though issues around the JSC's independence have arisen in interviews of both men and women, issues around gender bias have been focused on women. The women judges I interviewed were in agreement about how difficult and nerve-wracking the process can be for women. Only one of the six interviewed had appeared before the JSC only once. Four had appeared at least twice for the same vacancy after it had been re-advertised in the same or subsequent years[857] and the sixth had been interviewed more than two times for different positions. One judge shared her thoughts on the interviews.

> My sense is, it's a very traumatic interview, and it's a very unusual situation. In the sense that a lot of my colleagues speak of it, speak of having Post Traumatic Stress Disorder afterwards but, it can be, even if it goes well. It's extremely gruelling and it takes some time to recover from it. So, I think what surprised me about it was that, I wasn't expecting that. There's a sense of like if you've had a heavy term at work or a heavy six months at work. You have that condensed into the space of a day and there is a sort of recovery.[858]

[857] This was for the High Court and other higher court vacancies.
[858] Interview with Judge E, 19 June 2017.

The description of the interviews as gruelling was also confirmed by another judge who related an instance of one of the heads of courts being extremely antagonistic towards her in the interviews for his court.[859]

It is worth acknowledging that in some respects, the process has moved away from what was once a very sexist process. The questioning process under Chief Justice Mogoeng's leadership is much improved. There have been no sexist or homophobic questions posed to the candidates, as was the case with Judge Anna-Marie de Vos who interviewed for the position of Deputy Judge President of Gauteng in 2005. She was quizzed about the fact that she was a lesbian and asked whether her sexual orientation would not make her colleagues uncomfortable.[860] Judge Kathy Satchwell's sexual orientation also appeared to be a barrier when she interviewed for a vacancy on the Constitutional Court in 2009.[861] A complaint from the Society for the Protection of the Constitution averred that 'god fearing people would not accept a lesbian judge'.[862]

In the 2006 interview round, Penny Andrews who was based in the USA at the time, was asked whether getting a boyfriend in South Africa might persuade her to return if she was unsuccessful in her bid to join the Constitutional Court.[863] These questions and others like them reveal a disturbing truth. Despite having a progressive and transformative Constitution, the JSC members are part of a society that is 'steeped deeply in patriarchal and masculinist cultural attitudes'.[864] This means that gender bias and prejudice is likely to be present in interviews. In the period of this research, no interview epitomised this more than that of Judge Nozuko Mjali.

[859] Interview with Judge A, 22 October 2016.
[860] Sheena Adams, 'Lesbian Judge Quizzed about Her Lifestyle ', *IOL News*, 19 October 2005 <https://www.iol.co.za/news/south-africa/lesbian-judge-quizzed-about-her-lifestyle-256414> [accessed 7 May 2018].
[861] 'Judge Defends Her Private Life', *News24*, 22 September 2009 <https://www.news24.com/southafrica/news/judge-defends-her-private-life-20090922> [accessed 7 May 2018].
[862] Ibid.
[863] Andrews, p.571.
[864] Ibid.

5.5.2 The Case of Nozuko Mjali

Judge Nozuko Mjali a sitting judge on the Mthatha High Court (a division of the Eastern Cape High Court), was seeking a transfer to the Bisho High Court in the same division where her family was based.[865] Regulation 4 of the JSC Act requires that a judge seeking a transfer must apply for a vacancy and be interviewed by the JSC as per standard procedure.[866] Judge Mjali's transfer was requested after her husband who stayed in Bisho with their young children, was charged with the rape of their domestic worker. The husband's case was widely reported in the media with reference also being made to an instance where Judge Mjali was presiding over another rape trial, while her husband was appearing in the court right next to hers.[867] Judge Mjali was initially appointed in 2010, and with no negative comments regarding her application to the Bisho Court, it was expected that the interview would be a mere formality. Instead, Judge Mjali had a devastating interview which left her sobbing before the JSC.

It was clear that the Judge President of her division Themba Sangoni, was not in support of her transfer request and that he was hostile towards her. He intimated that she knew that her family lived in Bisho when she took up the position in Mthatha and that she had managed fine by commuting. Mjali described in detail how the arrest of her husband had traumatised her nine year old child and how her three year old who was autistic was traumatised by her absence.[868] She further explained to the JSC how she had to stop commuting with one of her children from East London (where the child was in a special needs school), after she had received death threats due to a criminal case she was hearing and she said she sought the transfer to find a balance between work and family life.[869] One commissioner asked Judge Mjali how she had

[865] JSC interview held on 8 October 2014 at the Twelve Apostles Hotel, Camps Bay, and Cape Town.
[866] *Judicial Service Commission Act 9 of 1994,Procedure for Commission* .
[867]Gugu Phandle, 'Rape Case Irony for Judge', *Dispatch*, 26 June 2014 <http://www.dispatchlive.co.za/news/2014/06/25/rape-case-irony-for-judge/> [accessed 9 May 2018]..
[868]Niren Tolsi, 'Judge Tells JSC about Husband's Arrest for Rape ', *News24*, 30 April 2014 <http://www.news24.com/Archives/City-Press/Judge-tells-JSC-about-husbands-arrest-for-rape-20150430> [accessed 12 May 2017].
[869] Ibid.

coped since the incident and she explained that she had relied on the generosity of her colleagues to exchange caseloads, so she could work in East London closer to Bisho.

Commissioner Modise enquired as to whether the judiciary provided any support for people in her situation because women were often selfless in the face of challenges. Judge Mjali informed the JSC, that no assistance was available within or from the judiciary. After such a harrowing interview that left many in the audience shaken, the JSC decided not to recommend Judge Mjali for the Bisho vacancy and it was left open. They did not provide reasons why, but the JSC spokespersons stated that there had been extensive deliberations and that other measures could be taken to ensure that Judge Mjali worked closer to her family. This however, could only be done by her Judge President.[870]

At least six interview participants mentioned Judge Mjali's interview as an example of the JSC's failure to be sensitive towards the challenges women candidates face and/or used it to illustrate just how terrible the process can be. One senior judge explained that granting Judge Mjali the transfer, would have enhanced the gender transformation in the judiciary because

> [I]f she was placed, where she could just have the comfort of having a normal life. She would be able to give her all to this demanding job. Stunningly, the JSC just closed its eyes to everything she said and each and every one of the reasons in my view that she gave was compelling. She should have been given what she was asking for.[871]

She also stressed that the interview did little to encourage women in the profession aspiring to be judges, that the JSC would acknowledge their concerns, if they joined the bench.[872] A journalist mentioned that the highly insensitive approach to Majli led one to believe 'that there was clearly something else that was going on that we did not know about'.[873] She added that

[870] Franny Rabkin, 'Judge Makes Tearful Appeal for Transfer', *Pressreader*, 9 October 2014, pp. 1–2 <https://www.pressreader.com/south-africa/business-day/20141009/281573763935121> [accessed 7 May 2018].
[871] Interview with Judge C.
[872] Ibid.
[873] Interview with journalist R, 5 October 2016.

the message that was sent to women judges was that the JSC would not 'cut them any slack' for being mothers.[874]

Another judge expressed similar shock at how the interview unfolded and stated:

> That's the kind of locus classicus on how not to treat women and an appalling lack of sympathy, of any kind of empathy or even basic sympathy. And I think, my concern is, there seems to be an attitude that they will not consider transfers, so they're going to make a point with Mjali.[875]

Journalist Narsee's deduction from the interview was that women, especially women who are married and have children, are at a disadvantage before the JSC. She opined that despite the very emotional and honest interview, Mjali's position was viewed by the JSC as one of weakness.[876] A senior advocate called the lack of interrogation by the JSC of the challenges Mjali faced as 'deeply problematic' and he stated that the JSC needed to clarify 'what their policy position is on questions of gender equity'.[877] In his opinion, the interview was a reflection of the legal profession as a rough place and a reminder that different challenges impacted women differently.[878]

I have previously expressed the view that expecting somebody in the position of Judge Mjali to serve the public efficiently and continuously, without providing support systems to help them cope, was not only frightening, but damaging in the long term for the judiciary as a whole.[879] In the interview, concern was expressed by Judge President Sangoni and ANC MP Mathole Motshekga that candidates often sought to leave Mthatha High Court, because it was located in a 'rural' town in comparison with the others. Yet it was clear in this case that Judge Mjali had a valid reason for wanting to leave, a reason not based on a vain desire to be in a

[874] Ibid.
[875] Interview with Judge E.
[876] Interview, 6 August 2017.
[877] Interview with Legal Professional S.
[878] Ibid.
[879] Tabeth Masengu and Katy Hindle, 'The New JSC in a Man's World ', *The Con Magazine*, 10 November 2014, <http://www.theconmag.co.za/2014/11/10/the-new-jsc-and-the-patriarchy/> [accessed 10 April 2018].

'city'. Judge President Kgomo made a subtle plea for Mjali, when he pointed out that Mjali had performed judicial duties in different parts of the country and he wanted 'commissioners to understand her passion and sacrifice', so that all things could be considered during deliberations.[880] Yet this plea by a fellow commissioner was surprisingly not enough to garner the support of at least thirteen JSC members, despite what were undeniably compelling circumstances.

The interview certainly raised questions about whether women can be treated equally before the JSC, if there is no recognition of the burden of motherhood and caregiving on women judges. This is a point Justice Mocumie considers in her article on the gendered challenges faced by women in the judiciary. She submits that:

> The JSC missed the opportunity to be flexible in respect of her dire circumstances. In my view, this was further exacerbated by the fact, that in the interview, the commissioners did not reflect, nor did they interact with her on the gendered aspects of her application. The application should have been dealt with internally on its merits and with the assurance that she would receive support on the way forward. Instead, her children ended in the same situation they were in before —exposed to all the adverse and negative publicity of their parents' situation and the absence of a mother who could not spend enough time with them.[881]

Hodgson et al argue that, 'the JSC failed to acknowledge the double burden women face when they are required to take on both primary caregiver roles and full-time work, and to attempt to give effect to substantive gender equality to alleviate these challenges'. [882]

They conclude that instead the JSC members, unsympathetic to Mjali, voted against her transfer and perpetuated patriarchal discrimination against women in the workplace.[883] While we may never know why Mjali's Judge President was not supportive of her transfer, it has been suggested that the opinion of the Judges President weigh heavily in some voting

[880] JSC Interview for Nozuko Mjali.
[881] Mocumie 'Gender Transformation in the Judiciary ', p.27.
[882] Mateenah Hunter, Fish Tim Hodgson, and Catherine Thorpe, 'Women Are Not a Proxy Why the Constitution Requires Feminist Judges', *South African Journal on Human Rights*, 33.3 (2015), 579–606.
[883] Ibid.

deliberations.[884] In this case since the Judge President was a man, one couldn't help but wonder if the outcome would have been different had the Judge President been a woman.

5.6 MORE WOMEN ON THE JSC EQUALS MORE WOMEN BEING APPOINTED AS JUDGES?

5.6.1 Gender Composition of the JSC over the years

In the period of this research, the number of women members on the JSC went from six to eight, less than 30% of the entire body. The South African JSC falls short of the SADC guidelines for at least 50% women in decision-making positions. In the period 2013-2014, the women JSC members were Deputy Minister of Home Affairs Fatima Chohan, Professor Engela Schlemmer, Advocate Leah Gcabashe SC, Ms Andiswa Ndoni (a presidential appointee) and two members of the National Council of Provinces (NCOP).[885] A critical interrogation of the issues that women face had been lacking and the only questions that did attempt to dig deeper, came from Advocate Gcabashe. Chohan's focus was mainly on questions of judicial deference, while Schlemmer often focused on whether candidates had published academically. Andiswa Ndoni's questioning was directed more at the dynamics in the legal profession. The other two hardly spoke which led to comments about whether a lack of gender balance on the JSC fed into how female candidates were interviewed and viewed.[886]

It was reported that the lack of engagement by some female commissioners was considered as embarrassing and potentially robbing 'the commission of a crucial gender voice', 'additional perspectives' and, 'insights'.[887] It is important to state here that the responsibility to interrogate challenges that women candidates face, does not lie with the women on the JSC alone. Women commissioners can bring different perspectives and insight into the process.

[884] Interview with Judge C.
[885] ANC Members Mmatlatla Boroto and Peace Mabe.
[886] Niren Tolsi, 'JSC Is Getting to Grips with Gender', *Mail & Guardian*, 11 October 2013 <https://mg.co.za/article/2013-10-11-00-jsc-is-getting-to-grips-with-gender.> [accessed 9 May 2018].
[887] Ibid.

Nonetheless, all members of the JSC should be actively seeking to try to question or at least understand, the difficulties that are faced by the very women they need to be appointing to the bench. During the Majli interview, Judge Kgomo provided an example of this, when he made his plea to the JSC. It was Julius Malema MP another man, who asked Sangoni during the interviews, why he couldn't allocate Majli to cases only in East London, so she could be nearer to her children in Bisho. Another man, Advocate Ishmael Semenya enquired whether Mjali and her children had received trauma counselling.

Therefore, there has been some interrogation into women's challenges by men, it just has not happened consistently. The Chief Justice since 2013, perhaps fuelled by complaints about the lack of progress in appointing women,[888] has constantly asked women about the challenges they face in the legal profession that impede their access to the bench.[889] These questions have often been repetitive, mostly centred on the paucity of women appearing as counsel in litigation matters before the courts. A change in the JSC composition in October 2014, brought with it a wind of change. Chohan, Schlemmer, Boroto, and Mabe left the JSC. Ms Thandi Modise together with Ms Dikeledi Mampuru were appointed as representatives of NCOP. Ms Thoko Didiza, and Ms Dikeledi Magadzi arrived as the ANC MP's, while Lindiwe Nkosi-Thomas SC was a presidential appointee and Professor Nomthandazo, a representative of academia. Added to Ndoni and Gcabashe, the complement of women grew to eight, the highest ever number of women on the JSC since its inception.[890]

The opposition members on the JSC also changed with Julius Malema, the controversial leader of the Economic Freedom Front (EFF), and Inkhata Freedom Party (IFP) MP Narend

[888] Democratic Governance and Rights Unit and Sonke Gender Justice, *'CGE Complaint on Gender Transformation in the Judiciary.'* (Cape Town, 2012), pp. 1–19.
[889] In October 2012, the author on behalf of the DGRU filed a joint complaint with Sonke Gender Justice where the Chief Justice and the JSC were respondents in the complaint. It was made before the Commission for Gender Equality and resulted in an Investigative Report in 2016.
[890] After April 2017, Gcabashe and Ndoni were replaced by Advocates Thandi Norman SC and Jennifer Cane SC.

Singh also being appointed to the JSC. The effect of the new appointees was felt immediately. Thandi Modise impressed from the first interviews, when she asked a woman candidate vying for the position of Judge President, how she would cope with men trying to undermine her.[891] It was the first time we had heard a commissioner bluntly pose such a weighted question. Modise was also quick to question Judge Mojalefa Rampai a male candidate vying for the same position, who advanced that a leadership position needed people who were seasoned and 'chiselled' and there were not many women like that.[892]

Thoko Didiza also asked Judge Rampai whether he would consider making gender mainstreaming part of the curriculum if appointed and whether he would support the appointment of a Judge President who was his junior on the bench (and a woman). Didiza also asked those vying for leadership, what steps they would take in addressing gender imbalances and asked all candidates what they had done to mentor other women from their communities. These two commissioners in particular, have continued to impress while on the JSC and it could be as a result of their history in gender activism.[893] While other JSC members do ask questions about women's challenges, these two women and Advocate Gcabashe during her term, consistently asked substantive and nuanced questions about gender equality, gender-based violence and women's difficulties in the legal profession. Their consistency appears to have rubbed off on other members, some commissioners seem to be asking more 'enlightened' gender related questions. This is an example of the advantage that different perspectives can have on a process.

[891] JSC Interview of Judge Constance Mocumie, 8 October 2014 at the Twelve Apostles Hotel, Cape Town.
[892] JSC interview 8 October 2014.
[893] Didiza had several roles in women's rights prior to her political career and Modise was one of the founders of the ANC Womens League.

5.6.2 Perspectives on the Gender Composition of the JSC

The responses to the question on whether the gender composition of the JSC does influence or have an impact on the number of women getting appointed fell within three separate camps. The first camp agreed with the assertion that more women at the JSC would lead to more women being appointed as judges. Seven of the participants were of this view and a common reason given was that women on the JSC would be able to identify better with women candidates. One participant said that more women would be appointed, because they would be more empathetic and identify with other women's struggles, and the obstructions they had faced in their careers.[894]

Tilley offered another reason, stating that research had shown that people were often thought to be competent, if they looked and sounded like the selector determining the competence.[895] Hence in her opinion, the gender balance on the JSC would be determinative in the appointment of women, as women are more likely to think women are competent. A third argued that the impact of more women on the JSC could be seen in the increase in women getting appointed. Specifically, she proffered that this is because there would be a stronger voice on the JSC to speak for the cause of women.[896] This was supported by a JSC member who stated that women are inclined to support women, because of the perspective that they came with from their own backgrounds.[897]

The participants in the second camp were adamant that the proportion of women on the JSC has no bearing on appointments. At least three of the commissioners mentioned that in some instances, women JSC members have not supported women candidates. They stated that sometimes it was because the women candidates were not deemed as capable, and that at other

[894] Interview with legal professional L, 12 October 2016.
[895] Interview, 4 October 2016.
[896] Interview with Judge D, 12 January 2017.
[897] Interview with Commissioner A, 14 May 2017.

times it was hard to discern why they did not support the women.[898] The latter argument was similar to the one made in Zambia in regard to the 'queen bee' syndrome and women's propensity to be jealous of other women. Modise said she only supported women who were extremely competent and was even harder on women candidates, because she wanted that woman to be 'a shining example to others who come behind them'.[899]

Advocate Ngalwana said that from his experience, having more women on a body did not mean an advancement of other women. He added, 'you put women in certain positions, and you hope that they are going to adopt a different approach from men, you find them mimicking men' and not bringing a different perspective.[900] Another judge suggested that the number of women on the JSC had no bearing, especially for the Constitutional Court vacancies, because the President appoints on the advice of his close circle of confidants. These confidants she pointed out, weren't even present at the interviews.[901]

The final camp argued that the composition of the JSC would only be determinant if certain conditions were present. The first condition is that the women on the JSC would have to have a feminist perspective. It was pointed out by one participant, that a feminist perspective can also be present in male commissioners.[902] This perspective is what I referred to earlier in the corresponding Zambian section, as a perspective that is committed to advancing women's rights and equality between men and women.[903] Another judge pointed out that even an all women commission would serve no purpose, if it didn't have the correct objectives in mind.[904]

[898] Views from Judge Kgomo, Advocate Leah Gcabashe and Commissioner B.
[899] Ibid.
[900] Interview, 7 July 2017.
[901] Interview with Judge B.
[902] Interview with Judge A.
[903] See Chapter 4, section 4.6.3 on whether the gender composition of the JSC in Zambia has made a difference.
[904] Interview with Judge C.

One participant cautioned against assuming that women would vote for women, because of a natural affiliation. She described this thinking as gender essentialism. She rather preferred the inclusion of people from different backgrounds, ages and worldviews. This she argued, would have a greater impact on diversity in regard to judicial appointments, than gender diversity amongst JSC members would.[905] A final more nuanced response came from an advocate who stated that there was no direct correlation between power and the extent to which there was commitment to questions of gender equality and diversity. Men too could understand the plight of women in the profession and vote for them.[906] However, he argued that women would bring a different perspective to the challenges than men would, and it was important for those women to be part of the JSC process too.

5.6.3 Improving the Composition for other reasons

The responses from the South African participants offer insight into how difficult it can be to deduce the relationship between the number of women on the JSC and the number of women getting appointed. There is no evidence that suggests that in the South African case, better gender diversity on the JSC would lead to more women being appointed. Yet some conclusions can be drawn from the responses. For those who believe that it would make a difference, they point to the fact that as more women have been appointed to the JSC, more women have been appointed as judges. In 2009, when only three women at most sat on the JSC, only 23% of the judges were women.[907] In 2017 with the eight women as the highest number ever on the JSC, 37% of the judges are women.[908]

There is no direct evidence of a causal link between the two as other factors have been present. For example more women have been nominated for positions in that same time and

[905] Interview with journalist R.
[906] Interview with Legal Professional S.
[907] 49 out of 216 judges.
[908] 89 of 240 judges.

there has been more advocacy around the need to transform the judiciary by gender. Yet it is perceived that there is a link and these perceptions fuel the desire for more women commissioners. Participants also relied on wider interpretations of diversity when they argued that women commissioners could bring a different perspective and that their presence on the decision-making body, also has symbolic importance. The equity argument was rarely mentioned. The view expressed by some participants that perhaps Mjali would have been treated better had there been more women on the JSC, points to the belief that it is necessary to have more women on such bodies, to negate discriminatory attitudes. They agree with Kenney's view that the presence of more women on the JSC is the antidote to discrimination against women coming before the JSC.[909] In addition, two participants who argued that gender diversity on the JSC did not necessarily mean more women getting appointed, made an important point. They said that women were likely to shy away from an interview process that may humiliate them and then it would not matter who was sitting on the JSC.

This is similar to views expressed in a discussion with three judges in respect of why women were unwilling to make themselves available for a Constitutional Court vacancy in 2015. I was told that women were apprehensive about going before the JSC because of previous negative interview experiences of their own and others.[910] Hence their fear was not whether there would be enough women sitting on the JSC, but rather, what the JSC as whole represented. If the JSC represented an extension of a societal patriarchy and the hostility that some women experience in the legal profession, then the gender composition would hardly be relevant. Here the emphasis is that gender equity should not only be present on the JSC, but that gender main-streaming should be infused in the process, so that it is a safe and fair process

[909] Sally J Kenney, 'Which Judicial Selection Systems Generate the Most Women Judges? Lessons from the United States', p 6.
[910] Tabeth Masengu, 'Gender Transformation as a Means of Enhancing Perceptions of Impartiality on the Bench', *The South African Law Journal*, 133.1 (2016), 475–90.

for women to undertake. Gender mainstreaming could be achieved by institutionalising gender concerns about the JSC process and 'contributing to a long-term transformative process for the organisation in terms of attitudes, culture goals, and procedures', towards and in respect of gendered issues. [911]

On a final note, I have previously argued that perceptions of impartiality are extremely important for the JSC process.[912] If women are represented only by a third of the JSC commissioners, how can there be an expectation of a fair, impartial and non-sexist process? This question is still relevant especially because I have witnessed on many occasions, how the JSC process can easily become an 'old boys club'. When male commissioners are huddling in corners during breaks or even whispering to each other during the interviews, it feels no different from other male dominated spaces. A male-dominated JSC suggests partiality, thereby creating the impression that much like the legal profession and the current judicial composition, the JSC operates in a man's world. [913] Thus I would add that for the South African process, the appearance and enhancement of impartiality could be an added justification for diversity on the JSC. The message from all three camps in regard to the diversity issue, all boils down to a desire and need for gender conscious JSC members. Or rather, members with a feminist perspective that are willing and able to listen, reflect on and interrogate women's challenges. This can and should not be limited to women JSC members only.

5.7 HAS THE TRANSPARENCY OF THE APPOINTMENT PROCESS HELPED WOMEN GET APPOINTED?

One of the other sub-questions explored by this research is whether greater transparency of an appointment process, would lead to more women getting appointed. Thomas has highlighted

[911] Fenella Porter and Caroline Sweetman, 'Gender Mainstreaming since Beijing: A Review of Success and Limitations in International Institutions', *Gender & Development*, 13.2 (2009), 11–22(p.11).<https://doi.org/10.1007/BF03085685>.
[912] Masengu, 'Gender Transformation as a Means of Enhancing Perceptions', pp.485-490.
[913] Ibid.

that the most widely addressed issue in regard to appointments, 'is whether the method of judicial selection affects the relative success of women attaining a seat on the bench'.[914] The use of the merit appointment system after apartheid has opened the JSC to scrutiny. As elaborated under section 3 of this chapter, for the most part, the South African process allows for its 'workings to be readily visible to outsiders, which then makes it likely for it to operate as intended'.[915] However I suggest that irrespective of the admirable levels of transparency, the South African case study suggests that transparency alone is not enough to ensure an increased presence of women on the bench. .

Firstly, the power and political dynamics that arise from the broad composition of the JSC have in some instances been detrimental to women. The examples of the Constitutional Court interviews in 2015 or the interview of Judge Violet Phatsoane reveal that JSC interviews can become a site to settle scores. As Thomas has argued, nominating commissions do not eliminate politics from judicial selection, they merely replace traditional party politics with executive branch politics amongst others.[916] The presence of these politics does not augur well for women who have judicial aspirations and they are rather discouraged from appearing before the JSC. This is especially so if they have handed down judgements that went against government or might be considered controversial.[917] Thus, the transparency of the JSC processes is negated if it leads to a public appointment system that potentially harms the people taking part in it. The manner in which the JSC members exercise influence and when they do it is a pivotal part of the process that can not be resolved by more transparency.

Secondly, there has been a failure to recognise the implications for women in the judiciary who are mothers and the intersections of their roles as judges and caregivers as

[914] Thomas, p. 35.
[915] Handsley and Lynch, p 199.
[916] Thomas, p.92.
[917] Masengu, 'The Judicial Service Commission and the Appointment of Women: More to It than Meets the Eye', p.6.

witnessed in the Mjali interview. On the one hand if not for the transparency of the process, we would have been unaware of the JSC shortcomings in this respect. On the other hand, the transparency of the process meant that Judge Mjali's personal life was aired publicly, which must have not only embarrassed her, but also discouraged other women. In this respect, concerted efforts to improve gender diversity from the JSC as power holders, must go beyond lip service. If women are discouraged from appearing before the JSC for interviews, then there are fewer women to recommend for appointment which invariably means the judiciary will continue to have fewer women than desired. The transparency of the process has proved to be critical for civil society campaigns as will be addressed in Chapter 8. However while transparency, may be a starting point, it is not a panacea for improved gender outcomes.

5.8 CONCLUSION

In this chapter, I have examined the South African JSC process regarding transparency, independence and representativeness. Though the process is one of the most public processes in the region, it is not devoid of challenges. The *Cape Bar and Helen Suzman Foundation* cases are evidence of the various issues that have arisen in regard to the workings of the JSC. This chapter analysed the contentious aspects of the process in regard to publicity and provided reasons as to why too much transparency, might have negative consequences for candidates. An enquiry was made in respect of the extent to which the JSC's objectives to transform the judiciary could be a foundation for weakening the independence of the JSC. Using the debates about merit versus transformation as a lens, I argued that a broader definition of merit would prevent accusations that the JSC was trying to weaken the judiciary.

The second issue that was discussed under the JSC's independence was the instances when the ANC members have used their political positions to impair some interviews. Here, I concluded that the value of independence is not only relevant to influence from outside interference, but it includes the question of whether commissioners can be independent enough

to act according to their constitutional obligations. The next part focused on examining the gender bias present in some of the JSC interviews, focusing on the interview of Nozuko Mjali. This interview exemplified the consequences of a failure to understand the structural challenges that women judges face. The penultimate discussion was on the value of diversity where I concluded that there is no evidence of a link between more women on the JSC and the number of women appointed as judges. Nonetheless, I provided reasons why having more women on the JSC is still important for the JSC as a body and for the courts, and why it is a cause worth pursuing.

The final part of this chapter investigated whether greater transparency in a judicial appointment process, would lead to more women being appointed. I concluded that in the South African context, greater transparency has not necessarily resulted in more women being appointed on the bench. Rather, bias, politics and power dynamics present in women's interviews have overshadowed some of the values of transparency.

CHAPTER 6
EXPECTATIONS OF JUDGES AND HOW THEY CAN AFFECT THE APPOINTMENT OF WOMEN

6.1 INTRODUCTION

> We all possess a certain image of a judge. He is old, male and wears pinstriped trousers. He decides only what is necessary, says only what is necessary and on no account ever talks to the press. He is respected and revered. His word is, literally and figuratively, the law, eternal, majestic. Even those of us who do not fit naturally into the traditional image tend to grow into it. The truth cannot be avoided. We judges, like the old image. We cling to it. And why not? It brings comfort, the comfort of knowing one is right, at least pending the verdict of the Court of Appeal, although most of us have learned to rationalize that as well. It brings security, the security of knowing what to do and when to do it. And it brings gratification, the gratification of knowing we are important and appreciated. [918]

The quote from Canada's first woman Chief Justice Beverly Mclachlin, encapsulates the previous (and in some quarters, still common), idea of the judge. This idea is one of a masculine description of authority; coupled with a detachment that comes with such a position of privilege, and the esteem that comes with wielding such responsibility.[919]

At the commencement of this research certain formal and informal aspects of the appointments process were identified, which would be examined in order to answer the research question. These were the recruitment process (JSC's role), the legal profession, the role of political leadership, transparency and the landscape regarding women's rights. However as I conducted my interviews, a constant theme that arose was the role of judges and the qualities and conduct that are expected from these judges. All the participants stated that an interrogation of the judicial appointment process alone was not enough. I had to understand what is expected of judges. This chapter therefore explores the various dimensions of what is expected of judges, from the vantage point of international guidelines, judiciaries, lawyers and other relevant stakeholders.

[918] Beverley McLachlin, 'Role of Judges in Modern Commonwealth Society', *The Advocate*, 53 (1995), 681–87 <https://doi.org/10.1097/ANS.0000000000000109>.
[919] Thornton, 'Affirmative Action, Merit and The Liberal State',p.30.

In particular, this chapter is interested in how these expectations of judges impact participants' perceptions of women judges and also, how they impact on the process of appointing judges. Invariably, expectations about who should be appointed as a judge are tied to notions of who a judge should be. If this notion was largely tied to masculine traits or gendered notions of authority and experience, then the appointment of women to the bench would be affected. Therefore, it was necessary to ask some questions. Are the requirements for what is expected of a judge context specific? Do women not possess the qualities of a good judge, or do they face different challenges because of their gender? Has the role of the judge evolved, resulting in a need to shift away from old conceptions of judges, which would allow for the inclusion of more women?

McLachlin notes that in modern Commonwealth societies, judges are required to be servants of the people, in the 'highest and most honourable sense of that term'.[920] The new system for judges involves changes in their tasks and duties, in the way they discharge those duties, in the process, the administration of judges and the appointment and removal of judges.[921] Indeed, the way judges work has changed drastically and the judicialisation of politics is a visible example of this change. The judicialisation of politics is the 'ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies that define the boundaries of the collective or cut through the heart of entire nations'.[922] Courts in Africa have made a fair contribution to the judicialisation of megapolitics particularly in the last two decades.[923] This is typified by the fact that the electoral processes and outcomes were decided by the courts in Uganda in 2006,

[920] McLachlin, p. 862.
[921] Ibid.
[922] Ran Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts', *Annual Review of Political Science*, 11 (2008), 93–118 <https://doi.org/10.1093/oxfordhb/9780199208425.003.0008>.
[923] For a definition of mega-politics, see Ibid, p.2.

Ghana in 2013, Kenya in 2013, Malawi in 2014, and in Zambia in 2016.[924] Courts have also had to decide on whether incumbent presidents can run for a third term in office.[925] In another instance, the Zambian Constitutional Court had to determine whether ministers should repay the salaries they received, while parliament was dissolved.[926]

While matters of megapolitics are new to the Zambian judiciary, the courts in South Africa have been delving into political controversies since 1997. In that year, the Constitutional Court had to adjudicate on the universal constitutional right to medical treatment in the context of an under-resourced health care system.[927] Since then, the courts have decided on several policy and political matters. The courts have mandated that government roll out antiretroviral drugs to HIV-positive mothers[928] and decided that the failure to provide learners at public schools with a textbook for each subject prior to the commencement of the 2014 school year, was an infringement of their rights to a basic education.[929] The courts have also determined that former President Jacob Zuma should abide by a decision of the Public Protector, requiring him to repay money spent on upgrades at his personal home.[930] They have also held that the

[924]Rachel Ellett, *Judicial Independence Under the APRM : From Rhetoric to Reality*, Occasional Papers, 2015 <file:///H:/Conference Attendance 2016/LSA 2016 conference/Articles/Judicial Independence under the APRM.pdf>[accessed on 17 November 2018].
[925] For example, Burundi in 2015 and the Zambian Constitutional Court decision in December 2018.
[926] *Constitutional Court of Zambia, Steven Katuka & Others v The Attorney General & Others,* 2016, 2016/CC/0010/ 2016/CC/0011 <https://zambialii.org/zm/judgment/constitutional-court/2016/1/Katuka v LAZ.pdf> [accessed 26 June 2018].
[927] *Soobramoney v Minister of Health* (Kwazulu-Natal), (CCT32/97) ZACC 17; 1998 (1) SA 765 (CC), <http://www.saflii.org/za/cases/ZACC/1997/17.html> [accessed 26 June 2018].
[928] *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16', *CCT9/02*, 2002, 2002 (5) SA 703, <http://www.saflii.org/za/cases/ZACC/2002/16.html> [accessed 28 June 2018].
[929] *Minister of Basic Education v Basic Education For All*, 2015, (20793/2014) [2015] ZASCA 198; [2016] 1 ALL SA 369 (SCA), <http://www.saflii.org/za/cases/ZASCA/2015/198media.pdf> [accessed 26 June 2018].
[930] *Economic Freedom Fighters v Speaker of the National Assembly & Others*, (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC), <http://www.saflii.org/za/cases/ZACC/2016/11.pdf> [accessed 16 July 2018].

government ignored its constitutional obligations when it allowed Sudanese President Omar Al-Bashir to leave, despite the existence of an international arrest warrant in his name.[931]

These and other cases show that judges are now in some sense political actors, bolstered by constitutional protections that were absent in the past. They now have the power to make pronouncements on the conduct of other branches of government. With the new role of judges in perspective, the discussion in this chapter commences with a review of international guidelines pertaining to the role of the judge. The second part then explores the judicial codes of conduct for the two jurisdictions in this thesis, in order to ascertain what is required from them. These codes of conduct have a bearing on this discussion because the expectations of a good judge are a combination of conduct and qualities. The subsequent part of the chapter locates the discussion in literature, by analysing current perceptions of the role of the judge. Here I focus on deducing the most common qualities required for judges, from the views of previous and sitting judges. The examination of literature confirms that what is expected of judges, is a combination of procedural conduct, substantive qualities and external factors central to the role. Therefore, the discussion in this chapter combines these different facets under the umbrella of expectations of a judge.

Section four focuses on the expectations of judges in Zambia and it discusses perceived disadvantages for women, using data from interview participants. The fifth section looks at expectations of judges in South Africa using participant observation combined with data from interview participants. I also examine the obstacles facing women candidates in South Africa. The sixth section of this chapter answers three questions. Whether the expectations of judges

[931] *Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others* (2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP), <http://saflii.org/za/cases/ZAGPPHC/2015/402.html> [accessed 31 July 2018].

are gendered, whether women are at a disadvantage because of particular obstacles they face and whether some expectations of judges are context specific.

6.2 GUIDELINES ON JUDGING AND JUDICIAL QUALITIES

6.2.1 International Standards

There are a number of guidelines outlining what is expected of judges. In 1985, the United Nations (UN) adopted the Basic Principles on the Independence of the Judiciary (UN Basic Principles).[932] The preamble acknowledges that judges are charged with the ultimate decision-making over life, freedoms, rights, duties and property of citizens. Consequently the judiciary is called to be independent, impartial and to conduct themselves in such a manner as to preserve the dignity of their office.[933] Article 10 states that 'persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law'.[934] The UN Basic Principles conclude with information on the professional secrecy required of judges and the grounds on which a judge can be removed from office. Almost two decades later, the Judicial Group on Strengthening Judicial Integrity, which included various Chief Justices and international judges, met to provide the judiciary with a framework for regulating judicial conduct.[935] The result was the Bangalore Principles for Judicial Conduct (herein Bangalore Principles), which were intended to establish standards for ethical conduct of judges.[936]

The Bangalore Principles outline six key values relevant for judicial officers, two of which are independence and impartiality —already mentioned in the UN Basic Principles. The

[932] *Basic Principles on the Independence of the Judiciary*, Office of the High Commissioner of Human Rights < https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> [accessed on 24 November 2019].
[933] Ibid at 1-8.
[934] Ibid, article 10.
[935] This included amongst others, Chief Justice Latifur Rahman of Bangladesh, Chief Justice Bhaskar Rao of Karnataka State in India, South African Deputy Chief Justice Langa, Chief Justice Nyalali of Tanzania, the Judge Christopher Weeramantry, Vice-President of the International Court of Justice.
[936] *The Bangalore Principles*, Judicial Group on Strengthening Judicial Integrity.United Nations Office on Drugs and Crime, < https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf> Strengthening Judicial Integrity.

other four are propriety, integrity, equality and competence, combined with diligence. Each value commences with the principle statement, followed by a description of what is expected from judges under that principle. Independence as a value is informed by two principles. There is an institutional requirement, where a judge must be free from extraneous influences, because she/he is expected to enhance the institutional and operational independence of the judiciary.[937] Then there is an individual requirement, which I refer to as an extended definition of substantive independence in Chapter 2 of this thesis.[938] Here the judge needs to be independent from colleagues and any internal influences that may arise.[939] In respect of impartiality, judges are called to perform their duties without favour, bias, and prejudice and to avoid making comments that may affect the fair trial of any person.[940] The value of integrity receives the shortest attention in the Bangalore Principles and here, a judge's conduct is required to be above reproach in the view of a reasonable observer. Their behaviour and conduct must also reaffirm people's faith in the integrity of the judiciary.[941]

Closely related to impartiality is the propriety value and here the Bangalore Principles provide lengthy guidance for judges. Amongst others, judges are requested to avoid even the appearance of impropriety and avoid engaging in personal relationships with members of the legal profession 'that give rise to the suspicion or appearance of favouritism or partiality'.[942] Judges are cautioned in regard to how they exercise their right to freedom of expression, in order to preserve the dignity of judicial office and the independence and impartiality of the judiciary. Judges are also warned about letting family or social contact influence their

[937] Ibid at p.3.
[938] See section 4.1 'Redefining Substantive Independence'.
[939] See Chapter 2, section 2.4.1 'Examining Substantive Independence', where I posit that judicial diversity enhances the independence of judges and the judiciary.
[940] The Bangalore Principles p.3-4.
[941] The Bangalore Principles, p.4.
[942] Ibid.

decisions, while being reminded not to accept any gifts, loans, favour or tokens in connection to their functions.

The value of equality requires that judges be:

> aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").[943]

In applying the value of equality, judges are implored to amongst others, avoid words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds. This requirement is not just personally required of judges, but they are also expected to ensure that lawyers appearing before them, refrain from similar conduct. The final value, which is a combination of competence and diligence, also lists a number of ways of implementing the said values. There is a requirement that judges be devoted to their professional activities and judicial duties, which includes tasks relevant to the judicial office or the court's operations.[944] Judges are also expected to keep themselves informed about relevant developments in international law, as well as 'take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties'.[945] Further, it is expected that judges will perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness. In doing so, she/ he must be dignified, patient and courteous to all litigants, lawyers, witnesses and anybody else related to official duties.

As a follow-up to the Bangalore Principles, an intergovernmental Expert Group on Strengthening Basic Principles of Judicial Conduct met in Vienna to prepare a draft commentary on the Bangalore Principles.[946] This commentary was later adopted by the United

[943] The Bangalore Principles, p.6.
[944] The Bangalore Principles, p.7.
[945] Ibid.
[946] This meeting was attended by participants from over 35 countries.

Nations Judicial Integrity group in 2007 and is an explanatory memorandum in the form of an authoritative guide to the application of the Bangalore Principles.[947] The Commentary on the Bangalore Principles of Conduct, (herein the Bangalore Commentary) is a lengthy document expanding on the six values already mentioned. On a number of occasions the Bangalore Commentary emphasises the importance of public perceptions of judges and the judiciary. In particular it advises judges to refrain from any conduct that would be perceived as being biased, prejudiced, unethical, and unsuitable for judicial office, subservient to another person or institution or that would bring the judiciary into disrepute.[948]

In the same year, the International Commission of Jurists published a Practitioners Guide (herein Practitioners Guide) on International Standards for Independence and Accountability of judges.[949] It highlights the importance of a judge's right to freedom of association and freedom of expression. It affirms the UN Basic Principles' view that judges should form associations 'in order to defend their independence and that of the judicial profession more effectively'.[950] While it still cautions against how judges use their right to freedom of expression, the Practitioners Guide states that as guarantors of the rule of law, judges must necessarily participate in the debate for reforms and other legal issues. Importantly, it reminds judges that they cannot be removed from office or punished for bona fide errors or for disagreeing with a particular interpretation of the law.[951]

The African Commission on Human and Peoples' Rights also provides further indication of what is expected of a judge. It does so in the form of Principles and Guidelines

[947] *Commentary on The Bangalore Principles of Judicial Conduct* < https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf>.
[948] Ibid.
[949] International Commission for Jurists, 'International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors' (Geneva, 2007), pp. 1–260 <http://www.refworld.org/pdfid/4a7837af2.pdf> [accessed 28 June 2018].
[950] Ibid at p. 37.
[951] Intentional Commission of Jurists,p.55.

on the Right to a Fair Trial and Legal Assistance in Africa (herein the African Commission Guidelines).[952] Though they are procedural rules, they are helpful in teasing out qualities expected of judges. For example, sections 3(j) and (h) require judges to take steps to protect the identity and dignity of victims of sexual violence and to protect the identity of accused persons or witnesses, when it is in the best interests of the child. Yet, in order to do so, a judge must be knowledgeable, competent and diligent. Therefore section 4(k) stipulates that no person shall be appointed as a judge if they lack the appropriate training or knowledge, which enables them to adequately fulfil their functions.[953] Such knowledge and training feeds into the quality of technical expertise that is expected of judges. Thus, the African Commission Guidelines are a reminder that a successful and efficient judicial process, largely depends on judges being professionally qualified adjudicators, who can be impartial, independent and ethical.

6.2.2 Zambian Judicial Code of Conduct

The Zambian Judicial Code of Conduct (Judicial Code of Conduct) was enacted in 1999 and it is a combination of preferred qualities, procedural rules and prohibitions, indicating that the judicial roles embrace different elements.[954] The procedural rules and prohibitions are an aspect of what is expected of a judge. The Judicial Code of Conduct was enacted after the UN Basic Principles and is divided into four sections, relevant for this discussion. The first is part II which is entitled 'Adjudicative Responsibilities'. Here the Judicial Code of Conduct delves into values that are present in the international guidelines mentioned above. Independence,

[952] African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003 <http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf> [accessed 28 June 2018].
[953] Ibid.
[954] Parliament of Zambia, *The Judicial (Code Of Conduct) Act*13, 1999 <https://zambialii.org/zm/legislation/act/1999/13/jcoca1999277.pdf> [accessed 26 June 2018].

integrity, impartiality and practical advice, as found in the Commentary on the Bangalore Principles.

The Judicial Code of Conduct also emulates the African Commission by providing procedural requirements. For example, article 5(4) precludes a judge from testifying as a character witness before a court. Article 8 (2) requires judges who are appearing as expert or technical witness before a court, tribunal or commission, not to give an opinion or express information, unless they have:

a) adequate knowledge of the facts in issue;
(b) a background of competence or jurisdiction on the subject matter; or
(c) an honest conviction of the accuracy and propriety of the testimony.

Article 8 identifies a judge's adjudicative responsibilities, as those not limited to their own court room proceedings and thus requires them to be effectively good and honest 'witnesses'. In essence, part II focuses on the expected conduct and character traits of judges.

Part III on 'Extra Judicial Activities' is concerned with how a judge behaves outside of the courtroom. Here the Judicial Code of Conduct provides some guarantees of impartiality, by detailing when and how a judge may receive compensation for services rendered, what activities cannot be conducted outside the office and when a judge can serve as a director, trustee or member of a Non-Governmental Organisation.[955] The accentuation in part III is that a judge's ill actions outside the courtroom, are likely to bring the judiciary into disrepute, hence the need to guard against ill-advised activities. Part IV of the Code of Judicial Conduct is dedicated to the significance of financial propriety. Judges are prohibited from soliciting or accepting any consideration for services performed and from using commercial information received during professional duties for personal profit.[956] The latter prohibition requires that

[955] Article 11-13.
[956] Article 14 (1) (a) and (b).

judges are honest and ethical enough not to capitalise on information that comes their way, purely because of their office. In respect of bribes, gifts, favours, loans or bequests, the prohibition goes beyond the judge. It also includes a judge's family members and the Code of Conduct provides a detailed list of what would be described as a gift, bequest or favour.[957] It appears that the drafters of the Code of Judicial Conduct stipulated these prohibitions as a means of guaranteeing impartiality in judges.

In article 16, judges are also prohibited from serving in any fiduciary capacity, which includes amongst others, being a trustee, executor or an administrator. The only exception to this prohibition, is if it is in respect of the judge's family. This article is interesting because there is no agreed standard, on when a judge can act in a fiduciary capacity. The Bangalore Commentary notes that during discussions, civil law judges did not believe that prohibitions of serving in any fiduciary capacity should be generally accepted as international standards.[958] Therefore, the Bangalore Commentary states that 'depending on the circumstances', a judge can serve in a fiduciary capacity in relation to family or a close friend, but must do so without remuneration.[959] Consequently judges in Zambia, are also prohibited from engaging in permitted fiduciary duties, if it is 'likely that the officer will engage in proceedings or matters that would ordinarily come before the officer'.[960]

The final section in part V, entitled 'Political and Employment Opportunities' is focused on helping judges navigate any political and professional ambiguities. It is brief and states that judges are prohibited from amongst others, endorsing political candidates, standing for political office and attending political gatherings.[961] The appointment of judges to offices outside the judicature is permitted, but the judge must apply for unpaid leave or apply for a

[957] Article 15.
[958] *Commentary on The Bangalore Principles of Judicial Conduct*, p.15.
[959] Ibid at p.113.
[960] Ibid.
[961] Article 18.

secondment. Article 19(3) permits judicial officers seeking employment to communicate with the body designated to consider the application and to request a reference or endorsement from any authority or relevant person. The Code of Conduct is not clear on what type of employment it refers to, but I submit that it could be in relation to situations where a judge wants to seek an opportunity in a different court, such as regional or international courts. In some instances, judges can serve in their countries and be on the roster for Special tribunals. Examples of this include Justice Florence Mumba who was a Justice of the Supreme Court of Zambia when appointed reserve judge of the Extraordinary Chambers in the Courts of Cambodia, and High Court Justice Prisca Nyambe, who currently serves on the International Residual Mechanism for Criminal Tribunals.[962]

When judges are not abiding by the Code of Conduct, a complaint or allegation of misconduct against them, can be made to the assigned disciplinary body as per part VI. This body previously referred to as the Judicial Complaints Committee, is now the Judicial Complaints Authority. The Judicial Code of Conduct Amendment Act 13 of 2006, was enacted to amend part VI of the Code of Conduct Act and must be read as one with it.[963] The Judicial Complaints Committee previously heard allegations of misconduct against High Court Judges Emelia Sunkutu and Timothy Katanekwa mentioned in the previous chapter.[964] The new Judicial Complaints Authority has also heard amongst others, allegations of misconduct against the Constitutional Court justices who presided over the presidential election petition in 2016.[965]

[962] See https://www.eccc.gov.kh/en/organs/judicial-chambers and http://www.unmict.org/en/about/judges/judge-prisca-matimba-nyambe.
[963] Parliament of Zambia, *The Judicial (Code Of Conduct) (Amendment) Act 13*, 2006 <https://zambialii.org/zm/legislation/act/2006/13/jcoca2006277.pdf> [accessed 26 June 2018].
[964] They were cleared of the charges of alleged misconduct, caused by their delays in delivering judgments.
[965] For a reminder of this case, see the discussion on *Hakainde Hichilema & Others v Edgar Lungu & Others*, in chapter on the Judicial Appointment Commission in Zambia.

6.2.3 The Code of Conduct in South Africa

The Code of Judicial Conduct (herein Code of Conduct) was adopted in terms of section 12 of the Judicial Service Commission Act of 1994.[966] Like the Zambian Code of Conduct, it identifies expected behaviour with required qualities. The preamble of the Code of Conduct states that any negligent or wilful breach of the Code of Conduct, 'may amount to misconduct which will lead to disciplinary action in terms of section 14 of the Act'.[967] The Code of Conduct is structured in such a way that each article commences with what is required of a judge, before providing explanatory notes. For example the first requirement in article 12 is independence. Judges are required to uphold the court's independence and take reasonable steps to ensure that 'no person or organ, interferes with the functioning of the courts'.[968] There are five attached notes to judicial independence and the first one states that 'a judge acts fearlessly and according to his or her conscience because a judge is only accountable to the law'.[969] South African judges are expected to act honourably, comply with the law and be transparent.[970] Article 7 on equality, requires judges to at all times, refrain from bias or prejudice and act courteously and with respect to others. It goes further and specifically requires that a judge:

> personally, avoid and dissociate him- or herself from comments or conduct by persons subject to his or her control that are racist, sexist or otherwise manifest discrimination in violation of the equality guaranteed by the Constitution.[971]

Considering the historical injustices that arose at the hands of the courts during the apartheid era, the drafters of the Code must have felt it extremely necessary to remind judges, what was required from adjudicators in the democratic dispensation.[972] The South African

[966]South African Government, *Code of Judicial Conduct*, *Government Gazette No.35802*, 18 October 2012, <http://www.justice.gov.za/legislation/notices/2012/20121018-gg35802-nor865-judicial-conduct.pdf> [accessed 26 June 2018].
[967]Ibid at p.19.
[968] Article 4.
[969] Ibid at Note 4 (i).
[970] Articles 5, 6 and 8.
[971] Article 7 (a).
[972] For a detailed information this past, see Dugard pp 10-15.

judiciary has unfortunately had to deal with two specific cases where a judge has not abided by article 7(a), leading to serious consequences. The first is the case of Gauteng Judge Nkola Motata, who crashed through a residential wall on 17 January 2007. Judge Motata was first convicted of drunken driving and sentenced to 12 months imprisonment or a fine of R20 000. He unsuccessfully appealed the judgment.[973] At the time, the JSC had already received complaints of gross misconduct made against him on two grounds; namely that he had made racist slurs against the owner of the property, Mr Baird, at the scene of the accident, [974]and that he conducted his defence at the criminal trial in a manner inconsistent with a judicial officer.[975] In this discussion however, the focus is on the first complaint.

Judge Motata was placed on special leave after the accident and after the criminal proceedings, he appeared before the Judicial Conduct Committee (JCC) in 2011. The JCC (a sub-committee of the JSC) decided that a prima facie case of gross misconduct had been established and it recommended that the complaint be referred to the Judicial Conduct Tribunal (JCT).[976] Motata then sought to delay the proceedings, by bringing an application challenging the sections of the Judicial Service Commission Act regulating the disciplining of judges.

The North Gauteng Court heard the matter in 2016 and dismissed it with costs, leaving room for the JCT to commence its task.[977] The JCT was finally able to hear the matter and it submitted its report on 12 April 2018. The tribunal found that Judge Motata had used vulgar and racist language unbecoming of a judicial officer. It found that the judge's defence of

[973] South Gauteng High Court, *Motata v S* (A345/2010) [2010] ZAGPJHC 134,<http://www.saflii.org/za/cases/ZAGPJHC/2010/134.html> [accessed 29 June 2018].
[974] See Judicial Conduct Tribunal of the Judicial service Commission, *Report of the Judicial Conduct Tribunal Re Judge Motata* (Johannesburg, 2018) <http://www.judgesmatter.co.za/wp-content/uploads/2018/04/Judge-Motata-Tribunal-Report-April-2018.pdf> [accessed 29 June 2018].
[975] Ibid.
[976] Established in terms of s 21(1) of the JSC Act, it hears and investigates complaints, in terms of s 16(4) (b) of the JSC Act.
[977] *Motata v Minister of Justice and Correctional Services and Another* (52010/2016) [2016] ZAGPPHC 1063; [2017] 1 All SA 924 (GP), , <http://www.saflii.org/za/cases/ZAGPPHC/2016/1063.html> [accessed 29 June 2018].

provocation did not justify his conduct and stated that judges are custodians of citizen's rights to dignity. It concluded that Judge Motata's conduct impinged on and was prejudicial to the impartiality and dignity of the courts.[978] The JCT also recommended that the provisions of section 177 (1) (a) of the Constitution be invoked. This section states that a judicial officer may be removed if 'the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct'.[979]

The advice to invoke section 177(1) (a) highlights the enormity of Motata's conduct and the consequences of a violation of article 7 of the Code of Conduct. The other relevant case is that of former Judge Mabel Jansen, whom I referred to in the Chapter 2 of this thesis.[980] Jansen had been placed on special leave in May 2016, following a trail of racist and disparaging remarks that she made on social media, including comments that rape was a part of the culture of black men.[981] Jansen resisted numerous calls for her to resign and a complaint was made to the JSC, by Advocate Vuyani Ngalwana SC in his capacity as the Chairperson of the Advocates for Transformation (Johannesburg).[982] In April 2017, the JCC found that Jansen's conduct warranted the establishment of the JCT to probe the complaint of gross misconduct.[983] To avoid the disciplinary process and possible impeachment proceedings, Jansen finally tendered her resignation to the Department of Justice and Constitutional Development in May 2017.[984]

At this juncture, it is necessary to point out that Jansen's comments were not only racist, but they also raised questions in regard to an accused person's rights to a fair trial. The

[978] Judicial Conduct Tribunal of the Judicial service Commission, p.23.
[979] The removal can only happen if the National Assembly adopts the resolution for removal, by a vote of at least two thirds of its members.
[980] See Chapter 4, section 4.1 entitled 'Impartiality and Bias'.
[981] 'Judge Mabel Jansen Placed On "Special Leave"', *Mare Claire.* 11 May 2016.
[982] SC Vuyani Ngalwana, 'Formal Complaint to the JSC Re Judge Mabel Jansen' (Johannesburg: Johannesburg Society of Advocates, 2016), pp. 3–15.
[983] Franny Rabkin, 'Judge Mabel Jansen to Face Impeachment Tribunal over Facebook Comments'', *Mail & Guardian*, 7 April 2017 <https://mg.co.za/article/2017-04-07-judge-mabel-jansen-to-face-impeachment-tribunal-over-facebook-comments> [accessed 10 July 2018].
[984] '"Racist" Judge Mabel Jansen Resigns', *Cape Argus*, 4 May 2017 <https://www.iol.co.za/capeargus/racist-judge-mabel-jansen-resigns-8957039> [accessed 10 July 2018].

statements made by Jansen generated questions about whether alleged rapists who were black, had received a fair trial in her courtroom. The requirement that a judge conduct a fair trial is also included in the Code of Conduct. Article 9 of the Code of Conduct states amongst others that, a judge must remain 'manifestly impartial' and 'observe the letter and spirit of the audi alteram partem rule'. The accompanying notes in article 9 advise that 'a judge may not, under the guise of performing judicial functions, make defamatory or derogatory statements actuated by personal spite, ill will, or improper, unlawful or ulterior motive'.[985] Jansen had claimed that she was making truthful statements about rape, based on the numerous cases she had heard in her court.[986] Even though Jansen made her comments outside of the court (via Facebook communication), the Code of Conduct does include guidelines on behaviour outside of the courts.

Article 12(c) states that a judge must not take part in any activities that practice discrimination inconsistent with the Constitution. Therefore regardless of where the activity takes place, if it is inconsistent with the Constitution, it is questionable conduct. Judges are also advised to immediately sever all professional links upon appointment and recover outstanding fees speedily, in order to minimise the potential for conflict of interest.[987] Furthermore, judges are also warned against social associations which might create the impression of favouritism or enable the other party to abuse the relationship.[988]

Articles 14 and 15 provide details on conduct expected in regard to extra-judicial activities and extra-judicial income. In both instances, a judge cannot be involved in activities and extra-judicial appointments, or negotiate or accept remuneration, gifts, advantages or privileges that would be incompatible with the impartiality and independence of the judiciary.

[985] Note 9 (iv).
[986] 'Judge Mabel Jansen Placed On "Special Leave"', *Marie Claire*, 11 May 2016.
[987] Article 12 (2).
[988] Note 12(i).

Included here, are any actions that would provide a risk of conflict with judicial obligations and would be reasonably perceived as being intended to influence the judge in the performance of his or her judicial duties.[989] However, judges are permitted to act in fiduciary position, such as in family or public benefit trusts, charitable institutions and university councils or governing bodies.[990]

6.3 GENERAL EXPECTATIONS OF JUDGES

It is clear that it is insufficient to examine the conduct and values required of judges, without referring to the responsibilities that come with the judicial role because, the judicial role is the basis from which one draws out necessary qualities for potential judges. Leslie Green submits that the judicial role consists of three main obligations.[991] The first is law applying obligations, which include correct findings of fact, knowledge of the law and how to apply it. The second is law improving obligations to clarify the law where necessary and resolve conflict in law. Third, is the law-protecting obligations, which occurs when judges are regulating their own process and protecting the rule of law and the integrity of the jurisdiction from attack.[992] These obligations, he submits are not absolute and depend on a positive environment.[993] In order to adequately fulfil these obligations, it is relevant to understand what is expected of judges.

6.3.1 The Requirements of a Good Judge

Shirley Abrahamson reflects on what she learnt from former American jurist Benjamin Cardozo, who was famous for his candour about the realities of the judicial role. First, she learnt that in criminal cases, judges not only have to consider principles from prior cases and look at the history of defences, but they also have look to social values to be served by an

[989] Note 14(i) and article 15(b) respectively.
[990] Article 14(2) (a) and Note 14 (b).
[991] Leslie Green, *Law and the Role of a Judge*, (13 September 2014) Oxford Legal Studies Research Paper Series No. 47/2014 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2495953> [accessed 19 October 2017].
[992] Ibid at pp.19-20.
[993] Ibid.

outcome.[994] Secondly, even though judges may disagree about the process through which decisions are reached, they should always strive for self-awareness and disclosure of their reasoning process. Abrahamson acknowledges that neither full self-awareness nor full disclosure is possible and the 'judge's mind which reaches the result sometimes works faster than the judge's fingers on the word processor's keyboard'.[995]

Others, she continues, may not have the ability to articulate a satisfactory account of the reasoning, which led them to the judgment. There are some constraints when one is a judge however such as the fact that 'the judges desire to earn the respect of sibling judges, the Bar, and the public and the dynamics of the judicial decision-making process' amongst others.[996] Yet Abrahamson argues that while the presence of constraints may be contested, what is important is that 'the judges perceive themselves as subjects to constraints'.[997] Consequently, she suggests that perhaps the most important element for a sound judicial process, is the selection of the right person to be judge.

Who is the right judge and how do we determine this, when different jurisdictions operate under different conditions? Cowen in her book on judicial selection in South Africa, provides some attributes which should be applicable irrespective of what jurisdiction a judge operates in. Though written with South Africa in mind, Cowen provided five categories that are helpful when considering, a candidate's fitness and propriety for office.[998] These are independence, impartiality and fairness, integrity, judicial temperament and commitment to constitutional values. The latter two categories are not overtly present in the international guidelines previously described, and hence they require some elucidation. Cowen describes

[994] Shirley S Abrahamson, 'Judging in the Quiet of the Storm', *St. Mary's Law Journal*, 24 (1993), 965–94 <https://doi.org/10.3366/ajicl.2011.0005>.
[995] Ibid at p.990.
[996] Ibid at p.993.
[997] Ibid.
[998] Cowen, *Judicial Selection in South Africa*, pp. 34-51.

judicial temperament as 'a somewhat elastic, term that refers to "the manner of thinking, behaving or reacting" expected of a judge'.[999] In a narrower sense, the term denotes humility, open-mindedness, courtesy, patience and decisiveness. The combination of these traits Cowen argues, is particularly important because a judge is performing a public function, and even the losing litigant in a case, should leave feeling that the case has been fairly tried.[1000]

In respect of the category 'commitment to constitutional values', Cowen distinguishes between having a commitment to constitutional values and having the skills and expertise relevant to constitutional adjudication. The former is about judges having a personal commitment to the values of a transformative Constitution while the latter is about the technical expertise involved in judicial reasoning concerning constitutional matters. The relevant constitutional values would include amongst others, respect for diversity and pluralism, an appreciation of the judicial role and the extent and limits of deference owed by the judiciary and the promotion of an active citizenry.[1001] For Cowen, valuing active citizenry means that judges will uphold active participation by citizens in decisions that affect them.[1002] Therefore she argues, it is 'surely legitimate for selectors to consider whether a candidate for judicial office is committed to the type of democracy, that active citizenry contemplates'.[1003]

Another important requirement is that a judge will be of strong character, able to withstand frequent criticism that comes with the role and 'take it all with good grace and smile'.[1004] A candidate for judicial office who is easily offended or is overly sensitive would not stand up to the rigours of what the role entails. In addition to having a thick skin, good

[999] Ibid at p.38.
[1000] P.39.
[1001] Pp. 41-46.
[1002] Ibid.
[1003] Ibid.
[1004] Harold R Medina, 'Some Reflections on the Judicial Function: A Personal Viewpoint', *American Bar Association Journal* , 38.2 (1952), 107–10 <http://www.jstor.org.ezproxy.uct.ac.za/stable/pdf/25717921.pdf?refreqid=excelsior%3A94de3cab52c0d7ef561854f9eaaea7ae> [accessed 24 October 2017].

judges are expected to be decisive, because research has shown that decision-making falls along a continuum of difficulty.[1005] Decision-making also requires information processing and Abrahamson et al submit that as information becomes more plentiful and more complex, decision-making becomes more difficult.[1006] Unlike when one is a lawyer, primarily focusing on their client's matter in order to win, a judge has to delve through all documents and evidence from both sides in order to arrive at a proper conclusion. To do so, judges have to be of a certain standard and a good source for an assessment of these standards, is from past and present judges.

6.3.2 Advice from the Bench

Northern Irish Judge Evan Bell recognised that being a judicial officer is a continuing role. Therefore, in a letter to new judges, he offers some important advice.

> The skills needed to be a successful judge are not necessarily synonymous with the skills required to be a successful lawyer. Simply put, lawyers are advocates; judges are neutral decision-makers. Judges face a difficult transition upon appointment in that they must learn to move from advocacy to decision making, from marshalling and presenting evidence to fact-finding and synthesising.[1007]

The transition from a good lawyer to a good judge, is one that a number of judges have had to grapple with. In a historical project on women judges in New Zealand, many of the judges noted how judging as a non-partisan referee was very different to that of a partial advocate.[1008] Judge Rushton found that looking at everything very objectively made it much easier, while Judge McAloon enjoyed the ability to be non-partisan. She 'was able to see and understand both sides of the story', which allowed her to resolve litigants' problems, particularly in the

[1005] Shirley S Abrahamson, Susan M Fieber, and Gabrielle Lessard, 'Judges on Judging: A Bibliography'', *St. Mary's Law Journal*, 24 (1993), 995–1040.
[1006] Ibid at p.996.
[1007] Evan Bell, 'Letter to a New Judge', *Commonwealth Law Bulletin*, 40.1 (2014), 95–126 <https://doi.org/10.1080/03050718.2013.873724>.
[1008] Elizabeth Chan, 'New Zealand Women Judges Oral History Project : Part Two' *Wellington: The Law Foundation New Zealand* (2017), pp. 1–38 <https://www.lawfoundation.org.nz/?p=8330> [accessed on 3 Augsut 2018].

Family Court. [1009] Seeing and understanding both sides of the story is part of the hard work of adjudicating. Hence Bell warned judges that there is no room for 'judicial passengers' in adjudication and that the work of a judge, is like a 'treadmill that never stops'.[1010]

A second requirement of a good judge, common amongst the judges in New Zealand, was being a listener. Judge Shaw stated:

> […] Listening is the great skill of judging. Active listening. Listening, and processing as you're listening, is what it's all about. If you're a judge who talks too much, then you're not listening and you're not absorbing, and you're not hearing and you're not giving the impression that you're listening. [1011]

Closely related to listening, was the necessity of having an open mind. Judge Shaw underscored the need to listen to all sides of a dispute and to maintain rigorous independence.

> The need to be absolutely, rigorously independent, and to work at being independent, and to never stop questioning whether you are independent of all forces that are thrown at you. Its independence not just from institutional things or from interest groups, it's from your own background, from your own leanings, from your own domestic situation.[1012]

This open-mindedness she emphasised, was required throughout the entire hearing, coupled with a willingness to change one's mind.

It is submitted that the willingness to change one's mind is only present if one has a certain level of humility. Humility is a quality Bell touches on in his letter; he warns against the perils of judicial hubris because judges should be servants of the people.[1013] He explains that pride is an occupational hazard and judges are simply temporary occupants of judicial positions, 'which existed before we arrived and will continue to exist long after we have passed

[1009] Ibid at p.25.
[1010] Bell. p.98.
[1011] Chan, p.27.
[1012] Bell, 'Letter to a New Judge'. p.28.
[1013] Ibid p.99.

on'.[1014] Judges are advised to be friendly but firm, personable but not personal, patient and not petulant or officious.[1015] Bell posits that the most important audience is the litigant and therefore, a judge must 'listen to the arguments, so that when people leave your courtroom, whether they won or lost, they will say you were decent, fair and tried to do what was right'.[1016] He further advises that judges must exhibit an understanding of human affairs and daily life, and have insight into the values of society.

In the advice given by the judges above, we can see the values of competence, impartiality, diligence and integrity that are present in the international guidelines discussed earlier.[1017] Notwithstanding, Bell also touches on an aspect that is not present in international guidelines and that is the importance of understanding human affairs and having insight into society. When judges are deciding 'what is necessary in a free and democratic society, or what is reasonable or fair', they need to bring to bear their insight into the values of society [1018] This requirement recognises that judges are human beings, who need to consider facts, ruminate on conflicting views, apply standards and sometimes, even disagree with the legislators. This role cannot be performed adequately if a judge is out of touch with the pressing societal issues in their jurisdiction.

Former South African Chief Justice Ismail Mahomed appears to agree with this view in his article on the role of the judiciary.[1019] He stated that the secret of effective justice through a procedurally and substantially effective process, lies in the capacity of judges to strike the

[1014] Ibid, p.100.
[1015] Ibid, p.101.
[1016] Ibid, p.103.
[1017] For an Australian study collating judges and magistrates views on necessary judicial skills, see Kathy Mack and Sharyn Roach Anleu, 'Skills for Judicial Work: Comparing Women Judges and Women Magistrates', in *Gender and Judging*, ed. by Erica Schultz and Gisela Shaw (Portkland: Hart Publishing, 2013), pp. 211–32 <https://doi.org/10.5040/9781474200127.ch-009>.
[1018] Ibid, p.99.
[1019] Ismail Mahomed, 'The Role of the Judiciary', *South African Law Journal*, 115 (1998), 111–15 <https://doi.org/10.1097/ANS.0000000000000109>.

balance between what is ethical, coherent and fair.[1020] That capacity for balance he continued, required a subtle and creative combination of a number of crucial qualities which need to be consciously identified, articulated and nurtured. He identified twenty qualities and these include experience, scholarship, dignity, rationality, forensic skill, humility, a capacity for articulation and discipline. He also listed diligence, intellectual integrity, and intolerance of injustice, emotional maturity, courage, objectivity, energy-both intellectual and physical, rigour, wisdom, efficiency and a sense of relevance. The final quality was that judges needed the moral ability to 'distinguish right from wrong and sometimes the more agonizing ability, to weigh two rights or two wrongs against each other'.[1021] Justice Mahomed's listed qualities are not confined to 'competent scholarship' but also include attributes such as intolerance of injustice and a moral ability to distinguish between right and wrong. These qualities it is submitted, are often understated in discussions on judging.

McLachlin also advises that to perform their modern role well, judges must be sensitive to a broad range of social concerns. This includes possessing a keen appreciation of the importance of individual and group interests and staying in touch with the society in which they work— understanding its values and its tensions.[1022] She asserts that the ivory tower no longer suffices as the residence of choice for judges. Their role in social policy, demands new efforts of objectivity.[1023] These efforts, as opined by fellow Canadian Justice Rosalie Abella, should be made with an understanding that judicial impartiality and neutrality does not mean that judges have no pre-conceptions or opinions about society's values.[1024] However she recommends that those pre-conceptions ought not to close his or her mind to the evidence and arguments presented. She states, 'all law is about values, all values are about public policy, and

[1020] Ibid at p.115.
[1021] Ibid.
[1022] McLachlin, p.685.
[1023] Ibid.
[1024] Rosa Silberman Abella, 'Public Policy and the Judicial Role', *McGill Law Journal*, 34.1021 (1988) <http://www.lawjournal.mcgill.ca/userfiles/other/5984150-Abella.pdf> [accessed 11 July 2018].

public policy and laws are about morality'.[1025] Thus Abella states that we cannot pretend that judges are prohibited from being influenced by them.

Former Chief Justice of Kenya Willy Mutunga goes even further than Justice Abella by stating that the fundamental pillar for judicial integrity is the ideological and political position of a judicial officer.[1026] He points out that despite this being so, judicial officers are told to distance themselves from their ideological and political positions, as if it were possible. He submits that building people's confidence in the judiciary and judicial officers lies on integrity. Judges will have moral authority to speak to societal issues, when 'whatever the decision she or he makes can be critiqued or supported on the basis of real and perceived honesty of the judicial officer'.[1027] He further adds that judicial officers should constantly and consistently ask themselves in whose interests is the independence of judiciary. This is because in the new constitutional dispensation, judges 'make' law and as such also need to guard against their own internal pressures, in order to achieve individual independence.[1028]

The views by Justices Mahomed, Mclachlin, Abella and Mutunga reinforce one important point: the declaratory theory of judicial decision-making, which encouraged judges to hold the view that their personal input into the decision was minimal, is no longer applicable.[1029] Australian Judge Michael Kirby opines that the demise of the declaratory theory of the judicial function, has been accompanied by greater candour about the process in which the judge is actually engaged. This has resulted in an acknowledgement that judges must make decisions on factual conflicts and that judges are not endowed with a judicial capacity to discern

[1025] Ibid at p.1028.
[1026] Willy Mutunga, 'Courts Do Politics and Do Politics All the Time', *Never Again*, 15 January 2018 <https://neveragain.co.ke/former-chief-justice-willy-mutunga-courts-do-politics-and-do-politics-all-time/article> [accessed 11 July 2018].
[1027] Ibid.
[1028] The issue of internal independence is discussed in more detail in Chapter 2 of this thesis.
[1029] Justice Michael Kirby, 'Judging: Reflections on the Moment of Decision', *Journal of the Judicial Commission of New South Wales*, 4.3 (1999), 4–17.

truth from falsehood.[1030] Kirby argues that in regard to judicial reasoning, judges can hear a case and leave the courtroom with the impression that this side must succeed, but eventually decide the opposite. According to Kirby, the unspoken reason for this could be legal realism, physiological stress and psychological forces. [1031] Therefore, he concludes by advising that judges need to understand decision making as a complex function combining logic and emotion, rational application of intelligence, reason and intuitive responses to experiences. This he suggests, is the best way to deal with the ever-evolving role of being a judge. Consequently, it is necessary to turn our attention to what can be learnt from interview participants in each jurisdiction and participant observation in South Africa.

6.4 WHAT IS EXPECTED OF A GOOD JUDGE IN ZAMBIA?

6.4.1 A General View of what is required to be a Successful Judge

The most striking element of my interviews with women judges in Zambia, was their emphasis on the nobility of the judicial role and how they see themselves as servants of the people. One judge argued that if one wants to be a judge, they must be ready for hard work and practically giving up their lives, for the service of the state.[1032] A second judge echoed the view that being a hard worker was necessary, while also adding the importance of diligence and integrity.[1033] She added that women in particular, needed to be assertive in order to successfully run their courts. A third mentioned how now more than ever, there is a specific need to be 'strong in the current dispensation in order to pass through the fire'.[1034] This metaphorical reference to fire was used in order to emphasise the trying times that judges can find themselves in, especially during times of political tension.[1035] Hence she stressed that one needed courage and soberness

[1030] Ibid at p. 6.
[1031] Pp.13-17.
[1032] Interview with Justice 1.
[1033] Interview with Justice 4.
[1034] Interview with Justice 2.
[1035] This interview was conducted during a politically tense period in Zambia, where the cadres from the ruling party, were harassing judges.

of character and behaviour.[1036] This courage she pointed out, was not only relevant to dealing with external parties, but also when one was sitting in an appeal court and needed to disagree with colleagues.

The need for a judge who is non-partisan and has integrity was also pointed out as a necessary quality, befitting of a good judge.[1037] For Justice 2, integrity was directly related to her Christian beliefs and fear of God. For advocate John Sangwa SC, a critical quality was intellectual superiority. He stressed that having a law degree alone was not enough.

> There is a reason why you need somebody who was excelled academically. One is that such a person, is likely to be very intellectually sound. [Secondly], such a candidate is likely to be broadminded, which is very important when you are a judicial officer. When you have a sound academic background, you would not flinch if you are challenged intellectually.[1038]

While he admitted that having superior intellectual ability did not always translate into being a good judge, he still insisted that judicial confidence and knowledge came with intellectual expertise. Mr Chishimba was concerned however, with judges who let their personality overshadow their office. He intimated that a judge's primary focus should be honing the skill of authorship, because 'you are authoring a public document when you write judgments'.[1039] He opined that judges 'have to be authentic, you have to be exact, you have to be clear'. You have to explain why justice has been pronounced in a certain way'.[1040]

Interviewees also emphasised the necessity of having a judge who was efficient. One advocate stressed that a good judge is one who prepares adequately for trial and does not adjourn matters unnecessarily.[1041] The soberness of one's character and the ability to be long serving and commit to the role of a judge, was also pointed out as a necessary quality.[1042]

[1036] Interview with Justice 2.
[1037] Ibid.
[1038] Interview on 13 April 2017.
[1039] Interview with on 4 April 2017.
[1040] Ibid.
[1041] Interview with Legal Professional 7.
[1042] Interview with Commissioner 1.

Interview participants also highlighted how demanding the work of a judge is. Judges were expected to be hard workers, meticulous in analysing cases and writing judgments. However it seemed that there were misconceptions about this amongst lawyers and people more generally who assume that judges have many perks with little work. Hence new judges were often surprised when they discovered how difficult the job is.[1043] Mr Chishimba explained that some judges only realised once they were there, that it was not a regular 8am to 5pm job. 'It is more than that, you have to burn the midnight oil and you have to respond according to the demands of a particular case. No two cases are the same. One could be very easy, another more complex.'[1044]

One judge explained that upon appointment, she found herself with 200 cases because the judge responsible for them had been promoted to another position in Lusaka.[1045] Therefore, she was starting her role as a judge with a disadvantage because she had inherited a backlog. This was not the start to a judicial career that she had anticipated. Advocate Sangwa SC confirmed the existence of the assumptions about the judicial role. He pointed out that judges not only had life tenure, but they got 80 percent of their salary until death and were assigned a house and many other perks. Thus in his opinion, some people applied to be judges for the benefits, without being committed to the actual job.[1046] Another state advocate explained that there were those who thought private practice was hard, because of the billing structure. A position in government departments was also unattractive after a while, because of a glass ceiling.[1047] Hence the desire to apply for a judicial position was motivated more by the need to have a well-paid, notable secure position, than by the desire to serve the country.[1048] These

[1043] Interview with Justice 2.
[1044] Interview on 4 April 2017.
[1045] Interview with Justice 3.
[1046] Interview on 13 April 2017.
[1047] Interview with Legal Professional 4.
[1048] Apart from security of tenure, another attractive element of judging may be what Junqueira calls 'the seduction of power'. For more on this, see Elaine Botelho Junqueira, 'Women in the Judiciary: A Perspective

candidates both men and women, were initially said to often struggle when appointed as judges because they were overwhelmed by the sheer volume of the cases.

In response to a question on whether they aspired to join the bench, two women legal professionals said they had no such aspirations. Their reluctance though, was not due to the hard work that would be required of them, but rather because they argued that being a judge is a restrictive role. One senior advocate described it in the following way.

> It's a bit of a restrictive lifestyle and it's a lot of work. It's a lot of work, if you want to do it properly and I guess also, I am used to being my own boss. This is something that you have to give up definitely and you give up your voice.[1049]

The restrictive lifestyle was also mentioned by another interviewee as the requirement that a judge should conform. She stated that she was not a conformist and that the judiciary, or at least the Zambian one, required judges who would conform.[1050] The idea of conformity to her meant she could not freely express her opinion on matters which she felt were important. Indeed articles 8 and 9 of the Code of Conduct restrict the expression of opinions and dictate the type of communication that judges can be involved in.[1051] In Zambia unlike in South Africa, judges do not pen newspaper opinions, give speeches at events not strictly related to the profession or lecture in university while serving as a sitting judge. [1052] Therefore for both women, a critical aspect of being a judge was the ability to accept that one would have to restrain their activities and the expression of their opinions. Something, they were not willing to do.

from Brazil', in *Women in the World'S Legal Professions*, ed. by Ulrike Schultz and Gisela Shaw (Portkland: Hart Publishing, 2003), pp. 437–50 (p.440) <https://doi.org/10.5040/9781472559395.ch-024>.
[1049] Interview with Legal Professional 5.
[1050] Interview with Legal Professional 2.
[1051] Parliament of Zambia, *The Judicial (Code Of Conduct) Act*.
[1052] Judge Dennis Davis of the Competition Appeal Court of South Africa hosts a weekly Television show and other judges have written letters or opinion pieces in newspapers.

6.4.2 In Which Areas are Women Considered to be at a Disadvantage?

Some of the questions asked during my fieldwork interviews were aimed at collecting perceptions of women as a group. This also included noting gender stereotypes and exploring how they feed into a larger narrative of women judges in both jurisdictions. Therefore, I had to enquire about whether interviewees believed that women were lacking in particular aspects that were necessary for the judicial position. Two issues were pointed out to me as possible areas where women may fall short.

6.4.2.1 'Women can be too emotional'

Two of the participants I interviewed argued that women got emotionally involved in the cases, which meant they lacked the necessary character expected of judges. One advocate provided a perspective on this:

> I think women are more emotional when you have got a criminal matter for instance rape, defilement, or even murder. If I'm representing somebody and it's a defilement offense, the cause list comes out and we are before a woman I will tell him "my friend, your chances [of conviction] just went from 50-90 or 80". That's a fact, but it's not a good quality for the job. So, women are more emotional. I have appeared before judges who are so sympathetic to the plaintiff. If I'm prepping a witness and we are appearing before a female judge, I actually tell them, "be extremely vulnerable my friend, don't even summon your best language don't look your best, just look humble".[1053]

I asked the advocate whether he believed that being emotional meant that a judge could be partial or whether it was just a judge showing a human response to a terrible crime. His response was that from a justice perspective, it depended on what you expected of a judge.

He added that an emotional reaction from a judge could be an act of injustice for the opposing party and he used one of his cases as an illustration.[1054] On one occasion, he was representing a woman whose daughter had died in suspicious circumstances. While narrating the horrific story in the judge's chambers, the mother of the deceased started to cry, which prompted the judge to start crying too. The other side settled the matter, because they were of

[1053] Interview with Legal Professional 7.
[1054] Ibid.

the view that the judge was already sympathetic to the plaintiff and hence their client's chances of success were minimal. While he stressed that this instance was an exception, he expressed concern about ever appearing before the same judge again, because he now knew 'how sentimental' she could be in cases of that nature. He concluded by adding, 'she is very good actually, for purely commercial matters, very good, but it is in criminal matters, domestic [matters], where she becomes emotional'. [1055]

The former Chief Justice Ngulube also expressed a view that some women appeared to eschew the idea of giving harsh sentences to criminal accused. He noted that while women gave convicted child defilers harsh sentences, they sometimes tried to avoid imposing the mandatory sentence in cases where the girl is almost 16 and the man is 19.[1056]

> One judge phoned me the other week from Ndola and she asked me "judge what do you think, I'm having difficulty with this [defilement] cases". You have no choice at all [he responded]. Maybe once you have done that [handed down the mandatory sentence], make a recommendation to the President for his clemency. Tell the President to commute it to a smaller sentence. He has the power to commute, you have no discretion.[1057]

He too mentioned, that such instances are exceptions and that from his experience, women judges did not cry while presiding over matters in court. Even though the instances mentioned by the two participants were noted as exceptions, they are a cause of concern for three reasons.

Firstly, the behaviour described by both does little to refute old stereotypes about women being emotional, hence unfit for the role as a judge.[1058] Ifill argues that women judges may be vulnerable to narratives about physical strength, emotionalism, vulnerability, virtuousness and that this can influence how they evaluate cases involving women litigants.[1059]

[1055] Ibid.
[1056] Under statutory law, sex with a girl under 16 is considered child defilement and mandatory sentence for those convicted of child defilement is 20 years.
[1057] Interview with Justice Mathew Ngulube.
[1058] Sherrylin A. Ifill, 'Racial Diversity on the Bench,beyond Morals', *Washington & Lee Law Review*, 57 (2000), 405–95.
[1059] Ibid at p.447.

In the two examples given above, the narratives are of judges who allow their emotions to get ahead of their judicial duties. Though they are regarded as exceptions, they do nonetheless provide evidence for those who would criticise the feminisation of the judiciary. Secondly, a perusal of the aforementioned advice from judges and the views of other interview participants, shows that a good judge is one of sober character, courage and emotional maturity. If some women judges are deemed to be too emotional or lenient in sentencing, it could be argued that these traits are the antithesis of courage, strong character and emotional maturity. Finally, describing women judges as more emotional, essentialises all women into emotional beings who are incapable of self-control. This negates the character of the women who are handing down harsh sentences (including the death penalty) and who do not show outward emotion when affected by a case.

6.4.2.2 Balancing Family Life and Judging

The second reason why women were said to fall short of expectations, was their perceived 'failure' to balance family obligations and the work of a judge. One senior judge described the multiple roles that women judges have to balance as homemakers, parents and cooks.[1060] She considered it to be a limitation in that, unlike their male colleagues, who could get home to a cooked meal from their wives, women judges still had to prepare dinner for their husbands and children when they arrived home.[1061] This she said meant that they had more roles to fulfil than male judges did, yet they were still expected to perform at a high standard. These sentiments were also echoed in a Swiss study, that found that women judges 'feel more obliged to cope with multiple tasks and bear the ultimate social responsibility for the family, household and child rearing or education'.[1062] The result of these obligations Kalem argues, is that 'the

[1060] Interview with Justice 1.
[1061] Ibid.
[1062] Revital Ludewig and Juan LaLlave, 'Professional Stress,Discrimination and Coping Stratgies: Similarities and Differences between Female and Male Judges in Switzerland', in *Gender and Judging*, ed. by Ulrike Schultz and Shaw (Portland: Hart Publishing, 2013), pp. 233–54 (p.249).

compulsory balance between their work and family life, is the main yardstick against which',[1063] a woman's competence as a judge is measured.

The primary reliance on women as home makers in Zambia is not surprising, even where those women hold a high profile role as judge. Historically, women in Zambia have been largely stereotyped as housewives, while men tended to present themselves as masters of their households. Public leadership has also been male-dominated: women's prescribed role has been to support men's endeavours.[1064] Thus, even in judicial interviews, women candidates were routinely asked what would happen if their husbands got transferred or if they got posted to another city, while male candidates were not asked these questions.[1065] As Advocate Sangwa SC stated, it is difficult for women to find a healthy balance between career and family, when they have societal expectations to fulfil. He added that, 'invariably if they focus on careers, then family life suffers'. If they focus on family life, then careers suffer'.[1066]

To conclude, it is important to note that there was no indication from any of the participants or any literature, that women lack the intellectual capacity or the experience to be good judges. Despite the view that some women judges were too emotional, two of the judges I interviewed spoke of instances where they stood up to Members of Parliament and withstood pressure from political cadres to pass judgment in government's favour.[1067] There was also no view that women candidates lacked integrity, humility and diligence in their work.[1068] There was some disagreement however, on which legal pool better prepared women candidates to be good adjudicators and this will be discussed in detail, in the succeeding chapter. In essence,

[1063] Seda Kalem, 'Being a Woman Judge in Turkish Judicial Culture', *International Journal of the Legal Profession*, (2019), 1–26 (p.9) <https://doi.org/10.1080/09695958.2019.1667807>.
[1064] Evans, p. 981.
[1065] Interview with JSC Commissioner 1.
[1066] Interview on 13 April 2017.
[1067] Interviews with Justices 1 and 2 respectively.
[1068] A study in Argentina also found no differences between men and women in terms of their adherence to an ethic of justice or of care. For more on this see Beatriz Kohen, 'Family Judges in the City of Buenos Aires: A View from Within', *International Journal of the Legal Profession*, 15.1–2 (2008), 111–22 <https://doi.org/10.1080/09695950802439775>.

interviewees' perceptions were that women's occasional failure to be emotionally detached in cases and their difficulty in balancing career and familial expectations, meant that they were at a disadvantage in comparison to men.

6.5 A SOUTH AFRICAN PERSPECTIVE ON JUDGING

6.5.1 Expectations of Potential Judges

6.5.1.1 Views of Interview Participants

In the South African interviews, it was apparent that just more than two decades after the declaration of a democratic country, one could not separate the judicial role from the country's transformative vision. The preamble of the South African Constitution states that the Constitution was adopted amongst others, to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.[1069] Social justice and respect for human rights cannot be achieved without judges who are willing and able to grapple with hard constitutional questions. Therefore, it was unsurprising that one of the most mentioned expectations of judges (regardless of which group I was interviewing) was that they understand their role in the new constitutional democracy. One judge described it succinctly:

> I think of an understanding of what it is to be a judge in this country [is required]. What are the dynamics at play, what are the relevant issues that pertain to many cases? So, sort of an understanding of politics, an understanding of our history, an understanding of gender, of race, of religion, of our Constitution and an understanding of where we've come from and where we're going to. [1070]

[1069] *Constitution of the Republic Of South Africa*, 1996 <http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf> [accessed 24 July 2018].
[1070] Interview with Judge E.

Another judge spoke of how the Constitutional requirement to have a bench diverse in terms of race and gender, also included a conscious understanding of societal, ideological and cultural differences.[1071]

Closely related to this was the view that technical experience alone, was not enough to be considered as a good judge in South Africa. Technical experience was described as knowledge of how to apply the law and in what circumstances a particular law should be applied. [1072] However, it was argued that a judge also needed to be 'human enough to know what life was like for people on the ground'.[1073] This means that a judge is expected to be in tune with the sufferings of those less privileged to properly dispense justice. Thandi Modise added that a good judge needed to understand 'where we come from', to have an 'understanding of the need for consciousness when you look at diversity' and an understanding of gender issues.[1074] Essentially, experience was framed in a broad sense to include an understanding of what adjudication in the new South Africa meant.

The second most noted requirement was judicial temperament, as articulated by Cowan's work above.[1075] Judge Kgomo stated that a judge needed to have the requisite temperament that helped them 'treat not only litigants, but also the practitioners, with respect' as this enhanced decorum in the court.[1076] Another participant described temperament as a softer skill that was difficult to judge until somebody was actually adjudicating in court.[1077] Advocate Leah Gcabashe SC stated that a potential judge needed to come off as even tempered and not somebody who would be up to 'theatrics' in court.[1078] A third expectation was that

[1071] Interview with Judge A.
[1072] Interview with Advocate Nlangwana SC.
[1073] Ibid.
[1074] Interview on 15 June 2017.
[1075] Cowen, pp.37-40.
[1076] Interview on 6 April 2017.
[1077] Interview with Alison Tilley.
[1078] Interview on 2 April 2017.

judges would be women and men of integrity, a value also emphasised by international guidelines. For one legal professional, it was not enough to have the requisite experience and qualifications− a judge needed to have integrity.[1079] The ability to analyse material and write succinctly was the fourth expectation of judges.

One senior judge said that judges especially appellate judges, need to have 'razor sharp intellect'. She stated that the higher cases went in the judicial hierarchy, the more difficult they became and hence one needed to have razor sharp intellect to cope.[1080] On the contrary, though another participant agreed that judges needed to be analytical, he submitted that this did not necessarily mean that judges needed to be clever in order to perform their role well. They just needed, an analytical mind-set.[1081]

6.5.1.2 Lessons learnt from Participant Observation of the Judicial Interviews

While observing the JSC interviews over the period of this research, several critical expectations of judges have emerged. For the purposes of this discussion, three important ones are worth mentioning. The first one is the issue of judicial temperament, which was earlier referred to by one of the interview participants as a 'soft skill'. The absence of judicial temperament has often come in the form of lack of humility, patience and/or courtesy. One such example already mentioned earlier is the candidacy of Jeremy Gauntlett SC.[1082] In Chapter 5, I mentioned that the JSC had expressed reservations about whether he 'had the humility and the appropriate temperament that a Judicial Officer should display', because he had a 'short thread'.[1083] Having observed Gauntlett's demeanour at his second interview, I agree with the

[1079] Interview with Legal Professional V.
[1080] Interview with Justice C.
[1081] Interview with Commissioner A.
[1082] I referred to him under the section on Transparency, in respect of litigation concerning his non-selection for appointment to the Western Cape High Court on two occasions.
[1083] Sello Chiloane, 'Why We Didn`t Appoint Jeremy Gauntlett', *Politicsweb*, 7 November 2012.

JSC submission that he did not appear to be a candidate who possessed humility and patience.[1084] On the contrary, he presented himself as officious.

It could be argued that an acerbic nature may be useful if one is to be a successful advocate. However, it is not a desirable trait for a judge who must pass judgments that have repercussions for various people. Temperament is not only assessed by how a potential candidate conducts themselves in court, but also how they conduct themselves outside the courts. A fitting example of this is the interview of Judge Rosheni Allie who was nominated for the position of Deputy Judge President of the Western Cape High Court division.[1085] The JSC had received copies of excerpts of a conversation in 2014, between Judge Allie and a Professor Ziyad Motala. In these WhatsApp and email conversations, Judge Allie had made disparaging remarks about Chief Justice Mogoeng, Justice of the Supreme Court of Appeal Stevan Madjiedt, Judge Nathan Erasmus of the Cape Town High Court and others.[1086] She accused the Chief Justice of 'fruitless and wasteful expenditure' as he travelled the world with an 'undemocratically elected' group of judges researching best practice models to make the judiciary more effective.[1087] She also referred to the Chief Justice as a sick roadshow with no integrity, Madjiedt was accused of compromising his morals, and Erasmus was called an Apartheid spy.[1088]

Judge Allie defended her numerous comments by stating that it had been a conversation between two friends, a 'heated and robust exchange' in which she made comments in the heat of the moment.[1089] Though she apologised in the interviews for her comments and repeatedly

[1084] Interview on 17 October 2012 at the Grand Westin hotel, Cape Town.
[1085] JSC Interview held on 6 April 2016 at the Radisson Blu Le Vendome Hotel in Sea Point, Cape Town.
[1086] The communication was made available to the JSC by Professor Motala himself.
[1087] *Interview of Judge R Allie* (Cape Town, 2016) <http://www.judgesmatter.co.za/wp-content/uploads/2016/05/Western-Cape-Deputy-Judge-President-Allie.pdf> [accessed 26 July 2018].
[1088] The derogatory phrase she used for apartheid spy is 'apparatchik', which was used to describe people of colour who were 'bought' by the Apartheid government.
[1089] *Interview of Judge R Allie* p.8.

stated that they had been made in anger, it was later revealed that she had not personally apologised to any of the people she had disparaged in her conversations. One commissioner suggested that Allie did not have the maturity and temperament required of a good judge, while others suggested that she had behaved dishonourably; they could not excuse her behaviour, by stating that she had lost her temper.[1090] Rather by using anger to excuse her behaviour, Judge Allie only succeeded in showing that she did not have good qualities for leadership. It was also felt by some commissioners that Allie lacked integrity. This is because integrity is concerned with the need for judges to conduct themselves in an honourable and righteous manner that does not bring the judiciary into disrepute.[1091] For Allie, it was considered that her insistence on proceeding with the interview, despite being given opportunities to withdraw her candidacy showed her lack of integrity.[1092]

Judge Allie however is not the only woman judge, to be questioned about conduct that was considered to be lacking in integrity. The previous year on 9 July 2015, Justice Zukisa Tshiqi, then a Justice of the Supreme Court of Appeal (SCA) was vying for a position on the Constitutional Court.[1093] At the time of the interview Justice Tshiqi had been a Supreme Court Justice for six years, having been appointed in 2009 and she was considered as a worthy candidate for the position.[1094] While there were adverse comments about her disinclination to write minority judgements, the biggest problem arose when Commissioner Thandi Modise pointed out that Tshiqi's mobile phone contract was still being paid by Tshiqi-Zebediela Incorporated, her previous law firm. She responded by stating that she never presided over any of their cases and hence did not see the conflict. Another commissioner pointed out that the firm still used Tshiqi's name, and there was no justification of the mobile arrangement, unless

[1090] Interview with Commissioner C, 14 May 2017.
[1091] *Commentary on The Bangalore Principles of Judicial Conduct* p.*80*.
[1092] *Interview of Judge R Allie* pp.10-16.
[1093] JSC Interview held on 9 July 2015, Southern Sun O.R Tambo International, Johannesburg. In 2019, she was appointed to the Constitutional Court.
[1094] Masengu, 'Lady Justice and the Road to Equality', p.1.

it had been part of the conditions of the sale of the firm. Justice Tshiqi continued to defend herself, stating that she had been honest enough to declare the arrangement in her application. The Chief Justice eventually informed her that there was no justification for it and that she should terminate all ties with the firm.

Tshiqi's arrangement with her previous firm created doubts to a reasonable observer about her integrity. Despite her insistence that she avoided matters that the firm was involved in, a reasonable person cannot be certain that she does. Alternatively even if she did avoid those specific matters, her connection to the firm might still raise a reasonable suspicion that she could be working to assist them 'behind the scenes'. Secondly, that Justice Tshiqi did not see anything wrong with her former firm paying her mobile contract for ten years, also brought into question her own wisdom.[1095] Judges are often asked to recuse themselves from cases, because of alleged bias and the impact this would have on the eventual outcome. Courts have held that if a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased, it would affect the judge's impartiality.[1096] With the body of jurisprudence on bias and Tshiqi's considerable experience, it was surprising that she had not considered the effect that the mobile phone arrangement would have on the public's perception of her integrity.

The final expectation worth mentioning, is the expectation that judges will be impartial as they adjudicate over matters. Judge Dhaya Pillay who interviewed for the same Constitutional Court vacancy as Justice Tshiqi, faced a question about her impartiality in matters.[1097] The General Council of the Bar (GCB) had commented that while Judge Pillay was generally fair and impartial, she often came to the aid of the indigent, to the prejudice of the other party. Judge Pillay's response to those comments was that she rather thought part of her

[1095] She had previously been a High Court judge for four years, prior to joining the SCA.
[1096] *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC).
[1097] Judge Pillay is a High Court Judge from the KwaZulu-Natal division.

mandate as a judge was to assist the poor and vulnerable.[1098] She questioned how transformation would occur in South Africa if the vulnerable citizens were not given sufficient support as many did not have access to courts. This response appeared to find favour with some of the commissioners, as it was deemed that such conduct could not be considered as partiality that would be detrimental to a case.

Nonetheless, in the interview of Judge Violet Phatsoane mentioned earlier in chapter 5, impartiality was a bigger question than it was for Judge Pillay.[1099] Members of the ANC took her to task by inferring that she had been partial when she sentenced a former politician John Block, to fifteen years for fraud. The JSC commissioners alleged that then Judge President Frans Kgomo, had influenced Phatsoane's decision because he was reportedly heard telling her on a telephone call, to convict Block and his co-accused.[1100] Despite the fact that the JSC had dismissed the complaint of her alleged partiality and bias in the matter, some commissioners were not satisfied. Their accusations weighed heavily in her interview and this could have been a reason why she did not get a sufficient number of votes to be recommended for appointment.

The examples given above are merely a reflection of different expectations of judges as revealed during the interviews. Interestingly, of the three expectations discussed in this section, judicial temperament is not specifically mentioned in the South African Judicial Code of Conduct. Attributes that would fall under temperament such as humility and patience are also absent; only courtesy is explicitly mentioned. This is because as described earlier, temperament can be an elastic term which refers to how one thinks, reacts and behaves.[1101] Alternatively, it could be that the traits that encompass temperament are not considered as important as others,

[1098] Notes taken by the author on 9 July 2015.
[1099] See Chapter 5, section 5.4.2 entitled' When Politics and Power collide on the JSC'.
[1100] See *Interview of Judge M V Phatsoane*, 2017 <http://www.judgesmatter.co.za/wp-content/uploads/2018/02/April-17-JSC-interview-of-Judge-M-V-Phatshoane-WCHCJudges-Matter.pdf> [accessed 26 July 2018].
[1101] Cowen,p.38.

unless and until somebody behaves contrary to these values. Despite the examples given above of interviews where women had been questioned about impartiality, temperament and integrity, there was no substantial evidence that the expectations of judges in South Africa are predominantly met by only male candidates. I have also witnessed interviews of male candidates where issues of integrity, honesty, propriety and temperament have dominated the interviews. However, there are other areas where women would appear to face obstacles.

6.5.2 Challenges Faced by Women

6.5.2.1 Lack of Acting Experience as a Hindrance

In South Africa, acting judges are appointed to fill temporary vacancies caused by the absence or disability of particular judges.[1102] There is no written requirement that a judicial candidate needs to have acted in the court they are applying for, yet this has become the practice. All the Chief Justices as chairpersons of the JSC, have stated that acting appointment is not a pre-requisite for permanent appointment. Yet, very few candidates have been appointed without it.[1103] Acting experience in principle is worthwhile for a candidate to have because it exposes candidates to the rigours of the court. It also allows one an opportunity to gain some confidence and learn how to control the court, while gaining valuable experience in writing judgments.[1104] The importance of acting experience was uncontested amongst interviewees. However, there was a unanimous view that the manner in which acting appointments are made is prejudicial, especially to women.[1105] The statistics of acting appointments speak for themselves. In the period of this research (2013-2017), 9 266 acting opportunities were available across the country. The availability of acting opportunities refers to various periods when the courts need

[1102] Harms,p.37.
[1103] Mocumie,p.16.
[1104] Views from a journalist R, Judge E and Advocate Leah Gcabshe SC.
[1105] For a perspective on how the lack of acting appointments has affected gender transformation at the Constitutional Court, see Moses Retselisitsoe Phooko and Sibusiso Blessing Radebe, 'Twenty-Three Years of Gender Transformation in the Constitutional Court of South Africa : Progress or Regression', *Constitutional Court Review*, 1.2016 (2016), 306–31 (p.319).

to fill a vacancy created by either illness, death or an increase in the workload. Hence it is possible that one person may temporarily fill several of these vacancies during the year, depending on the duration of their acting stint. Of the 9 266 available opportunities, only 3 095 opportunities were given to women, a mere 30% of the opportunities.[1106]

Women are effectively prejudiced by this situation because acting experience is highly prized by the JSC and in this period of research, nobody was appointed to the High Court without acting experience.[1107] A 2015 report based on five legal sector meetings across the country with various stakeholders, noted that:

> Judge Presidents of the various provincial divisions exercise their discretion on who to appoint in the absence of a guideline or policy. Selections or acting appointments are generally closed processes that lead to acting appointments of candidates who are known to the individuals making the decisions about who to appoint. This results in many interested or suitable candidates not being appointed on an acting basis. [1108]

In response to the report and other complaints in April 2016, the JSC issued guidelines pertaining to the appointment of acting judges. The guidelines require a candidate have been in practice for ten years and must be appropriately qualified.[1109] They do not expound on what 'appropriately qualified' means. Further, the guidelines also advise courts to have a selection committee for the recommendation of candidates and urge the committee to consider the gender and racial composition of the country when candidates are being chosen. Despite this guideline, there are still discrepancies in how candidates are appointed across the country and this continues to prejudice women.

[1106] Statistics obtained from the Department of Justice and Constitutional Development.
[1107] For a view on acting affects women seeking promotion, see Masengu, 'A Perspective on Women and Leadership in the South African Judiciary'.
[1108] Tabeth Masengu and Cherith Sanger, *Legal Sector Meetings on Gender Transformation in the Judicairy* (Cape Town, 2015) <http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/gender.pdf> [accessed 26 March 2018].
[1109] Judicial Service Commission of South Africa, *Criteria for Acting Appointments* (Johannesburg: Office of the Chief Justice Republic of South Africa, 2016).

6.5.2.2 Tension between Family Life and Career

The difficulty of trying to balance raising children and pursuing a judicial career has been a constant problem that has been echoed in both JSC interviews and in the fieldwork data. In one interview, then Judge Nambitha Dambuza of the Eastern Cape High Court, was interviewing for a position on the Supreme Court of Appeal.[1110] It was noted by Commissioner Singh, that Dambuza was a single mother who had two daughters, aged 14 and 16 years. He enquired whether being appointed to the Supreme Court of Appeal would not affect childcare duties, since she would be in a different province.[1111] This question could be viewed in two ways. One is that it was a sexist question, because it has not been asked of men and could insinuate that a position on the Supreme Court of Appeal may not be a suitable aspiration for a single mother. On the other hand, it could be an acknowledgment of the fact that Commissioner Singh was alive to the challenges that single mothers with high profile careers face and thus he wanted to know what Dambuza would do to alleviate these challenges.

Dambuza's responded that she had anticipated applying for the position and hence had placed her daughters in boarding school and would visit them during court recess. When asked by another commissioner why it had taken her so long to avail herself for the position, she stated that her primary concern had been raising her daughters. She also explained that the judiciary did not provide support for single mothers, hence she relied on colleagues to swap rotas with her and arrange suitable timetables for her children. Dambuza, who was subsequently appointed to the Supreme Court, was neither the first nor last woman candidate to explain the difficulty of being a mother and judge at the same time. In the 2015 Constitutional Court interviews, Justice Nonkosi Mlanthla and Judge Dhaya Pillay also spoke about the challenges of balancing family with career.[1112] Judge Mlanthla spoke of how women had to

[1110] JSC Interview on 14 April 2015, held at the President Hotel, Bantry Bay, Cape Town.
[1111] Notes taken by the author.
[1112] JSC Interviews on 9 July 2015, held at the Southern Sun O.R. Tambo International Airport.

work ‘double’ shifts in order to raise a family and achieve any ambitions they had, because taking care of a family is often considered a ‘woman’s issue’.[1113]

Judge Pillay referred to it as a vicious cycle, because women’s capacity was often impaired, due to the lack of support when raising children and managing households.[1114] In order to have the kind of legal practice focusing on human rights law that would eventually lead to a judicial career, Judge Pillay made the choice not to have children. Commissioner Modise referred to this choice as one between reproductive rights and career advancement.[1115] She submitted that it was a real problem facing women everywhere and that institutions used familial obligations to block women’s progress. She further explained how she and other women parliamentarians, had fought to have child facilities provided at parliament and that the judiciary needed to do the same. For Modise, real democracy meant that one had to look at society through a gender lens and this meant specifically addressing the challenges women face regarding career and family goals.[1116] To ignore the challenges faced by women who wanted both a family and a judicial career, was to ignore the reality of women.

One of the judges interviewed for this research also pointed out that the work of a High Court judge was not conducive for mothers because it required them to physically be on the move.[1117] This was also highlighted in the interview of Judge Nozuko Mjali mentioned in Chapter 5, who sought a transfer in order to strike the balance between work and family.[1118] She had reported commuting with an autistic child between East London and Mthatha where she was hearing a case; she only stopped doing so because of death threats.[1119] Allison Tilley commented on this dynamic: ‘I think particularly in some of the more recent interviews of the

[1113] Ibid.
[1114] Ibid.
[1115] Interview on 15 June 2017.
[1116] Ibid.
[1117] Interview with Judge A.
[1118] See Chapter 5, section 5.5.2 entitled ‘The Case of Nozuko Mjali’.
[1119] JSC Interview held on 8 October 2014 at the Twelve Apostles Hotel, Camps Bay, and Cape Town.

senior women, they have been able to explain the problems of being a primary caregiver and needing flexibility in their work in order to do that'.[1120] The openness of these women candidates brought a much ignored matter to the fore, as they stated the real challenges that women face.

Judge President Mlambo also noted that when he encouraged women who had acted in his court to avail themselves for permanent appointment, he heard a familiar response. 'I have got young kids. I don't think I will be able to'. 'Having acted and seen what it takes, to bring up my kids and do this job effectively. Give me four or five years'.[1121] He cited this as the reason why good women candidates were not available for nomination and effectively not for appointment either.

6.6 WHAT CAN BE LEARNT FROM THE VARIOUS EXPECTATIONS OF JUDGES?

Before the conclusion of this chapter, there are three questions which need to be answered. Firstly, are the expectations of judges gendered, thus excluding women candidates? Secondly is the role of the judge in modern societies an acknowledgment of the need to do away with previous conceptions of judging that were steeped in patriarchal definitions and standards? Thirdly, are judicial expectations context specific? To respond to these questions it is helpful to categorise the various expectations of judges (a combination of conduct and qualities), that have been outlined in this chapter.

6.6.1 Practical Requirements

The first category is the practical expectations of judging or judges. These are the attributes most concerned with law applying obligations or adjudicative responsibilities. Here, I include requirements such as technical experience, competence, forensic skill, intellectual rigour and

[1120] Interview on 4 October 2016.
[1121] Interview on 4 April 2017.

the ability to analyse cases. Hard work, diligence, the ability to work under pressure, knowledge of the law and the capacity for articulation and discipline amongst others, also fall in this category. I categorise these as practical elements, because they are the basic elements for the functioning of the judicial role. Without the necessary experience or analytical mind, one cannot be successful in practice or whichever legal pool they are in, which is the route to appointment as a judge. These, I would argue are the minimum expectations for judicial office. I would submit that these expectations initially seem non-gendered but upon interrogation, one discovers that women bear the brunt of the consequences of these expectations.

If we examine women in South Africa, the acquisition of technical experience and forensic skills can be very difficult. Both attributes are acquired and honed with exposure and practice. The people often perceived as the 'best advocates' or the experts in a particular field, are all products of years of exposure and practice in that field. Typically for one to be successful in their chosen legal career, they must be specialists in a niche area. For example, an advocate in South Africa may have a commercial arbitration niche practice. They will be experts in this area, to the exclusion of other areas of law such as criminal law or family law. Similarly magistrates often do not amass a large wealth of experience in various legal areas because they are often assigned to specialist lower courts.[1122] However to perform successfully as a judge, one has to be able to adjudicate and have a knowledge of a wide range of legal matters.

This makes acting experience useful because the length and breadth of exposure to judicial work while acting, is unmatched by experience in any other professional pool. And yet women in South Africa are not given enough acting opportunities as judges. Consequently, without acting experience a woman judicial candidate is prejudiced, because that is the most effective way of gaining technical experience and forensic skills.[1123] Thus technical experience

[1122] This will be elaborated on further in the subsequent chapter on the Legal profession.
[1123] See Mocumie 'Gender Transformation of the Judiciary', p.14.

which is largely gained by acting experience on the bench, invariably becomes a gendered expectation of potential judges.

Secondly for women in both Zambia and South Africa, efforts to acquire experience, to be diligent, perform their duties competently and even the ability to work under pressure, can be affected by family obligations. As mentioned in the previous sections interview participants across the board pointed to the tension between motherhood and family obligations versus career. To rise to the level of expertise and competence to be considered for judicial appointment, one must spend countless hours dealing with legal matters and working overtime. This is difficult to do when a woman must balance family obligations, especially when one has small children. Even when a woman does gain the skills, experience and competence required for appointment, the challenges do not stop there. As heard from the judges interviewed or observed during interviews (in South Africa), there is insufficient support for single mothers in the judiciary. Therefore, 'while women continue to bear children, there is a biological necessity for reconciling the complicated relationship between personal lives and professional work'.[1124]

The reconciliation of personal and professional work is not only necessary for those who would be joining the bench, but for existing judges too. Failing to recognise the importance of this particular issue on women judges, means turning a blind eye to the gendered implications of the expectations of judges. This leaves women in a difficult position, one that male judges are rarely in. If they neglect their job because they are focusing on their family, it affects litigants and the functioning of the judicial system. If they give everything to their job at the expense of their family, it leads to personal problems too. Thus women who are mothers

[1124] Menkel-Meadow, 'The Comparative Sociology of Women Lawyers :The "feminization" of the Legal Profession', p.916 .

will continue to work double shifts in a dual role that requires them to 'feel like these are necessary sacrifices if they want to be a judge'.[1125]

6.6.2 Essential Character Traits

This category, I suggest, contains attributes that are very much concerned with law improving obligations. These are the expectations of judges that come after the minimum requirements mentioned above and I suggest that these are the ones that determine whether a good lawyer, becomes a good judge. As a judge, one moves from advocacy to decision making, 'from marshalling and presenting evidence, to fact-finding and synthesising'.[1126] This transition is not easy. It is in a candidate's demeanour and in how they interact with people that you can observe whether they have the specific traits of impartiality, honesty, independence, integrity, and judicial temperament (which includes humility and patience, good listening skills and emotional maturity). It is in this category, that I would place Justice Mohamed's requirements that a judge needs a moral ability to 'distinguish right from wrong and sometimes the more agonizing ability to weigh two rights or two wrongs against each other'[1127] and that she/ he also needs to have an intolerance for injustice.

I submit that understanding the daily lives of most of a country's citizens, understanding societal values and the competing interests between group and individual rights, is also a necessary attribute for having an intolerance for injustice. Integrity, in the form of moral authority as expressed by Justice Mutunga, can also not be understated. The list is not exhaustive however and has room for aspects that would be unique for the jurisdiction in question. Therefore, there may be instances where some expectations can be specific to a jurisdiction. For example, in South Africa, it is paramount for judges to be non-discriminatory and to steer away from any actions or words that would be interpreted as racist. This is peculiar

[1125] Kalem,p.9.
[1126] Bell,p.96.
[1127] Mahomed,p.115.

to the historical nature of the country and thus, a similar emphasis on conduct that can even infer racial discrimination, is absent in Zambia.

Article 13(3) of the Zambian Judicial Code of Conduct prohibits a judicial officer from belonging to any organisation that practices discrimination, contrary to the Constitution.[1128] Nonetheless, the Code of Conduct does not make any specific reference to racial discrimination, unlike the South African Code of Judicial Conduct.[1129] Another example of a context specific expectation, may be religion. In Zambia, although the Constitution upholds a person's right to freedom of religion, the Constitution declares in its preamble that Zambia is a Christian nation.[1130] Hence, it was unsurprising when judges I interviewed placed emphasis on the expectation for a judge to be God fearing or at least Christian. This expectation was absent in South Africa. It should be noted that being a Christian is not a requirement to become a judge in Zambia however, there appeared to be an expectation that judges should be of a religious belief.

From the perspective of two interviewees in Zambia, some women judges are considered as too emotional, when dealing with criminally related cases. This allegation impinges on their emotional maturity and effectively, judicial temperament. In the absence of empirical research to support these perceptions, it would be inaccurate to state that this is a factual obstacle facing women judges. However, even though this perception of women being too emotional, is currently not harming women's aspirations in Zambia, it could have a negative impact on litigants who may, as a result, view women as non-impartial adjudicators. These perceptions of women were limited to Zambia and were absent in the South Africa part of this research.

[1128] Parliament of Zambia, *The Judicial (Code Of Conduct) Act*.
[1129] Article 7 focuses on equality and non-discrimination.
[1130] Government of Zambia, *Constitution-of-Zambia-Amendment-Act-No-2-of-2016*, 2016.

Finally, I suggest that essential character traits help us answer the question of whether the role of the judge has developed from its patriarchal roots, to acknowledge women's competence. An examination of the traits listed in this category provides a testament to this change in thinking. In the past, judges were expected to be aloof, devoid of personal feelings and out of touch with the common population. As McLachlin stated, judges clung to the old image of the judge, because it brought security and gratification.[1131] As the role of judges has broadened to include matters of mega politics, the expectations of judges have also broadened to include previously unemphasised traits such as good listening skills, honesty, compassion, humility and patience.

These were previously considered to be the domain of women, while men mastered authority, assertiveness, objectivity, power and articulation.[1132] The idea that men had the monopoly on the latter traits helped support the private versus public divide, where women were consigned to home duties while men served their countries in public capacities.[1133] Now, there appears to be agreement that the traits previously alleged to be proof that women were unfit for judging are the very traits that are relevant in today's societies. More so because social, economic, political and cultural rights, are now at the very heart of a large part of judicial adjudication.[1134]

6.6.3 Societal Interactions − Conduct

This final category is more concerned with law protecting obligations in the sense that a judge needs to be concerned with not only honouring the law but protecting the judiciary's image.[1135] It does not necessarily have gendered implications. The protection of the law and the judiciary's

[1131] McLachlin, p.681.
[1132] Sherrilyn Ifill, 'Racial Diversity on the Bench Beyond Role Models And Public Confidence', *Washington & Law Review*, 57 (2000), 405–95.
[1133] Thornton, p.31.
[1134] This is evident in the cases being in heard in a number of African courts regarding presidential and parliamentary elections, the provision of social rights, contestation about the expropriation of land and the presence and work of multinational companies in mineral rich states.
[1135] Green, p.19-20.

image is premised on the importance of maintaining institutional integrity and thus unlike the first two categories, this one relates more to the external interactions of judges or rather, their conduct. For example, this category covers matters of financial propriety, interactions with lawyers and the expectation that they would refrain from any social interactions that would create a reasonable apprehension of bias. This category also encompasses the expectation that judges will be non-partisan, will act with caution in regard to the receipt of gifts or favours and that judges would refrain from commenting on political matters. The limitations of fiduciary duties as in Zambia or the exercise of same as in South Africa, are all relevant for this category. As such, there is no expectation where women could be prejudiced by these expectations in any way.

6.7 CONCLUSION

This chapter has outlined the expectations of judges in both countries. The chapter commenced with the premise that an understanding of the role of a judge, would provide some insight into whether, if at all, women were at a disadvantage in comparison to male candidates. I have highlighted the international guidelines on judging and judicial qualities before discussing the judicial codes of conducts in both jurisdictions. While the codes of conduct also included a number of procedural rules, I submit that the examination of these rules was relevant in order to illicit a holistic picture of what is expected of judges. The advice from current and past judges revealed some general practical qualities necessary for the performance of judicial work. The ability to be a neutral adjudicator, a good listener, a hard worker and a person of integrity and impartiality, were some of the commonly listed traits.

Empirical research in the form of interviews and participant observation, where possible, was of assistance in outlining specific expectations in each jurisdiction and the areas where women may face obstacles. In both jurisdictions, balancing family life and a judicial career was identified as a major obstacle. Women have either had to avoid appointment until

their children are older or accept appointment and try to balance the two competing demands. Despite numerous advances that have been made in recognising women's rights, the judiciary appears to be lagging in terms of providing a conducive and supportive environment for women. Further, societal expectations weigh heavily on women judges despite their privileged societal position. The tension between family life and work is an obstacle to advancing to the bench or being promoted to higher positions after appointment. In Zambia, there were two views that women judges get too emotionally involved in cases. This perception if proven true would be problematic, because judges are expected to be of emotional maturity and judgment.

In South Africa, the lack of acting experience presents a very real problem, because acting experience is the ticket to get permanent High Court appointment and in a large measure appointment to higher courts. Then there is the challenge of balancing career and family in both jurisdictions. If there is inadequate attention to the structural and institutional dynamics that inform these issues, women will continue to be disadvantaged. Not because they are incompetent, unfit or incapable of meeting judicial expectations, but because they are receiving inadequate support to do so. Support for women in regard to institutional and structural challenges is not only necessary for those in the judiciary, but for women in the pool from which judges are drawn. It is relevant therefore to scrutinise the legal profession, in order to assess what type of challenges are faced by prospective judicial candidates.

CHAPTER 7
THE LEGAL PROFESSION:
WHERE POTENTIAL JUDGES ARE RECRUITED

7.1 INTRODUCTION

A study on gender and judicial appointments in the selected jurisdictions would be incomplete without a discussion on the pool from which judges are drawn. Cheryl Thomas submits that there is a combination of background factors that affect judicial diversity.[1136] One such relevant factor is the legal pool from which judges are drawn. If judges are drawn from a single pool of lawyers with similar backgrounds, training and work experience, their gender alone will not guarantee a rich diversity of backgrounds. Essentially, the composition of judges on the bench is affected by the composition of the legal pool and legal system that those very judges are selected from.[1137] Rackley has argued that judicial diversity is not just about having more women on the bench, but also about ensuring that a wide diversity of backgrounds and experiences 'are actually tapped into' so that they can lead to diversity in judging.[1138] This diversity will depend on the legal pool from which judges emerge.

This chapter moves away from the selectors and the role of the judge, to the people who are most likely to be future judges. In order to understand the pool from which judges are drawn, one must interrogate the legal professions in each jurisdiction. It is acknowledged that an examination of the legal profession alone requires an in-depth and detailed study, due to the various factors that create, inform and sustain the legal profession in different jurisdictions. This chapter does not intend to address all these facets of the legal profession in both countries.

[1136] Cheryl Thomas, *Commission for Judicial Appointments Judicial Diversity in the United Kingdom and Other Jurisdictions* (London, 2005) <https://www.ucl.ac.uk/laws/judicial-institute/files/Judicial_Diversity_in_the_UK_and_other_jurisdictions.pdf>[accessed on 5 February 2019].
[1137] For instance, see Vadim Volkov and Aryna Dzmitryieva, 'Recruitment Patterns,Gender and Professional Subculture in Russian Judciary', *International Journal of the Legal Profession*, 22.2 (2015), 166–92.
[1138] Erika Rackley, *Submission to the Lord Chancellor's Advisory Panel on Judicial Diversity* (Durham, 2009) <http://www.law.qmul.ac.uk/eji/docs/51452.pdf> [accessed on 5 February 2019].

Instead what is provided here is a succinct exposition of the legal profession, limited to an overview of the environment in which women lawyers operate. The chapter commences with a general summary of the legal profession, drawing from international guidelines and literature. Subsequently, the chapter is divided into two distinct parts.

Part 1 is a discussion of the Zambian legal profession. Here the reader is introduced to the career trajectory for a potential lawyer and the different available pools from which judges can be drawn. Obtaining statistics from Zambia proved challenging so it is impossible to provide a complete picture of all the legal pools. The statistics discussed will therefore be limited. Nonetheless, using interview data, I identify certain aspects of the legal pools that are worth drawing attention to; one of which is the perceived tension between people in private practice and those in government branches or those working in the judiciary. This tension is the result of contesting perspectives about which legal trajectory better prepares one to be a judge. I conclude part 1 by submitting that the current system of judicial appointments, favours those from within the judiciary and Ministry of Justice who are mainly women.

The South African legal profession is discussed in part 2, where I examine the trajectory for a legal professional in South Africa. Consequently, the availability of more statistics in this jurisdiction allows for a more detailed interrogation of the three pools from which judges are drawn. These are the advocates' profession, attorneys' profession and the magistracy (those with a pure academic background are no longer a pool for judicial appointment). The interrogation of these pools of professionals will also include a summary of the challenges women face in these pools, which includes the lack of quality work, stereotypical perceptions of women, gender discrimination, lack of mentorship and training opportunities and the lack

of acting experience.[1139] This chapter concludes with an examination of different perspectives regarding which legal professionals actually make the best judges.

7.2 LAWYERS AND THE LEGAL PROFESSION

7.2.1 Operationalising the Legal Profession

In 1990, the Basic Principles on the Role of Lawyers (UN Basic Principles) were formulated by the United Nations to assist Member States in their task of promoting and ensuring the proper role of lawyers.[1140] Articles 9-11 focus on the lawyers' qualifications and training, with emphasis being placed on the need for lawyers to be adequately educated and trained. The UN Basic Principles also prohibit any form of discrimination in respect of entry to or practising in the legal profession. The UN Basic Principles further provide guidelines for lawyer's duties and responsibilities, lawyers' rights to freedom of association and expression, the importance of professional associations and how disciplinary proceedings should be conducted.[1141] The African Union (AU) Guidelines on the Principles and Guidelines on the Right to Fair Trial mentioned in the chapter on the expectations of judges, further provides direction on what is expected of lawyers. In addition to the guidelines provided in the UN Basic Principles, the AU Guidelines specifically draw attention to the role of prosecutors.[1142]

Prosecutors are expected to perform their duties without fear, harassment and intimidation and are, amongst other things, entitled to adequate remuneration and services.[1143] The AU Guidelines provide detailed requirements for states to ensure that lawyers in general can practise in conducive environments for themselves and their clients. This includes recognising and respecting that all communications and consultations between lawyers and

[1139] The lack of acting experience as an obstacle to judicial appointment was introduced in the preceding chapter on the Expectations of Judges.
[1140] Human Rights Office of the High Commissioner, *UN Basic Principles on the Role of Lawyers* (Cuba, 1990) <https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx> [accessed 11 September 2018].
[1141] Ibid, Articles 12-29.
[1142] African Commission on Human and Peoples' Rights.
[1143] Articles F (a)-(o).

their clients within their professional relationship are confidential.[1144] Finally, the International Commission of Jurists Practioners Guide of 2007, buttresses the above principles with a section specifically dedicated to the role of lawyers.[1145] It also highlights the need for lawyers to behave in an ethical manner and prohibits any form of discrimination.[1146]

7.2.2 General Experiences of Women in the Legal Profession

Despite the existence of international guidelines that prohibit discrimination in the legal profession, globally women's experiences in the legal profession have not been without challenges. Previously there was a paucity of women among law graduates, legal professionals, or for that matter in any occupation involving legal work, however loosely defined.[1147] Menkel-Meadow explains that while opportunities were created by the inclusion of women into universities in the 1970's, this did not bring a flood of women to the profession. Rather, women's entry to law has been a gradual process through much of the first half of the twentieth century.[1148] Eventually when women could practise law, social barriers to entry and participation in the profession, seemed more powerful than legally prescribed limits.[1149]

These barriers were and still are the absence of cultural and social capital which is necessary to excel in private practice,[1150] stereotypes about the type of work women can do,[1151]

[1144] Article I (c).
[1145] *Practitioners Guide No. 1 International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* (Geneva, 2007) <www.icj.org> [accessed 21 August 2018].
[1146] The International Bar Association also provides extensive guidelines for practioners on various aspects of practice. See https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#Practice%20Rules%20and%20Guidelines.
[1147]Menkel-Meadow, 'The Comparative Sociology of Women Lawyers',p.897.
[1148] Fiona Kay and Elizabeth Gorman, 'Women in the Legal Profession', *Annual Review of Law and Social Science*, 4.1 (2008), 299–332 <https://doi.org/10.1146/annurev.lawsocsci.4.110707.172309>.
[1149] Menkel-Meadow 'The Comparative Sociology of Women Lawyers' p.897.
[1150] Kay and Gorman, p.10.
[1151] Justin D Levinson and Danielle Young, 'Implicit Gender Bias in the Legal Profession: An Empirical Study', *Duke Journal of Gender & Policy*, 18.1 (2010), 1-41, <http://www.aals.org/statistics/2009dlt/titles.html> [accessed 30 August 2018].

racial and gender discrimination present in the profession,[1152] relegation to feminised specialisms which are less remunerative and offer fewer opportunities for progression in firms,[1153] and bias in promotion criteria.[1154] In Schultz and Shaw's seminal book on women in the legal profession, the/some/all? authors highlight the double discrimination faced by women of colour in the legal profession.[1155] This discrimination can take various forms such as slower progression in the careers of women of colour or difficulties in being hired and/or being retained in legal positions. The intersections of race and gender and the implications of such, are relevant for recognising patterns that may impede women's progress in the profession and the judiciary.

Barmes and Malleson argue that in the legal profession, notably but not exclusively, women and members of ethnic minorities are disadvantaged because of the segmented and stratified nature of the profession.[1156] The stratified nature of the profession starts at the very beginning when a jurisdiction chooses to have a split or fused bar. Dawuni and Kang posit that in African civil law jurisdictions, where one trains to be a judge after taking an examination, women are more likely to ascend to the bench.[1157] Further, in common law jurisdictions with a fused legal profession, where there is no distinction between barristers and solicitors (advocates and attorneys), there is a higher chance for women to be appointed as judges, than if they were

[1152] Jennifer Tomlinson and others, 'Structure, Agency and Career Strategies of White Women and Black and Minority Ethnic Individuals in the Legal Profession', *Human Relations*, 66.2 (2013), 245–69 <https://doi.org/10.1177/0018726712460556>.
[1153] Sharon Bolton and Daniel Muzio, 'The Paradoxical Processes of Feminization in the Professions: The Case of Established, Aspiring and Semi-Professions',*Work, Employment & Society*, 22.2 (2008), 281–99 <https://doi.org/10.1177/0950017008089105>.
[1154] Ibid, p.8.
[1155] *Women in the World's Legal Professions*, ed. by Ulrike Schultz and Gisela Shaw (Oxford: Hart, 2003).
[1156] Lizzie Barmes and Kate Malleson, 'The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity', *Modern Law Review*, 74.2 (2011 <https://doi.org/10.1111/j.1468-2230.2011.00845.x>.
[1157] Dawuni and Kang.

in a split legal profession.[1158] Consequently, the senior judiciary is often a reflection of the systematic marginalisation present in the legal profession.[1159]

In some jurisdictions, women have managed to negotiate their way and survive in private practice, which is structured in a masculinist nature. Sweetha Ballakrishnen's research on women in global transactional law firms in India, provides an interesting case study.[1160] Her findings were that women in these firms reported strong organizational and interactional advantages within the firm, especially in contrast with women in other legal workspaces.[1161] Ballakrishnen noted that some part of the advantage was negotiated because their social and cultural standing (class), mediated their gender. She also theorised that women's deference in these firms, led to greater rewards because they had been typecast as being more careful, more dedicated and polite.[1162] In the United Kingdom, a study by Tomlinson et al showed that women and minorities engage with organisational structures and ways by developing different agentic strategies to deal with discrimination.[1163] As new lawyers, women and minorities used assimilation techniques and 'played the game' (found ways to progress and perform) to be retained.[1164]

Once they had been at the firms for long, the tactics changed. If they reached partnership level, they were then likely to compromise, in order to reconcile professional and personal lives and challenge and reform existing structures and practices. How women negotiate their careers in the legal profession, is not only relevant for building on existing theoretical approaches to women's experiences in law. If judicial appointers and other stakeholders are

[1158] Ibid at p.57.
[1159] Barmes and Malleson,p.246.
[1160] Swethaa Ballakrishnen, '"Why Is Gender a Form of Diversity?": Rising Advantages for Women in Global Indian Law Firms', *J. Global Legal Stud*, 20.2 (2013), 1261-89.
[1161] Ibid at p.1268.
[1162] Ballakrishnen, p.1281.
[1163] Tomlinson and others, p.247.
[1164] Ibid at p.259.

committed to diversity in the judiciary, they too must first recognise the barriers that exist in the legal profession and the negotiation that women do, to navigate through these barriers. There are various contributing factors that compound to sometimes produce legal environments that perpetuate the barriers that women are seeking to overcome. The examination of the two jurisdictions provided below, reveals the complexity of varying issues and outcomes faced by women.

7.3 PART 1 - THE LEGAL PROFESSION IN ZAMBIA

7.3.1 How do you Qualify to be a Lawyer?

Until 1967, Zambian lawyers were trained in Britain and thus the resulting legal education pattern, largely reflected the English system of law.[1165] The urgent need to train lawyers locally to run the courts and various government departments, resulted in a pattern of education reflecting this urgency. Ndulo submits that more scholarly and reflective subjects were excluded from the curriculum, and the English system of law as an undergraduate course was adopted.[1166] Currently, potential lawyers need to obtain a Bachelor of Laws degree (LLB) from a recognised Zambian university or an internationally recognised university.[1167] Previously, the University of Zambia (UNZA) was one of only two universities in the country and the only one that offered a law degree. The recent establishment of five private universities in the last few years, has provided more avenues for those seeking to obtain a law degree.[1168]

After graduation, prospective lawyers must complete post-graduate training at the Zambia Institute of Advanced Legal Education (ZIALE), while undertaking clinical pupillage

[1165] Muna Ndulo, 'Legal Education in Africa in the Era of Globalization and Structural Adjustment', *International Law Review*, 20. (2002), 487–503.
[1166] Ibid at p.488.
[1167] Mwizukanji Namwawa, 'The Legal Profession: Perceptions and Misconceptions' (Unpublished Thesis, University of Zambia, 2005) <http://dspace.unza.zm:8080/xmlui/bitstream/handle/123456789/2747/NAMWAWAM1.PDF?sequence=1&isAllowed=y> [accessed 29 August 2018].
[1168] A number of interview participants in this research expressed the view that the proliferation of universities offering the law degree, have led to a 'drop in standards'.

at local firms or government departments.[1169] They then have to pass the Bar examinations set by the Council of Legal Education.[1170] As Zambia has a fused legal system, success at the examinations will enable one to be called to the Bar and be admitted as an advocate of the Supreme Court of Zambia. The ZIALE has faced criticism in recent years, due to its poor student pass rate (normally 3-9% at the first attempt).[1171] In the period 2013-2017, only 118 candidates in total passed the Bar examinations.[1172] This includes candidates who were re-taking the exams after previous failed attempts. The lowest number was in 2013, where only 12 of 200 candidates passed while, the highest success rate was in 2017, where 40 of 300 candidates passed the exams.[1173]

Gender disaggregated information from ZIALE was unavailable, therefore it is difficult to establish how well women are faring at the Bar exams. Though the law school of the UNZA does not maintain gender disaggregated data of law students, the Dean and another interview participant stated that most of their law graduates are women.[1174] The chairperson of the JSC also stated that there are more women taking the exams at ZIALE and being called to the Bar.[1175] However, the lack of accurate data makes a thorough analysis impossible. The pass rate at ZIALE is particularly worrying because Zambia is a small jurisdiction with a shortage of lawyers. In 2013, there were only 800 lawyers in the country, which if applied to the general population meant one lawyer for every 20 000 people.

[1169] Ministry of Legal Affairs, *The Zambia Institute of Advanced Legal Education Act*, 1996 <http://www.parliament.gov.zm/sites/default/files/documents/acts/Zambia Institute Of Advanced Legal Education Act.pdf> [accessed 17 September 2018].
[1170] The Council of Legal Education was also established by the same Act that created the ZIALE.
[1171] Elias Munshya, 'On ZIALE: Questions, Concerns and the Way Forward', *Elias Munshya*, 26 November 2015 <https://eliasmunshya.org/2015/11/26/on-ziale-questions-concerns-and-the-way-forward/> [accessed 12 September 2018].
[1172] Statistics obtained from the ZIALE in November 2017.
[1173] These statistics include those who were re-writing the Bar exams after previous failures.
[1174] Interviews with Dean Mudenda and Legal Professional 6.
[1175] Interview with Chief Justice Ngulube.

Kahn-Fogel has argued that the shortage of lawyers in Zambia is partly due to the failure rate at ZIALE which is informed by various factors such as the cost of tuition, the unfair examination system,[1176] insufficient practical experience and a faculty that has private practice or judicial experience, but no academic teaching or training experience.[1177] However, he argues that the lawyers who administer the programme at ZIALE have an incentive to keep the profession small, because of how lucrative legal work is due to the small number of practising lawyers in Zambia.[1178] In order to understand Fogel's argument better, it is necessary to examine the structure of the legal profession.

7.3.2 Structure of the Profession

The legal profession is considered attractive owing to the popular view that lawyers earn a high income and appear to have easy access to seats of social and political power.[1179] The profession is regulated by the Law Association of Zambia (LAZ) established by the Law Association of Zambia Act,[1180] read with Legal Practioners Act of 1973[1181] and the Legal Practioners Amendment Act of 2006.[1182] Amongst other objectives the LAZ furthers the development of law as an instrument of social order, considers the qualifications of lawyers and issues licensing certificates.[1183] Only advocates who are admitted to the practising roll in Zambia can be members of the LAZ that is, if they can afford to pay the membership fees.

[1176] Candidates write ten subjects and if they fail more than four, they have to retake all ten exams in the next round. In addition, if one fails to succeed after three attempts, they are banned from writing the exams for five years.
[1177] Kahn-Fogel,p.765.
[1178] Ibid at 767.
[1179] Namwawa, p.11.
[1180] Ministry of Legal Affairs, *The Law Association of Zambia Act*, Cap 31,1973 <http://www.parliament.gov.zm/sites/default/files/documents/acts/Law Association of Zambia Act.pdf> [accessed 13 September 2018].
[1181] Ministry of Legal Affairs, *The Legal Practioners Act*, Cap 30, 1973.
[1182] Ministry of Legal Affairs, *Legal Practioners Amendment Act*, 14 of 2006 <https://zambialii.org/system/files/legislation/act/2006/14/lpa2006287.pdf> [accessed 13 September 2018].
[1183] Section 4 of the Act.

The LAZ is an influential actor in Zambia, contributing to law reform and political debate.[1184] It has also been involved in the numerous constitutional processes that Zambia has undergone since 1996 and has defended the judiciary when the Executive has sought to intimidate them.[1185] That being said, Pamela Sambo argues that there are multi-faceted challenges faced by the legal profession in Zambia. These include high poverty and illiteracy rates in the Zambian population and gender imbalances.[1186] The high rates of poverty and illiteracy amongst the population are relevant if one considers just how elite legal practice in Zambia is. In this research period, the following licences to practise law were issued:

Table 4 - Number of Practising Certificates.[1187]

Year	**Practising Certificates issued**
2013	920
2014	901
2015	868
2016	1026
2017	1112

In 2017, Zambia had a population of 17,237,931 people.[1188] With only 1112 practising lawyers, there was one lawyer to every 15,501 people. Of the 1112, most legal practitioners

[1184] Jeremy Gould, 'Strong Bar, Weak State? Lawyers, Liberalism and State Formation in Zambia', *Development and Change*, 37.4 (2006), 921–41 <https://doi.org/10.1111/j.1467-7660.2006.00507.x>.
[1185] Joyce Shezongo-Macmillan, *Zambia Justice Sector and the Rule of Law* (Johannesburg, 2013) <http://www.osisa.org/sites/default/files/afrimap_zambia_justice_main_report_web_5july.pdf> [accessed 1 May 2017].
[1186] Sambo, 'The Legal Profession and Judicial Appointments in Zambia'.
[1187] Statistics obtained from LAZ in December 2017.
[1188] Statistics obtained from https://www.populationpyramid.net/zambia/2017/.

prefer employment in private legal practice or in the corporate sector, while very few join the public service, either in the government ministries, National Prosecution Authority or the Judiciary.[1189] The cost of studying law at university, funding the post-graduate training at the ZIALE and paying membership fees to the LAZ in order to join the legal practice, are serious barriers to people entering the profession.[1190] Secondly, a large number of the population cannot afford private legal services and the Legal Aid department under the Ministry of Justice, is overworked and understaffed.[1191] Advocates who work for Legal Aid often leave due to insufficient income.[1192] This has led to the provision of some legal services by non-state actors such as the National Legal Aid Clinic for Women, Caritas Zambia, Paralegal Alliance Network, Young Christian Women Association and Plan International.[1193]

In respect of the gender imbalance in the legal profession, like the ZIALE, the LAZ does not keep disaggregated statistics of its members. It is therefore difficult to ascertain how many practising women lawyers they are in Zambia. The difficulties in obtaining data in the Zambian part of this study, can perhaps be attributed to what Nabombe et al argue is a culture of sharing information minimally.[1194] They argue that in government institutions, government policies do not generally promote a culture of sharing of information, making it difficult for those who want to undertake research.[1195] However, while this may be applicable to the

[1189] Sambo,p.4.
[1190] Marc Masson and Ovais Tahir, *The Legal Information Needs of Civil Society in Zambia*, Occasional Papers Series, 2015 <http://saipar.org/wp-content/uploads/2016/02/2015_3_Masson-and-Tahir_The-Legal-Information-Needs-of-Civil-Society-in-Zambia.pdf> [accessed 31 August 2018].
[1191] Kahn-Fogel, pp.722-23.
[1192] Ibid.
[1193] Masson and Tahir, p. 11.
[1194] Pumulo Nabombe and Christine W~munyima Kanyengo, 'Knowledge Sharing among Lawyers in Zambia: Drawing from the Experience of the Ministry of Justice', *Zambia Library Association Journal*, 24.1 & 2 (2009), 29–36<http://journals.co.za/docserver/fulltext/zambia/24/1-2/409.pdf?expires=1535724656&id=id&accname=guest&checksum=1F93F06CC8E262DFA0505267C6155E25> [accessed 31 August 2018].
[1195] Ibid.

judiciary as an arm of government, it does not apply to entities such as ZIALE and the LAZ. They are established as body corporates and have no attachment to the government.

It is submitted that the failure to disaggregate data by gender, by both ZIALE and the LAZ could be indicative of two issues. Firstly, that the system does not see the need to collate gender disaggregated statistics because they are of the view that 'it does not matter'. This could be due to a lack of understanding of just how important reliable gender statistics are in providing a quantitative picture of women's access to the legal profession. The first Zambian woman to be admitted as an advocate was the former acting Chief Justice Lombe Chibesa-Kunda. She was only admitted in 1973.[1196] Hence, reliable gender statistics would be useful in determining the rate of women's access to the legal profession and comparing the increase in women judges to the number of women in the profession, since CJ Chibesa Kunda' ascension. Have more judges been appointed because of an increase in qualified women lawyers or is the proportion of women judges extraordinarily higher than women advocates?

Secondly, the lack of disaggregated data could be indicative of the belief that the Zambian legal profession is non-discriminatory because legal acumen and expertise, not gender, make one a successful advocate. This view, coupled with the idea that lawyers are deemed to be an isolated breed 'adorned in gowns of superiority',[1197] often lends itself to the perception that the legal profession is 'above' practising discriminatory behaviour. Some of the interview participants emphasised that the profession is concerned with technical skills and not gender. The presence of formal equality in regard to studying law and joining the legal profession, may contribute to this theory. However, there are signs that in regard to substantive equality, all is not well. The first woman President of the LAZ, Ms Linda Kasonde was only

[1196] Florence Ndepele Mwachende Mumba, 'The Quest for Equal Opportunities', in *International Courts and the African Woman Judge: Unveiled Narratives*, ed. by Josephine Dawuni and Akua Kuenheyia (New York: Routledge, 2018), pp. 27–35.
[1197] Namwawa, p.3.

elected in 2016 and she served a two year term.[1198] She has openly spoken about the personal attacks, criticism and sexual objectification she faced based on her gender.[1199]

In addition, one woman legal professional stated that 'women don't survive in private practice', as evidenced by the paucity of female partners and very few women holding senior legal positions.[1200] She reiterated that women advocates in Zambia are not excluded from global challenges that women face such as sexism, the stress of billing hours for new mothers and expectations to bring in new clients.[1201] It was further argued that many women would prefer to go into government departments, because they receive full employment benefits when on maternity leave. This is better than private practice, which thrives on uninterrupted periods of labour and billing hours − something that mostly only men can accomplish.[1202] Another woman advocate explained that the commission earnings structure common in a majority of law firms, impeded women's progress higher up the ranks.[1203] From her experience as a junior associate, senior associates were unlikely to work on complex matters with juniors, because they did not want to share the commission that was attached to each file.[1204]

Consequently, women were less likely to gain the requisite experience if they didn't stay at the firm for more than five years and were also less likely to be in the running for partner. This also had consequences for any bids to apply for the status of State Counsel (SC). This status is a recognition of one's skill and experience and is akin to Queen's Counsel in the UK and Senior Counsel (SC) status in South Africa and is sometimes called silk. Being an SC is a prestigious position entitling one to charge high fees and retainers, take on complex and

[1198] Ms Kasonde was also the first woman to become a named partner in an established law firm in 2009.
[1199] Linda Kasonde, 'Why We Need More Women in Leadership', *News Diggers*, 7 March 2018 <https://diggers.news/guest-diggers/2018/03/07/why-we-need-more-women-in-leadership/> [accessed 28 May 2018].
[1200] Interview with Legal Professional 6.
[1201] Ibid.
[1202] Interview with Mr O'Brian Kaaba.
[1203] Interview with Legal Professional 4.
[1204] This commission is in addition to the monthly salaries senior associates receive.

important political matters and generally be held in high esteem by the legal fraternity.[1205] Advocates in Zambia must make an application for SC to the Attorney General on the recommendation of two other SCs.[1206] This application then must be recommended by the Attorney General in consultation with the Chief Justice, before the names are sent to the president, who has the final say.[1207]

In 2018, the official number of registered SCs affiliated with the LAZ was 31.[1208] At the time only two women were listed as SCs. Advocate Abha Nayeer Patel who was later appointed as a High Court judge in May 2019[1209] and Lillian Fulata Shawa -Siyuni, the current Director of Public Prosecutions (DPP). High Court judge Prisca Nyambe also attained silk status before she was appointed to the bench, but as a judge she cannot participate in any of the LAZ activities. At the time of conducting fieldwork in 2017, I was informed that two women's names had been submitted to the President for approval as SCs, but they are yet to be appointed. The delay could partially be caused by regulations that state that only three SCs may be appointed yearly and it can only be increased by the number in which the numbers of the preceding year/years falls short.[1210]

The LAZ Executive Council (herein LAZ Council) is predominantly comprised of SCs. The LAZ Council recommends advocates and is consulted in regard to appointments for judicial office and other senior government appointments.[1211] The DPP can not participate on the LAZ Council, which effectively means that currently, all of the SCs on the LAZ Council are men. It is acknowledged that the impact of the low gender composition of the LAZ Council,

[1205] Interview with Legal Professional 2.
[1206]Ministry of Legal Affairs, *The Legal Practioners Act* Cap 30.
[1207] Article 17 (2) of the Act.
[1208] Statistics obtained from the Law Association of Zambia website at http://www.laz.org.zm/wp-content/uploads/2014/04/2018-List-of-Paid-Up-Members.pdf
[1209] Benedict Tembo, 'Abha Patel Raising Zambian Bar', *Zambia Daily Mail*, 17 May 2019.
[1210] According to Article 18(2) , Ministry of Legal Affairs, *The Legal Practioners Act* Cap 30.
[1211] Appointees to the positions of Attorney General and Solicitor General automatically attain the title of SC.

does not appear to have negated women's appointment to the bench at the moment. However it is submitted that an equal gender representation of the LAZ Council, is critical for equal gender representation in the profession.

As argued in previous chapters, the presence of more women, in this case on the LAZ Council, would be important for a variety of reasons. Equal gender representation on the LAZ Council would not only have symbolic value, but it would also bring different perspectives that could change perceptions of what is required of a successful SC candidate. This is because all advocates applying for SC status have to be approved by the LAZ Council. If ones' expertise and esteem as an advocate is mostly determined by a male LAZ Council, it could perpetuate gendered ideas of the attributes that are required by an SC, mirroring the experience of a male advocate. An increased representation of women on the LAZ Council could have the potential of reducing gender bias often prevalent in male dominated bodies.[1212] A detailed look at the dynamics of the legal profession would be useful in understanding the tension that is present amongst lawyers in Zambia.

7.3.3 Dynamics in the Legal Profession

It was clear from the interviews that tension exists between the advocates in private practice and those who work in the judiciary, state departments and other government related entities. This tension arises from differences about which legal pool best prepares one to be a judge. There are those who argued that the best judges come from private practice because advocates appear in court regularly. A competing view is that private practice does not have a monopoly on judicial craftsmanship, meaning those within the judiciary and other government departments, do also make good judges. These opposing views have resulted in accusations that the JSC favours one pool of lawyers, at the expense of the other.[1213] The previous JSC

[1212] See the sections on the gender compositions of the JSC in Chapters 4 and 5 of this thesis.
[1213] The term Legal Professional refers to all advocates generally, operating in academia, the judiciary, government departments and private practice.

practice was to appoint people mostly from magistrates and government departments such as Legal Aid and the Attorney General's chambers.[1214] After formal submissions from the LAZ for changes to this system, the JSC started to consider advocates in private practice and gradually more advocates from private practice were appointed to the bench.[1215] However, it would appear that this decision has not received universal approval.

7.3.3.1 Lawyers in the Judiciary and Government Ministries

Registrars who are within the judiciary believe that becoming a judge is a natural progression for them. This progression sees one starting off as a Resident Magistrate, then being appointed to Senior or Chief Resident Magistrate, before moving on to become a Deputy Registrar, then Chief Registrar.[1216] The position of Resident Magistrate is the only one for which a candidate can proactively apply. The rest of the positions require one to be head hunted by senior staff.[1217] In the period 2013-2017, 38 new magistrates were appointed across the country and 21 (55%) were women.[1218] As of 2017, the Zambian magistracy had a total of 207 magistrates, of whom only 73 (35%) were women.[1219] A specific breakdown of how many women occupy leadership positions in the magistracy was unavailable. However, the statistics for registrars are relevant because that is the final steppingstone before appointment as a judge. As of 2017, there were seventeen registrars in the judiciary with eight (47%) of them being women. This is an improvement from 2014, when only 3 of the 12 (25%) registrars at the time were women.[1220]

Registrars in Zambia are important quasi-judicial officers and not just administrative officials, as they are in other countries like South Africa. In Zambia, registrars handle chamber matters or assessment of damages after a judge has found liability for general damages e.g.

[1214] Interview with Mr Chishimba.
[1215] Ibid.
[1216] Masengu, 'Research Report on the Zambian Judicial Appointment System'.
[1217] Interview with Legal Professional 1.
[1218] Statistics obtained from the judiciary in November 2019.
[1219] Statistics obtained from the website of the Zambian judiciary in Septembers 2018. Available at http://www.judiciaryzambia.com/women-in-the-judiciary-2014-2018/.
[1220] Ibid.

personal injuries.[1221] If a judge is busy and cannot determine the quantum of damages, it is passed on to the deputy registrar to look at the evidence, evaluate and find damages. Of the seven judges interviewed in this research, three of them had started off as magistrates before becoming registrars and eventually judges.[1222] They all submitted that if you performed well as a registrar, it was only a matter of time before you would be encouraged by the Chief Justice or senior judges to apply to the bench. Consequently, if there is transparency in respect of a preference for those from within the judiciary, this could result in more women taking the route of registrar, in order to eventually become judges.

On more than one occasion, interview participants referred to the attainment of judicial office as a reward for one's long service in the judiciary after working as a magistrate or registrar. The Deputy Chief Justice Marvin Mwanamwamba has also previously stated that when one reaches the level of Registrar, they have ample experience which allows for a smooth transition to judgeship.[1223] While this is a great incentive theoretically, it may however result in a sense of entitlement from those working within the judiciary. One magistrate I interviewed expressed the view that magistrates or people from 'within the system' were now being ignored as the JSC sought judges from private practice.[1224]

> Previously we had an advantage, but of late they are picking more from private than from the judiciary itself. Which shouldn't be the case. First look at the people who are in a system, the people on the bench. That's when now you go and fish from outside.[1225]

According to him, people who had been in private practice for years with commercial law specialities, would struggle when dealing with criminal cases on the bench. Magistrates he argued, had the value of hearing both sides argue, before weighing up competing evidence.

[1221] Masengu, 'Research Report on the Zambian Judicial Appointment System', p.15.
[1222] Justices 1, 3 and 6, with Justice 1 occupying a position on one of the top courts.
[1223] Ibid, p.15.
[1224] Interview with Legal Professional 1.
[1225] Ibid.

Therefore if people were to be appointed from private practice, he insisted that it must be only those who regularly appear in court and argue matters of all types.[1226]

A woman legal professional argued that favouring those from private practice would give magistrates no incentive to work hard and churn out judgments, if they would be 'bypassed by somebody coming out of private practice'.[1227] The feeling that magistrates should be the prime candidates for judgeship was also informed by the view that magistrates considered themselves more patriotic than those in private practice. Ironically, advocates in private practice argue that the patriotism that magistrates boast of, is proof that they lack the requisite independence to be judges.[1228] It was explained that there is a fear that career judicial officers have 'baggage', making them more likely to defer to government.[1229] One woman judge also added that there was a deliberate attempt from advocates in practice, to look down on judges who had been appointed from within the judiciary. She stated, 'they still look down upon you like "no you are not good enough"'.[1230] This negative perception was partially informed by the view that those who elected to be in private practice sought a challenging environment, while those in the judiciary and Ministry of Justice sought security.

When questions about this view were raised, the Chair of the JSC Justice Ngulube stated that 'those who stay, who stick around in the government circles, cannot be overlooked in favour of people who had run away for greener pastures'.[1231] Justice Ngulube acknowledged that even though preference is given to those from within the judiciary, former magistrates sometimes struggle with civil cases. This is because the majority of the work in the magistracy is criminal work.[1232] Hence the importance of experience as a registrar, where one would be

[1226] Ibid.
[1227] Interview with Legal Professional 2.
[1228] Tabeth Masengu 'Research on the Zambian Judicial Appointment System',p.15.
[1229] Interview with Advocate John Sangwa SC.
[1230] Interview with Justice 3.
[1231] Interview with former Chief Justice Ngulube.
[1232] Ibid.

exposed to civil law, matters. He also emphasised that with the new Constitutional obligation to establish specialised courts, this problem may eventually fade.

It is worth mentioning that there were mixed views on judges who had been appointed from government departments. Those who had worked in the Ministry of Justice in the civil department and the Attorney Generals Chambers, appeared to be more accepted than those who worked in conveyancing or company registration.[1233] One of the senior women judges I interviewed, was previously in the Attorney General's chambers where her usual workload was at least 100 files.[1234] Therefore when she transitioned to the bench, a workload of 50-200 files did not intimidate her, while her colleagues from private practice appeared to be overwhelmed. An assistant Senior Advocate in the Attorney General's chambers also echoed this, explaining that the workload was not only varied in quality of matters, but also very voluminous.[1235] She added that with only ten advocates representing the Attorney General nationally, advocates were often thrown into the deep end and two years there, was the equivalent of ten years work in a law firm.[1236]

7.3.3.2 Advocates in Private Practice

The interview participants from private practice considered themselves as the best candidates for judicial appointment for the following reasons. Firstly, it was argued that advocates in private practice generally had to constantly research further to know more about cases and this meant that they were alive to the latest legal developments.[1237] A second reason was that private practice gave one commercial acumen which translated into efficiency and an understanding of a client's perspective.[1238] The third reason was that advocates from private practice were

[1233] Two interview participants specifically mentioned a woman judge who had previously been a registrar at the Patents and Companies Registration Agency, as an example of a bad appointee. According to them, she lacked the requisite experience.
[1234] Interview with Justice 7.
[1235] Interview with Legal Professional 4.
[1236] Ibid.
[1237] Interview with Mr Gideon Kalandanya.
[1238] Interview with Legal Professional 5.

less likely to be inclined to side with government and quasi-government institutions.[1239] A senior woman judge who was appointed from private practice also argued that those from private practice could navigate their way around a courtroom better than those who had not regularly appeared in court.[1240] A JSC commissioner appeared to agree with the importance of court appearances as a way of buttressing one's experience as a lawyer. He stated that a number of women had been unsuccessful in their attempts to become judges because they were weighed down by the lack of courtroom experience.[1241]

A fourth reason proffered by Advocate Sangwa SC was that judges who came from private practice, were doing the job for the 'correct reasons'.[1242] In mentioning three sitting judges who came from private practice, he described them as respectable judges because they left successful firms to go to the bench.[1243] Therefore these judges he argued, were able to perform optimally on the bench because they were not seeking security, but rather took the position out of conviction to serve the judiciary. The underlying theme in all four arguments seemed to be that advocates from private practice are more versatile, commercially savvy and independent, than career judicial officers and those in the Ministry of Justice. Yet Advocate Sangwa did admit that his experience as a law lecturer also gave him valuable research and other experience, which placed him at a further advantage. A judge who had come from private practice was quick to point out that it was possible to have people who rarely appear in court become excellent judges. She gave the example of former Supreme Court Justice Gardener, who had previously been a legislative drafter in the Ministry of Justice and emphasised that there was no perfect judge.[1244]

[1239] Ibid.
[1240] Interview with Justice 4.
[1241] Interview with Mr Fredrick Mudenda.
[1242] Interview with Advocate John Sangwa SC.
[1243] One of the three is a woman and one of the men, is now a Supreme Court justice.
[1244] Interview with Justice 4.

7.3.3.3 Who will make the best Judges?

Admittedly there are contesting views about who makes the best judges. Despite the difference in views, all the interview participants conceded that there have been good and bad judges from all legal pools. There was also agreement that anybody appointed from a conveyancing department or any other area of law that is mainly drafting and filing of registration papers, would grapple with the quantity and quality of work on the bench. Essentially, these issues all relate to the questions covered in Chapter 6 of this thesis: What are the expectations of judges and what does the role of the judge entail? Magistrates and registrars have an advantage in judgment writing skills, knowledge of court procedure and experience as impartial adjudicators. Advocates from private practice or even those working at the Attorney General's chambers could claim an advantage in regard to a wide knowledge of law, the ability to think quickly and the propensity to work under pressure. However, neither of these groups would have the monopoly on qualities such as independence, impartiality, integrity, propriety, being a good listener or the moral ability to distinguish between right and wrong.[1245]

These and other qualities have more to do with character and personality traits which are not established in a particular legal pool. Perhaps they can be improved on depending on what type of work one deals with, but essentially anybody can be found wanting. Once this is recognised, the question becomes less about who makes the best judge and more about how the JSC can create the best pool of judges. Two suggestions were offered by the interview participants. The first was that the JSC needs to ensure that judicial appointees are a mix of people from the judiciary, Ministry of Justice and private practice. The LAZ has previously made a submission to parliament stating the importance of having a mix of people with different legal backgrounds, because this would bring different perspectives and exposure to

[1245] These and other expectation of judges were explained in Chapter 6 entitled 'Expectations of Judges and How They Can Affect the Appointment of Women'.

the bench.[1246] In this scenario, the judiciary would be able to get the best of both worlds, which would even be more beneficial, once the specialised High Courts are fully functional.[1247]

The second suggestion was that judges should be trained after leaving university, as is done in civil law countries. Advocate Sangwa admitted that his suggestion was a radical way of changing the current system, but he argued that this system was less open to manipulation as prospective judges would be trained straight out of law school.[1248] He added that making the appointment of judges contingent on having the necessary academic qualifications would be less open to corruption and would be dictated by the needs of the country. Another lawyer agreed with this perspective but stated that there was no need to re-invent the wheel, as there was already a training pool for judges, the magistracy. [1249] She argued that people who aspired to become judges should all go via the magistracy, so that they could be trained and rise up through the system. This she opined, was the best way to build the system and counter arguments about who makes the best judges.

The current system of preferring those in the judiciary and the Ministry of Justice over those in private practice does seem to be working well for women. Despite the view by some interview participants that magistrates are being neglected in favour of those from private practice, there appears to be no evidence of this in the last few years. At least, not in regard to women. One senior judge explained that of the fourteen women judges working in the Lusaka courts, only three had come from private practice.[1250] The absence of detailed background information on all judges, means that I cannot provide an accurate picture of where judges are being drawn from. [1251] However, if the system were amended to reflect an equal combination

[1246] Interview with Legal Professional 5.
[1247] These include a Commercial Court, Family Court and Children's Court.
[1248] Interview with Advocate John Sangwa SC.
[1249] Interview with Legal Professional 2.
[1250] Interview with Justice 4.
[1251] The judiciary would not furnish me with such details as they were concerned about the judges' privacy.

of those from private practice and those from within government, perhaps there would be a drop in the number of eligible women, because of how difficult it is for women to succeed in private practice. Ultimately it would seem that in this period of study, using the judiciary and Ministry of Justice as the preferred pools of appointment for women has contributed to the increased number of women judges on the bench.

7.4 CONCLUSION OF PART 1

The purpose of this entire chapter is the examination of the legal profession, in order to provide context to questions regarding judicial diversity. To provide a foundation for the examination of the Zambian legal profession, this chapter commenced with an introduction to the legal profession generally. Thereafter, I summarised current literature on the challenges that women face globally in the legal profession. Some of these challenges mirrored those that were expressed by women judges in Chapter 6 of this thesis, such as discrimination on the basis of gender, and stereotypes about women's competence. Other challenges were peculiar to the profession, such as the lack of social and cultural capital, fewer opportunities for progression and bias in promotion criteria. I then examined the legal profession regarding the necessary qualifications to qualify as an advocate in Zambia, and explained the criticism surrounding the institute that trains would be advocates.

The next section of part 1 examined the structure of the legal profession, noting the absence of gender disaggregated data from both the ZIALE and the LAZ. I argued that the absence of this data could be due to perceptions that gender disaggregated data is not relevant or that it is unnecessary, because it is perceived that there is no discrimination in the legal profession. The final section of part 1, focused on the dynamics in the legal profession generally. There was also a specific focus on the contestation between those in private practice and those in the judiciary and Ministry of Justice. Those in private practice suggested that they are better placed to be judges because of their vast litigation experience. I concluded part

1 by suggesting that the current system of judicial appointments favours those from within the judiciary and Ministry of Justice who are mainly women. I now move on to part 2 on South Africa, where there are similarities and differences with the Zambian Legal Profession.

7.5 PART 2 - THE LEGAL PROFESSION IN SOUTH AFRICA

7.5.1 Trajectory of Legal Professionals

There have been changes to both legal education and the governance of the legal profession since the end of apartheid in South Africa. In this section, I shall focus on the career paths of magistrates, attorneys and advocates because that is where judges have been drawn from since 1994.[1252] Prior to 1997, universities offered a B.Proc (Baccalaureus Procurationis) or B Iuris degree as an undergraduate qualification in law which was the minimum educational requirement for becoming an attorney.[1253] Some, mostly previously white universities also offered the graduate LLB (Baccalaureus Legum) degree which was a necessary requirement if one wanted to qualify as an advocate. After 1997, universities have offered a four year LLB or a five year LLB which enabled one to also graduate with a Bachelor of Arts (BA) or Bachelor of Commerce (BCom) undergraduate degree.[1254] Thereafter one could pursue one of the following routes.

7.5.1.1 The Magistracy Route

The Magistrates Courts, also known as the lower courts of the judiciary hear less serious civil and criminal cases and are regulated by the Magistrates Act of 1993.[1255] Previously, magistrates were only appointed from the ranks of State Prosecutors who form part of the

[1252] Other possible career paths in law include working in the Masters Office and the Office of the Family Advocate.
[1253] Lisa R Pruitt, 'No Black Names on the Letterhead? Efficient Discrimination and the South African Legal Profession', *Michigan Journal of International Law*, 23 (2002), 545–671.
[1254] These are offered at approximately seventeen law faculties in the country.
[1255] Department of Justice and Constitutional Development, *Magistrates Act*, 1993 <http://www.justice.gov.za/legislation/regulations/r2006/MAGISTRATES.pdf> [accessed 19 September 2018].

public service.[1256] One could become a prosecutor after completing an LLB degree and completing an exam to be part of the Aspirant Prosecutor training. If successful, the candidate trained for twelve months as an intern with the National Prosecuting Authority of South Africa.[1257] On completion of the programme, one was appointed as a District prosecutor and could rise up the ranks to eventually move to the magistracy. Today, the magistracy is not only limited to prosecutors; there has been an influx of mostly attorneys and a few advocates applying to become magistrates. In order to be eligible for appointment as a magistrate one must have, amongst other things, seven years of post-university applicable experience.[1258]

The District Court is the lowest level of all magistrates courts and can hear civil and criminal matters of up to R200 000.[1259] District Court magistrates can progress to being a Senior Magistrate and then Chief Magistrate, or they can be appointed as a Regional Court Magistrate. The Regional Courts hear more serious criminal cases such as murder and Regional Magistrates now also preside over civil matters such as divorce, transfer of property and actions arising from credit agreements that do not exceed the amounts determined by the Minister.[1260] Magistrates are appointed by the Minister of Justice and Correctional Services (herein Minister of Justice)[1261] after they are interviewed by the Magistrates Commission.[1262] Subsequent to a

[1256] Morne Olivier, 'Is the South African Magistracy Legitimate', *South African Law Journal*, 118. (2001), 166–176.
[1257] National Prosecuting Authority of South Africa, *Post: Aspirant Prosecutor Training*, 2015 <https://www.npa.gov.za/sites/default/files/careers/NPA Adverts 03 July 2015.pdf> [accessed 19 September 2018].
[1258] The Magistrates Commission Republic of South Africa, *The Magistrates Commission Invites Applications to Fill the Judicial Vacancies on the Following Levels*, 2016 <http://www.justice.gov.za/vacancies/201605-MagistratePosts.pdf> [accessed 19 September 2018].
[1259] Western Cape Government, 'The Courts of South Africa', *Western Cape Government*, 2017 <https://www.westerncape.gov.za/general-publication/courts-south-africa#11> [accessed 19 September 2018].
[1260] Department of Justice and Constitutional Development, *Jurisdiction of Regional Courts Amendment Act*, 2008 <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/bills/081105a31-08.pdf> [accessed 19 September 2018].
[1261] The Minister was previously called the Minister of Justice and Constitutional Development.
[1262] Part 1 of the Magistrates Court Act.

successful interview, they must complete a six months course at the Justice College before beginning to preside in court.[1263]

7.5.1.2 The Attorneys' Profession

The admission requirements to become an attorney as of August 2018 are now prescribed by the Legal Practice Act 28 of 2014.[1264] Prior to August 2018, the attorneys' profession was overseen by the Law Society of South Africa (LSSA). It has since been replaced by the South Africa Legal Practice Council which will exercise jurisdiction over all legal practioners.[1265] In this period of study (prior to the new changes), one qualified as an attorney by obtaining an LLB and undergoing practical training, through one of two routes. The first route was the completion of a two year period of articles of clerkship with either a private law firm, or the State Attorney's office, or a recognised community service organisation or legal aid institution.[1266] This would be combined with a practical legal training course for five continuous weeks. The second route was to serve one year of articles of clerkship followed (or preceded) by six months of full time study at the School of Legal Practice. [1267]

The current guidelines in the new Act add an extra requirement, which is the completion of community service in designated areas of practice.[1268] One must also successfully pass the attorney's admission exam which is practice oriented, before applying to be admitted as an Attorney of the High Court of South Africa.[1269] Newly admitted attorneys can either practise in commercial firms and community service institutions which include organisations like university law clinics and Non-Governmental Organisations (NGOs).

[1263] Since 2012, the Justice College is part of the South African Legal Education Institute.
[1264] Previously prescribed by the Department of Justice, *Attorneys Act* (Pretoria, 1979) <https://www.lawsoc.co.za/upload/files/ATTORNEYS_ACT_53_OF_1979.pdf> [accessed 19 Sptember 2018].
[1265]Minister of Justice and Constitutional Development, *The Legal Pratice Act, Government Gazette*, 2014 <http://www.lssa.org.za/upload/documents/Legal Practice Act GG 38022 of 22 September 2014.pdf> [accessed 4 October 2018].
[1266] Article 2 of the Attorneys Act of 1979.
[1267] The training was organised by the Law Society's School of Legal Practice.
[1268] See section 26(c)(i) and section 29 of the Legal Practice Act.
[1269] The exams are held twice yearly, so a candidate has more than one opportunity to write the exams.

Alternatively, they can join the State Attorney's office, which is the equivalent of Attorney Generals chambers and is tasked with providing legal services to national and provincial departments.[1270]

7.5.1.3 How does one become an Advocate?

Similar to the attorneys' profession, one needs additional training in order to qualify as an advocate. Once a prospective candidate is in possession of an LLB, they can apply for pupillage with a constituent Bar. There are ten Bars affiliated to the General Council of the Bar (GCB) of South Africa and each Bar is an independent association.[1271] Each applicant for pupillage is evaluated using a standardised scoring system which assesses academic results, relevant previous experience, aptitude and motivation to be an advocate, and an entrance examination.[1272] The pupillage period runs for one year and each pupil is assigned to a pupil mentor to guide them through the process. Unlike the articles of clerkship period for attorneys, where clerks are remunerated, pupils are not paid a salary during their one year period. Limited financial assistance is offered by the GCB, the Cape, Johannesburg and Pretoria Bars.[1273]

The pupillage period consists of practical courtcraft, legal document drafting skills and procedural law.[1274] Previously, if one completed their pupillage period, passed their exams and was declared a fit and proper person, they would be admitted as an advocate of the High Court of South Africa. Now, the Legal Practice Act also requires prospective advocates to undertake community service as contemplated by section 26 (c) (i) of the Act. Once they have completed their community service, they can practise as an independent advocate affiliated to a constituent

[1270] Well known NGOs include the Legal Resources Centre, the Women's Legal Clinic, Probono.org and Tshwaranang Legal Advocacy Centre.
[1271] General Council of the Bar, 'A Career at the Bar in South Africa:The General Council of the Bar (GCB)', *General Council of the Bar South Africa* <https://www.sabar.co.za/legal-career.html> [accessed 19 September 2018].
[1272] Cape Bar Society of Advocates, *Pupillage Selection Policy* (Cape Town, 2017) <https://capebar.co.za/wp-content/uploads/2014/11/Cape-Bar-pupillage-selection-policy-2017-05-25.pdf> [accessed 19 September 2018].
[1273] General Council of the Bar.
[1274] Ibid.

Bar or apply to the National Prosecuting Authority to be a State Advocate (prosecutors in the High Courts). With this description of the three different pools from which judges are drawn, I now turn to the challenges faced by women in each pool.

7.5.2 Dynamics in the Legal Profession

7.5.2.1 Magistrates, the coalface of the Judicial System

The Magistrate courts as the lowest tier of the judicial system, are 'the primary gateway of access to justice for the majority of members of the public' because very few members of the public can afford access to the High Courts.[1275] The magistracy was previously beset by illegitimacy concerns because it was formerly dominated by white magistrates only (the demographic minority) and appointments were strongly influenced by the executive.[1276] Magistrates have now become public office-bearers, instead of civil servants and the previous administrative tasks handled by senior magistrates are now the responsibility of court managers.[1277] In the democratic era, the Magistrates Commission has made great strides to improve the racial and gender demographics of the magistracy. The table below illustrates the statistics of the magistracy in the period 2013-2017.

Table 5 - Magistrates[1278]

Year	African Male	African Female	Indian Male	Indian Female	Coloured Male	Coloured Female	White Male	White Female	Total
2013	424	268	60	86	78	57	461	235	1659
2014	416	285	50	65	65	48	304	177	1225
2015	392	272	60	84	84	61	387	228	1568
2016	259	233	66	93	85	68	346	244	1570

[1275] Pritzman Busani Mabunda, *BLA Welcomes Appointments of District Magistrates* (Johannesburg, 2015).
[1276] Olivier 'Is the South African Magistracy Legitimate',p.168.
[1277] The Presidency, *Twenty Year Review South Africa* (1-43, 1994) <https://www.dpme.gov.za/publications/20 Years Review/20 Year Review Documents/20YR Judiciary.pdf> [accessed 3 October 2018].
[1278] Statistics provide by the Magistrates Commission from 2016-2018.

2017	537	408	80	114	110	90	400	279	2018

In 1998, only 284(18%) of the total number of magistrates were women. By 2013, the numbers had increased to 39% and by 2017 this had risen to 44%. In 1998, of 1515 magistrates, only 567 (37%) were black and by 2017, it had risen to 66%. Senior positions such as the Regional Court Presidents and Regional Court Magistrates were previously dominated by white men.[1279] As of May 2017, four out of nine Regional Court Presidents are women, with 155 of 359 (43%) women Regional Magistrates. Despite the impressive transformation, the magistracy has been plagued by various problems. Firstly, the magistracy still suffers from the stigma brought on by its skewed composition during apartheid and its reputation as a hub for 'government' appointees who lack independence.[1280]

The independence of the magistracy was called into question in the case of *Van Rooyen and Others v The State and Others*.[1281] In this case, the High Court held that the Magistrates Commission was an executive structure that lacked independence. Consequently, because the Commission lacked independence, the magistracy was bereft of institutional protection that it required to function independently and impartially.[1282] Further, the High Court held that a number of provisions pertaining to the magistracy were inconsistent with the Constitution. However the Constitutional Court later overturned this ruling and decided that the mere fact that the executive and the legislature participate in the appointment process is not inconsistent with judicial independence. Therefore, the magistracy was sufficiently independent as required by the Constitution.[1283]

[1279] In 1998, five of seven Regional Court Presidents were white men and so were 144 of 173 Regional Court Magistrates.
[1280] Olivier 'Is the South African Magistracy Legitimate', p.166.
[1281] *Van Rooyen and Others* v *The State and Others* 2001 (4) SA 396 (T); 2001 (9) BCLR 915 (T).
[1282] Ibid at para 26.
[1283] *S and Others v Van Rooyen and Others* (CCT21/01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (11 June 2002).

Despite this decision, critics have argued that the Magistrates Commission still lacks the power and authority to make independent decisions and that the Minister of Justice has too many discretionary powers.[1284] In addition, a number of allegations of corruption over the years has not improved the perception of the magistracy as one that lacks institutional independence.[1285] These allegations have included allegations of fraud[1286] and corruption arising from accepting a bribe to influencing a case.[1287] The second issue plaguing the magistracy is its structural organisation. There has been a desire to restructure the judiciary to have a single (unified) judiciary instead of the Magistracy and the Superior Courts.[1288] The unified judiciary is not meant to abolish the lower and higher courts, in order to create one type of court. Rather, it is a call 'for unity in name, administration and control' and a replacement of the Magistrates Commission, with the Judicial Service Commission, undertaking its tasks.[1289]

Steps to unify the judiciary were affected by the Constitution 17th Amendment Bill,[1290] which allowed for the enacting of the Superior Court Act.[1291] The Act replaces the term 'Magistrates Courts' with 'Lower courts' and also enables the Chief Justice to establish norms and standards for the whole country, including for magistrates. The Judge President in each

[1284] Vanja Karth, 'Transforming the South African Magistracy: How Far Have We Come?' (University of Cape Town, 2007) <https://open.uct.ac.za/bitstream/handle/11427/3788/thesis_hsf_2007_karth_v.pdf?sequence=1>.
[1285]See Open Society Foundation, *South Africa Justice Sector and the Rule of Law A Review by AfriMAP and Open Society Foundation for South Africa Open Society Foundation* (Cape Town, 2005) <www.afrimap.orgwww.osf.org.za> [accessed 3 October 2018], p.66.
[1286] Editor, 'Former Magistrate in Court for Fraud and Corruption', *Mpumalanga News*, 7 June 2018 <https://mpumalanganews.co.za/338559/former-magistrate-court-fraud-corruption/> [accessed 3 October 2018].
[1287] Katherine Child, 'Corrupt Magistrate Sentenced to 15 Years in Prison', *Times Live*, 20 April 2018 <https://www.timeslive.co.za/news/south-africa/2018-04-20-corrupt-magistrate-sentenced-to-15-years-in-prison/> [accessed 3 October 2018].
[1288] This was first tabled by the Policy Unit of the Department of Justice and Constitutional Development in *The Vision 2000* document.
[1289] Kees van Dijkhorst, 'The Future of the Magistracy', *Advocate*, 13.1 (2000), 39–42 <https://www.sabar.co.za/law-journals/2000/firstterm/2000-firstterm-vol013-no1-pp39-42.pdf> [accessed 3 October 2018].
[1290] Minister of Justice and Constitutional Development, *Constitution Seventeenth Amendment Bill 6* (Cape Town: National Assembly, 2011) <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/110628seventeenth_0.pdf> [accessed 3 October 2018].
[1291] Department of Justice and Constitutional Development, *Superior Courts Act*, *Government Gazette*, 2013 <http://www.justice.gov.za/legislation/acts/2013-010.pdf> [accessed 3 October 2018].

province also now has responsibility to coordinate judicial functions of all Magistrates Courts falling under their jurisdiction. Critics of the proposal for a unified judiciary have argued that these changes are an effort to try and establish a career path from the lowest court to the two highest courts− the Supreme Court of Appeal and the Constitutional Court.[1292] Former Judge President Bernard Ngoepe argued this was unnecessary because a career path for judicial officers would deter experienced practioners from accepting appointments. In his opinion, the best source of appointments was from the advocates profession and thus, magistrates would be ill equipped as judges.[1293]

How do the two issues plaguing the magistracy relate to women and their aspirations for appointment on the Superior Courts bench? Over the years I have gained useful insight into the challenges women face, from my interactions with magistrates on various projects.[1294] Firstly, I have heard from both magistrates and judges that there is a perception that a unified judiciary is not feasible, because it would be robbing judges of their much-earned status. Essentially, the stigma against magistrates goes beyond their being considered as 'public servants' and corruptible. They are perceived as not being good enough to be considered akin to judges of the Superior Courts. This notion has extended into the JSC interviews and on a number of occasions magistrates have been interrogated about whether they believe that their work is equivalent to the work of judges of the High Court.

In one interview, Regional Magistrate Sardia Jacobs explained to the JSC that since the Regional Court now handled civil matters in addition to serious criminal trials, her experience

[1292] Bernad M Ngoepe, 'White Paper on the Judicial System Memorandum by Pretoria Judges BM Ngoepe', *Advocate*, 13.1 (2000), 27–32 <https://www.sabar.co.za/law-journals/2000/firstterm/2000-firstterm-vol013-no1-pp27-28-and-30-32.pdf> [accessed 21 August 2018].
[1293] Ibid at p.1.
[1294] These projects include the countrywide Legal Sector meetings conducted from 2013-2015 and the Womens Pioneer Programme which sees magistrates mentor women LLB students from the University of Cape Town (2015-2017).

as a Regional Court Magistrate was no different to a High Court judge.[1295] This earned her the ire of some commissioners and in a subsequent interview in 2014 for the same position, she was asked to revisit her opinion on the matter.[1296] The women magistrates I have interacted with have stated that despite guidelines calling for a career path from the lower courts to the higher courts, they would never be considered as 'good enough' as evidenced by Sardia Jacobs' interview and others. The perception that magistrates are not good enough also refers to their experience or lack of it. Justice Mocumie, previously a magistrate herself, acknowledges that in the past district magistrates were not rotated and as such they were stuck in either civil or criminal sections only.[1297] The Regional Magistrate courts lacked civil jurisdiction prior to 2014, so despite trying criminal trials akin to those in the High Court, Regional Magistrates had insufficient adjudication experience.

Women magistrates have stated that they are often lumped into the family courts and criminal courts, which makes them less equipped for High Court positions.[1298] However, Mocumie argues that even though Regional Magistrates now hear civil law matters, this is still not considered as good enough by the JSC.[1299] Mocumie opines that in the district courts, there have been some changes and now magistrates are rotated into different sections to garner varied experience.[1300] This she writes, coupled with an effective mentoring system by High Court judges, should give magistrates more exposure and experience that will silence their critics. Critics of the magistracy often overlook the fact that the magistracy is composed of 44% women magistrates and is more reflective of both gender and race, than the other two legal

[1295] JSC Interview held on 18 October 2012 at the Grand Westin Hotel, Cape Town.
[1296] JSC Interview held on 8 October 2014 at the Twelve Apostles Hotel ,Cape Town.
[1297] Mocumie, 'Gender Transformation in the Judiciary', p.8.
[1298] View from participants at the DGRU and Sonke Gender Justice legal sector meetings in Johannesburg and Port Elizabeth, on 9 November 2013 and 29 March 2014 respectively.
[1299] Ibid.
[1300] Ibid.

pools that will be discussed below. If the magistracy is side-lined as an untapped pool that could be drawn on for different expertise, it would defeat efforts to diversify the judiciary.

One of the research interview participants opined that the problem with the magistracy is that they 'don't promote themselves like the Law Society and the Bar promote their people'.[1301] The promotion she referred to relates to the need to 'advertise' one's profession as competent, skilled, capable and efficient. This advertisement is especially imperative in light of the importance of visibility, if one wants to be offered an opportunity to act as a High Court Judge. Which as mentioned in Chapter 6, is now a de facto requirement for permanent appointment as a judge.[1302] Women magistrates have complained that they are often not privy to information about how to apply for acting appointment or even how the selection process works.[1303] Unlike advocates and attorneys who are noticed by judges when they appear before them to argue a matter, magistrates are confined to their own courts and will not come to the High Court's attention, unless a case they preside over is taken on review. Thus, magistrates must hope that they fall under a Judge President who is pro-active enough to seek recommendations of magistrates who can act as judges.[1304]

7.5.2.2 Attorneys

In 2004, Thulu Mhlugu argued that preliminary findings of an investigation into the supply and demand for attorneys indicated that there was an oversupply of attorneys, against what the public and the state were prepared to pay.[1305] This is unsurprising because the attorneys' profession is a more attractive option for many law school graduates. There are fewer financial risks, especially for black practitioners who have financial obligations due to family

[1301] Interview with Legal Professional L.
[1302] See Chapter 6 on 'The Expectations of Judges' and particularly the section on challenges facing judicial aspirants in South Africa.
[1303] Masengu and Sanger.
[1304] Former Judge President of the Northern Cape Frans Kgomo and current Gauteng Judge President Dunstan Mlambo have been applauded by women magistrates for proactively seeking them out.
[1305] Thuli Mhlungu, 'Educating and Licensing Attorneys in South Africa' (Georgia, 2004), pp. 1–15 <http://clarkcunningham.org/Professionalism/GSULRev-MhlunguDraft2.pdf> [accessed 29 August 2018].

circumstances and university loans.[1306] The table below provides statistics of practising attorneys in this research period (2013-2017).[1307] It should be noted that they were some inaccuracies in the race statistics provided by the Law Society of South Africa (LSSA) and thus when summed up, the numbers will not reflect the accurate total number of attorneys.[1308]

Table 6 - Attorneys.[1309]

Year	Women	Men	Total practising attorneys	Non-White Women and Men[1310]	White Women and Men	Race Unspecified
2013	8102	14385	22487	8024	14189	272
2014	8708	15004	23712	8659	14694	368
2015	9356	15344	24700	9790	14696	273
2016	9818	15465	25283	10025	14765	500
2017	10309	15808	26117	10712	14890	547

The statistics above show that in 2013 the profession was composed of 36% women and as of 2017, this had gone up to 39%. On the face of it, this appears to be an improvement. Yet in all the five years of research, more women graduated from law school than men and

[1306] Masengu, 'It's a Man's World: Barriers to Gender Transformation in the South African Judiciary', p.311.
[1307] Statistics obtained from the Law Society of South Africa website, see http://www.lssa.org.za/about-us/about-the-attorneys-profession/lssa-lead-annual-statistics.
[1308] The LSSA does place a disclaimer on its website, saying that the data is received and published as is from the relevant Law Society divisions and they assume no responsibility for any errors or omissions.
[1309] The statistics are from April of each year to March of the following year e.g. April 2013-March 2014 is counted as the year 2013.
[1310] This refers to Africans, Coloureds, Indians and those who identified as others.

more women undertook articles.[1311] Of the 11,340 attorneys who were admitted to practise law in this research period, 6648 were women, a total of 59%.[1312] Therefore the skewed composition amongst practising attorneys in favour of men, prompts the question what happens to all the women? In regard to race, the contrast in progress is similar. The overwhelming number of people graduating with law degrees, undertaking articles and getting admitted as attorneys are black (Africans, Coloureds and Indians), yet the majority of practising attorneys as displayed above are white. In 2017 alone just 41% of practising attorneys were black, up from 36% in 2013 yet in the five years of study, the majority of LLB graduates and admitted attorneys were black.[1313]

Research has shown that experiences of practising law are highly gendered, and this affects women's ability to stay and thrive in law firms.[1314] Added to this is the intersectionalities of race, gender and even class, which have devastating effects, especially for black women. In 2013 a demographic survey of 55% of the corporate law attorneys in South Africa found that 31% of the equity partners were women, with only 5% of them being black women.[1315] The study also revealed that 53% of all equity partners were white and male.[1316] There were more white lawyers in senior positions than any other race group: 89% of managing partners and 80% of the chief executives. At the level of equity partners, 79% were white women or men and nearly half of the African women professionally employed in large corporate law firms

[1311] Information obtained from the Law Society of South Africa Annual statistics, found at http://www.lssa.org.za/about-us/about-the-attorneys-profession/lssa-lead-annual-statistics.
[1312] Ibid.
[1313] For a detailed discussion on law graduates, articles and admissions, see Jonathan Klaaren, 'South Africa: A Legal Profession in Transformation', 2018 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3375928>.
[1314] Kay and Gorman and also see Judith K. Pringle and others, 'Women's Career Progression in Law Firms: Views from the Top, Views From Below', *Gender, Work and Organization*, 24.4 (2017) <https://doi.org/10.1111/gwao.12180>..
[1315] Plus 94, *Project Law: Demographic Survey of Large Corporate Law Firms, South Africa* (Johannesburg, 2013) <https://www.vancecenter.org/wp-content/uploads/stories/vancecenter/demographic survey report_final.pdf> [accessed 5 October 2018].
[1316] Jonathan Klaaren, 'Current Demographics in Large Corporate Law Firms in South Africa', *African Journal of Legal Studies*, 7 (2014), 587–94 <https://wiser.wits.ac.za/sites/default/files/AJLS_007_04_06_2059-Klaaren%5B5%5D_0.pdf> [accessed 17 May 2018].

(48.1%) were candidate attorneys.[1317] In the 12 participating law firms in a survey done by Jonathan Klaaren, only 13.8% of the African women were employed at equity partner or director level, with no black women lawyers at managing partner or chief executive level. [1318]

A 2016 survey conducted by the Law Society of South Africa (LSSA) does not show much change in law firm demographics of the 12,373 law firms countrywide.[1319] There were 20% less fully white-owned firms and 14% more mixed-ownership firms, than in 2008. Fully black-owned firms grew by 3%, but the majority of the firms had an all-male ownership structure (53%) with 27% mixed gender and only 20% women owned firms.[1320] Even in the mixed ownership firms, women were the minority even though there has been an increase in mixed ownership firms (8% to 27%).[1321] What is clear is that much like in Canada, the profession is encountering difficulties in its efforts to absorb and provide opportunities for upward mobility to an increasing and more diverse number of entrants to law.[1322] In a 2016 article, I argued that the uneven law setting described above is what Bolton and Muzio have characterised as a pattern of vertical stratification. This occurs when a growing cohort of predominantly female subordinates are confined to 'a frequently transient proletarian role' and deployed to support the earnings and privileges of a relatively prosperous and autonomous elite of predominately male partners.[1323]

The past 30 years have seen the emergence of a large corporate law firm sector.[1324] In these firms, the 'track to partnership in South Africa is more of an endurance contest, a period

[1317] Klaaren, 'Current Demographics in Large Corporate Law Firms in South Africa'p.591.
[1318] Ibid at p.592.
[1319]Law Society of South Africa and LexisNexis, *Attorneys' Profession in South Africa* (Pretoria, 2016) <http://www.lssa.org.za/upload/LSSA-LexisNexis---Infographic-Report-2016-Survey-of-the-Attorneys-Profession.pdf> [accessed 5 October 2018].
[1320] Ibid at p. 20.
[1321] P.21.
[1322] Fiona M. Kay and Joan Brockman, 'Barriers to Gender Equality in the Canadian Legal Establishment', *Feminist Legal Studies*, 8.2 (2000), 169–98 <https://doi.org/10.1023/A:1009205626028>.
[1323] Bolton and Muzio, p.6.
[1324] Klaaren, *South Africa: A Profession in Transformation*,p.5.

of paying one's dues'.[1325] To eventually become a salaried, then equity partner, one must persevere for at least five years once admitted as an attorney.[1326] This is why Seuffert et al argue that the stratification of partnership was specifically designed to keep women out of equity partnership.[1327] A 2017 study by Meyer on women in law firms in South Africa, found that not only are women outnumbered, they are significantly under-represented.[1328] This is because only half of the female population is represented at the partnership level and men are over-represented.[1329] Partnership is not just about having a stake in management decisions or equity, it also means greater financial security, power and flexibility. Yet the road to become a partner or even advance in law firms, is beset by various complex factors. The first factor is human capital development, which often encompasses education, acquired skills and experience earned.[1330] The legacy of apartheid has meant that those who attained their education at formerly non-white (Bantu) institutions, cannot compete for articles of clerkship, with white counterparts who went to elite institutions.[1331] Only a small number of politically connected black people or those who trained outside of the country are considered as marketable candidates.[1332] The more prestigious university one goes to, the higher the chances of being hired as a candidate attorney, which is the entry point into the firms.

Closely related to human capital development is cultural capital, which encompasses 'general dispositions' and a 'cultural awareness' that can facilitate and nurture social connections and provide information about opportunity systems.[1333] During my period of

[1325] Pruitt,p.603.
[1326] Ibid.
[1327] Nan Seuffert, Trish Mundy, and Susan Price, 'Diversity Policies Meet the Competency Movement: Towards Reshaping Law Firm Partnership Models for the Future', *International Journal of the Legal Profession*, 25.1 (2018), 31–65 <https://doi.org/10.1080/09695958.2017.1359613>.
[1328] Tamlynne, Meyer, 'Female Attorneys in South Africa: A Quantitative Analysis', *African Journal of Employee Relations*,42 (2018),1-21.
[1329] Ibid, pp.13-14.
[1330] Fiona M Kay and John Hagan, 'Raising the Bar: The Gender Stratification of Law-Firm Capital', *American Sociological Review*, 63.5 (1998), 728–43.
[1331] Pruitt, p.567.
[1332] Ibid.
[1333] Kay and Hagan, p.730.

articles of clerkship in a medium sized firm, I realised that the cultural awareness that is prized at most law firms is an awareness most familiar and particular to white male activities and privileges. These include but are not limited to playing golf, membership of the local country club and access to various holiday homes.[1334] Displaying particular tastes, styles or understandings can often serve as a cultural resource, because one can manage impressions and construct social networks through that.[1335] Black lawyers to a large extent and women lawyers (especially black women) are less likely to possess the general dispositions of the white male due to different historical backgrounds, financial capital and educational access resulting from apartheid.[1336]

In research conducted by the Centre for Applied Legal Studies (CALS), black participants expressed feelings of difference and alienation in law firms due to lack of cultural capital.[1337] One choice available to them was to try and assimilate into the dominant culture through language, behaviour and other social conduct. The option of assimilating is borne from the recognition that cultural capital, paves the way into the inner circle from where important networks are made that are critical to one's legal ascension.[1338] A lack of the cultural capital would lead to career stagnation in a firm. This is not unique to South Africa and research conducted in England and Wales also provided similar observations. Promotion in firms was tied to bringing in new clients through strategic activities located in gendered, cultural and ethnic specific spaces, such as the side-lines of sporting events, the confines of exclusive clubs

[1334] For a discussion on how merit is also illuminated through traditional practices such as homosocial bonding, see Hilary Sommerland 'The "Social Magic" of Merit: Diversity,Equity, and Inclusion in the English and Welsh Legal Profession', *Fordham L. Rev.*, 83 (2015), 2325–48.
[1335] Kay and Hagan, p.731.
[1336] Masengu 'It's a Man's World: Barriers to Gender Transformation in the South African Judiciary ', p.312.
[1337] Centre for Applied Legal Studies, *Transformation of the Legal Profession* (Johannesburg, 2013) <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Transformation of the Legal Profession.pdf> [accessed 16 May 2018].
[1338] Masengu 'It's a Man's World: Barriers to Gender Transformation in the South African Judiciary ', p.312.

and camaraderie of drinking engagements.[1339] This left Black Minority and Ethnic (BME) people and white women excluded. Some chose to assimilate which meant adopting traits which conform to the dominant white male, dressing in a particular manner and minimizing visibility or impact of family life.[1340]

On account of South Africa's racial history, the majority of corporate clients are white and buoyed by the currency of cultural capital in law firms, prefer giving work to other white males.[1341] Solanke argues that studies have also shown that gender and race create a qualitative difference due to negative myths and stereotypes which can covertly influence decision-making.[1342] The decision-making on who the preferred attorneys are, means that women are less likely to be retained and to be promoted, because they are not receiving briefs. Kay and Brockman have argued that regardless of experience, field of law, billable hours, clientele responsibilities, and size of firm, men have consistently higher likelihoods of attaining partnership status than women.[1343] The situation in South Africa is also informed by what Pearce et al refer to as the myth of the meritocratic journey of the atomistic individual.[1344] This approach rests on an assumption that once at the firm, partners and associates behave as atomistic actors, such that their achievement is a function of individual merit and that discrimination only occurs when individuals in power intentionally engage in it. [1345]

This false approach buttresses the continued privilege of white males and sometimes black males, resulting in women leaving the profession due to frustration, lack of promotion or

[1339] Tomlinson and others,p.251.
[1340] Ibid, p.258.
[1341] See Plus 94 report in totality.
[1342] Iyiola Solanke, 'Putting Race and Gender Together: A New Approach To Intersectionality', *Modern Law Review*, 72.5 (2009), 723–49 (p.732) <https://doi.org/10.1111/j.1468-2230.2009.00765.x>.
[1343] Kay and Brockman,p.182.
[1344] Russell G Pearce, Eli Wald, and Swethaa S Ballakrishnen, 'Difference Blindness Vs. Bias Awareness: Why Law Firms With The Best Of Intentions Have Failed To Create Diverse Partnerships', *Fordham Law. Review.*, 83 (2015), 2407–54.
[1345] Ibid.

simply ill treatment.[1346] In addition, discrimination can appear in subtle forms. One interview participant stated that he knows firms who will not hire young women attorneys, because they want to avoid having to find a replacement when they go on maternity leave.[1347] Essentially, the situation described above leaves women in a precarious position.[1348] The absence of quality work and career progression, makes them less experienced and competent to be eligible for judicial appointment. If they stay in law firms that don't recognise their technical expertise but rather focus on their cultural capital, they will never make partner. If they leave and start their own law firms, they still lack the cultural capital to draw in new clients, hence the small number of women owned law firms.

Accordingly, the CALS report calls for an acknowledgement that the lack of transformation in the judiciary is linked to a lack of transformation in the legal profession.[1349] The more women and black women exit the profession, the smaller the pool of black female candidates for the judiciary in comparison to their white male colleagues. This is especially relevant because in the past few years, there appears to be a recognition of attorneys as a valuable pool for judicial appointments. In the period 2013-2017, 77 people were appointed to ordinary High Court positions. Of the 77 people, 35 of them were attorneys and of these 35 attorneys, 16 (45%) were women.[1350] This is an indication that attorneys are a competent pool to draw from and a more enabling environment in law firms, would further increase the number of women eligible for appointment.

[1346] Centre for Applied Legal Studies, *Transformation of the Legal Profession*,p.37.
[1347] Interview with JSC Commissioner A.
[1348] For an exposition on why women will never be able to meet the masculine standards of law firms, see Hilary Sommerlad, 'The Myth of Feminism: Women and Cultural Change in the Legal Profession', *Interntaional Journal of the Legal Profession*, 1.1 (1994), 31–51 <https://doi.org/10.3868/s050-004-015-0003-8>.
[1349] Centre for Applied Legal Studies, p.62.
[1350] Statistics on file with the author, tabulated by information provided by the Department of Justice and Correctional Services.

7.5.2.3 The Advocates Profession

Advocates have long been the preferred pool for judicial appointment. Former Judge President Bernard Ngoepe openly stated that 'the best source of appointments is the advocates profession because magistrates, academics and attorneys have limited experience and competence'.[1351] In the judicial appointment period of October 2010 – April 2015, a total of 265 candidates were interviewed for 136 vacancies and 95 of these (35% of the total) were advocates. Of the successful candidates appointed to the bench however, 43% of the 101 candidates were advocates.[1352] In the period 2013-2017, 41% of the successful candidates had been advocates before their initial appointment to the High Court. From my observation of the JSC interviews, advocates, especially those who have attained silk (Senior Counsel), are highly prized for appointment. Yet in terms of diversity, the demographics at the Bar are even worse than in the attorneys' profession. The first table depicts statistics for all advocates and the second table focuses on Senior Counsel (SC).

Table 7 - Advocates.[1353]

Year	White Male	White Female	African Male	African Female	Coloured Male	Coloured Female	Indian Male	Indian Female	Total
2013	1378	390	320	102	50	41	120	70	2471
2014	1387	414	366	115	57	44	116	71	2571
2015	1374	428	405	132	63	46	117	76	2641
2016	1404	442	490	162	70	49	114	95	2826
2017	1392	458	526	196	75	48	126	94	2915

[1351] Ngoepe, p.30.
[1352] This is an improvement from the pre-democratic era, when 100% of the judicial candidates were from the advocates profession.
[1353] Statistics obtained from General Council of the Bar.

Table 8 - Senior Counsel

Year	White Male	White Female	Black Males [1354]	Black Females
2013	371	20	61	9
2014	367	19	57	7
2015	383	21	67	11
2016	414	27	63	23
2017	410	27	77	17

As of late 2017, 47% of the advocates nationally were white males, while only 27 % (796) of the entire advocates' profession were women. The status of Senior Counsel (SC) is dominated (80%) by white men.[1355] The advocates' profession, even more than the attorneys' profession is built on and thrives on a white male masculinist culture that is the antithesis of non-white males. Much like Hunter describes the profession in Australia, the South African profession is 'an imagined community sustained by acculturation processes, a hierarchical power structure and invented traditions of behaviour that reproduce and reinforce hegemonic masculinity'.[1356]

Prior to the introduction of the Legal Practice Act in August 2018, advocates work was based purely on referrals from attorneys. In terms of receiving briefs once again, the importance of both human development and cultural capital is clear. Who you know, which networks you

[1354] The term black here, includes Africans, Indians and Coloureds.
[1355] The previous Minister of Justice, Michael Masutha had on two occasions stated that he has returned lists from constituents Bars for recommendations of SC, because the lists had no black people or women.
[1356] Rosemary Hunter, 'Women Barristers and Gender Difference in Australia', in *Women in World's Legal Profession*, ed. by Ulrike Schultz and Gisela Shaw (Portland: Hart Publishing, 2003), pp. 103–22.

are affiliated to, which university you went to and other factors determine whether one receives work or not. Personal preferences of attorneys mean that they are likely to trust, support and promote people with profiles similar to their own.[1357] Therefore looking at the composition of the attorneys' profession, it is unsurprising that the LSSA survey found that only 24% of the expenditure on advocate's briefs was spent on black advocates, with women advocates only receiving 22% of the briefs.[1358]

The State has also been accused of playing a role in supporting the unequal field, because of allegations that it mostly briefs white SCs. Dissatisfaction with the lack of briefs from the State Attorneys office (the institution in charge of government's legal work) led to a public protest by black advocates in 2017.[1359] An LLSA draft report found that Government departments and State Owned Enterprises briefed the same few advocates from time to time, with women significantly receiving fewer briefs than men.[1360] Interestingly, the report also stated that a handful of both black and white male advocates are the recipients of most of the work and specific white advocates are the most paid. [1361] Even though the Minister of Justice has previously claimed that government departments are briefing more black advocates and women,[1362] the issue is whether the briefs are significant enough to earn them big fees.

The larger fees are earned in commercial matters and cases that are heard in the Supreme Court of Appeal and Constitutional Court. As an illustration, consider the fact that in 2013, 72% of advocates appearing before the Constitutional Court were white and 77% of

[1357] Tomlinson and others,p.250.
[1358] Law Society of South Africa and LexisNexis,p. 35.
[1359] Alex Mitchley, 'Stop Feeding Us Crumbs, Black Lawyers Association Tells Govt', *News24*, 14 June 2017 <https://www.news24.com/SouthAfrica/News/stop-feeding-us-crumbs-black-lawyers-association-tells-govt-20170714> [accessed 7 October 2018].
[1360] Moses Retselisitsoe Phooko, *Draft Report on Research Findings on the Distribution of Legal Work in the Legal Profession in South Africa* (Pretoria, 2016) <http://www.lssa.org.za/upload/Draft Briefing Patterns Report.pdf> [accessed 7 October 2018].
[1361] Ibid.
[1362] Statement by former Minister of Justice and Correctional Services Michael Masutha, at the JSC Interviews held on 9 July 2015 at the OR Tambo Southern Sun Hotel.

appearances were made by males.[1363] Between the periods of 1995 and 2013, 63.3% of the appearances as lead counsel in the court have been made by white males and 18.2% by black males. Women in total accounted for 19% of the appearances with 9.7% of them being black. Consequently, women cannot easily acquire the experience and exposure that would make them prime candidates for judicial appointment.

Another challenge for women is the individualised nature of the Bar. To stay financially afloat, one has to consistently make fees to cover their own finance, administrative bills and costs of chambers. Yet there are various impediments to this. For example, the GCB rule 7.6.1 requires junior advocates to wait 60 or 97 days (depending on jurisdiction) before claiming fees for work done. Yet every 30 days rental dues must be paid.[1364] For junior advocates, the financial struggles are mostly experienced by women and black advocates, though some white advocates have also struggled. [1365] 'Many junior advocates have left the Bar because of cash-flow problems caused by inordinately late or non-payment of their fees by instructing attorneys'.[1366] It has been argued that women find themselves accumulating debts, being in overdraft or falling victim to attorneys who are bad payers.[1367]

Alternatively, there are instances where women are considered as 'objects of desire', while men are the desiring objects in what Hunter argues is an element of hegemonic masculinity.[1368] Women are sometimes faced with situations where senior advocates taking

[1363] Michael O Donovan, *Aspects of South Africa's Constitutional Court* (Cape Town, 2014).
[1364] Vuyani SC Ngalwana, 'Legitimacy, Transformation and the Need for Change at the Bar', *Advocate*, 30.1 (2017) <https://www.sabar.co.za/law-journals/2017/april/2017-april-vol030-no1-pp03-08.pdf> [accessed 22 August 2018].
[1365] Ibid, p.6.
[1366] SC Ngalwana 'Legitimacy, Transformation and the Need for Change at the Bar ', p.6.
[1367] Thandi Norman, 'Why Do Women Leave the Bar?', *Advocate*, 2 (2004), 24–26 <http://journals.co.za/docserver/fulltext/advocate/17/2/394.pdf?expires=1526571376&id=id&accname=guest&checksum=E1EB900601D4F4C1D4D24CF2E880E93C> [accessed 17 May 2018].
[1368] Hunter 'Women Barristers and Gender Difference',p.110. For an additional perspective of a profession segmented by gender, see Hilary Sommerland, '"A Pit to Put Women in": Professionalism, Work Intensification, Sexualisation and Work–Life Balance in the Legal Profession in England and Wales', *International Journal of the Legal Profession*, 23.1 (2016), 61–82 <http://web.a.ebscohost.com.ezproxy.uct.ac.za/ehost/pdfviewer/pdfviewer?vid=0&sid=e79b10aa-c57a-4ab7-9c97-511fa70f70af%40sessionmgr4007> [accessed 25 September 2017].

them on as junior advocates in cases, expect to be paid in kind with sexual favours.[1369] It has also been reported that some advocates are harassed by attorneys in return for briefs, yet many advocates are not willing to report the harassment.[1370] This sexual harassment is a form of sexual bias.[1371] A different form of bias is also present in socially constructed gender biases and stereotypes about women being naturally suited to family law work, to the exclusion of commercial law and other types of law.[1372] Research conducted on women at the Johannesburg and Cape Bars found that some women feel pigeon-holed, in family law practice or other non-dominant practice spheres.[1373] There is a perceived disjuncture between the qualities stereotypically associated with women and the demands of an advocate's practice or the demands of litigating commercial cases.[1374] Therefore, stereotypes about women's work styles, character traits and job competencies have hindered women's abilities to land and advance to high level litigation in complex commercial matters.[1375]

Advocate Norton SC has also posited that the conventional brand of success at the Bar calls for single-minded application over a sustained period, which requires 'the ability to work long (and often unpredictable) hours on a sustained basis'.[1376] Herein lies the fourth challenge for women who want to straddle career and motherhood. Women unlike men, are more likely to take months out of practice to give birth and parent growing children. Women who assume meaningful parenting responsibilities or those who take leave of absence after childbirth suffer,

[1369] Feedback provided by advocates as the Legal Sector Meeting organised by Democratic Governance and Rights Unit and Sonke Gender Justice, held on 9 November 2013 at the Protea Hotel Wanderers, Johannesburg.
[1370] SC Ngalwana'Legitimacy, Transformation and the Need for Change at the Bar ',p.7.
[1371] Rudo Runako Chitapi, 'Women in the Legal Profession in South Africa: Traversing the Tensions from the Bar to the Bench' (University of Cape Town, 2015) <https://open.uct.ac.za/bitstream/item/16273/thesis_law_2015_chitapi_rudo_runako.pdf?sequence=1> [accessed 25 July 2017].
[1372] Rudo Chitapi, 'Women in Law: Navigating the Tensions of Gender Bias and Intersectionality at the Cape and Johannesburg Societies of Advocates (the Bar)', *Agenda*, 115.32 (2018), 43–52 <https://doi.org/10.1080/10130950.2018.1460134>.
[1373] Ibid.
[1374] Michelle SC Norton, 'The Other Transformation Issue: Where Are the Women?', *Advocate*, 30.1 (2017), 27–34 <www.lexisnexis.co.za/store> [accessed 22 August 2018].
[1375] Ibid at p.46.
[1376] SC Norton, p.28.

because the interruption of practice flies in the face of the sustained momentum required to develop a practice.[1377] The weight of parenthood disproportionately impacts women and those who take maternity leave face a negative impact on their practice, because overhead costs still have to be paid.[1378] The Cape Bar has tried to alleviate this problem by giving women six months maternity leave which addresses the financial burden of keeping chambers, but this is not the case in other constituent bars across the country. Having explained the challenges facing women in the three legal pools, it is worthwhile to interrogate where the best judges come from.

7.5.3 Do Advocates Really Make the Best Judges?

Akin to the discussion in Zambia, there were suggestions that the best judges come from those who are constantly litigating and appearing in court. These are predominantly advocates, even though attorneys can apply for a practising certificate to appear in the High Court.[1379] Advocate Ngalwana SC stated it in the following manner:

> by and large, the training that an advocate goes through and the preparation by nature of the advocates' profession, prepares him and equips him or her, for the bench but, attorneys are not trained to do that. When attorneys draft contracts by and large, even the litigation departments, they don't litigate themselves, they've got too many files and cases to deal with and they brief counsel.[1380]

He did however admit that there are some attorneys and magistrates who are exceptions and can cope with High Court work. An advocate who was formerly an attorney agreed in part with Ngalwana SC's statement. He offered the view the being a judge is a public function and that function requires certain skills. One of them, is the skill to adjudicate disputes and the adjudication of disputes is primarily done in the High Court.[1381] Therefore in his opinion, it

[1377] Ibid.
[1378] Rudo Chitapi 'Women in Law: Navigating the Tension', p.49.
[1379] The Legal Practice Bill also now allows attorneys the right of appearance in the High Court, Supreme Court of Appeal or Constitutional Court, as long as they comply with certain requirements.
[1380] Interview with Advocate Vuyani Nlangwana SC.
[1381] Interview with Legal Professional S.

was difficult to see how this could be done effectively, if a practitioner didn't have experience in the High Court or some experience in litigation.

On the other hand, he argued that judging required other skills such as making findings of facts and law, evaluating the admissibility of evidence and managing caseloads. Attorneys with a busy practice he opined, were likely to have these skills because they have to research, draft and manage their practices (if the practice was small or solely owned). It is obvious in the JSC interviews that candidates who litigate often, are considered as more promising judicial candidates. Advocates are top of the equation, followed by attorneys. Magistrates who adjudicate, albeit in lower courts daily, have often been perceived as inadequate for appointment.[1382] Justice Mocumie finds this view troubling.

> The magistracy is the coalface of the South African judiciary. Surely if an advocate or attorney gained experience, he must have cut his or her teeth in the magistracy. If that counts as experience or competence, should it not be that the magistrate he appeared before repeatedly to gain that experience and competence gained the same if not more because of the diverse practitioners and matters that come before him or her?[1383]

Essentially, Mocumie argues that if magistrates are adjudicating civil and criminal trials daily, they are acquiring the same skills that advocates and attorneys acquire when they argue in the High Court.

Former Judge President Kgomo appears to agree with this view and he has been very influential in training and mentoring women magistrates who have subsequently become judges.[1384] According to Judge Kgomo, the magistrates he mentored approached their work with dedication, honesty and integrity, making them suitable candidates to be mentored in order

[1382] Interview with Advocate Nlangwana SC.
[1383] Justice Constance Mocumie, 'Challenges Women Face in Their Quest for a Representative Judiciary' (Bloemfontein, 2013).
[1384] He has mentored at least seven women who went on to become High Court Judges by 2017 and one who is currently a Justice of the Supreme Court of Appeal.

to eventually be eligible for High Court appointment.[1385] Regardless of the differentiation in work experience, there are three important issues that are relevant for a discussion on diversity in the superior courts. First, the emergence of acting appointment as a prerequisite for permanent appointment, indicates that there is a prevailing view that one needs to be exposed to the quality and quantity of work on the bench. This in a sense helps level any perceived shortfalls that magistrates or even attorneys may have. In the periods of acting as a High Court judge, one learns skills, adapts to the court environment and essentially tests their ability to adjudicate. This period I suggest, should be the determining factor for appointment and not whether one has been an advocate.

Secondly, the recent trend to appoint judges from the magistracy and attorneys' profession, partially stems from the problems that are being experienced in the advocates' profession. If the JSC wanted to only appoint senior advocates as judges, it would be hard pressed to find a big enough pool of women from the Bar from which to appoint. I submit that the diversification of legal professionals for judicial appointment is not a case of picking 'second best'. Rather it's a proactive and sensible effort to recognise that different legal professionals will have different skills and attributes and that can only be of benefit to the judicial system.

Finally, across the magistracy, attorneys' profession and advocates' profession, a common refrain in the interviews was the need for mentoring. Interview participants emphasised the need for male SCs who have been at the Bar for years to mentor women and give them requisite skills.[1386] Magistrates spoke of the need to have judges mentor them and invite them to shadow them in courts.[1387] Even judges, emphasised the importance of mentoring

[1385] Interview with former Judge President Kgomo.
[1386] Interview with Justice D.
[1387] Interview with Legal Professional V.

and how it had assisted them on their trajectories to the bench.[1388] The question should not be which legal professionals make the best judges but rather, what can be done to ensure that all women legal professionals have equal opportunities to be considered for judicial appointment.

7.6 CONCLUSION OF PART 2

In the second part of this chapter, I have provided an exposition of the legal fraternity in South Africa. I have discussed the possible routes for LLB graduates before examining three areas of the legal profession where judges are drawn from. The magistracy, the attorneys' profession and the advocates' profession. I did not discuss legal academia because candidates with predominantly academic experience are no longer a pool where judges are often drawn from. Key to this part of the chapter, was an analysis of the challenges that women face in each pool and how that affects their judicial aspirations. It was suggested that a failure to interrogate the complexities of women's challenges will harm any efforts to diversify the judiciary. I also highlighted the intersections of race and gender and how they collide, to the detriment of black women in the attorneys' profession and at the Bar. Part 2 concluded by discussing the issue of which legal pool provides the best judges and surmised that each legal pool does and can offer different skills that would be useful to the judiciary. The crux however, lies in implementing solutions that will alleviate the challenges women face, while providing them with useful mentorship opportunities.

[1388] Interviews with Justice D and Judge E.

CHAPTER 8
ADDITIONAL FACTORS THAT MAY HAVE A BEARING ON THE JUDICIAL APPOINTMENT OF WOMEN

8.1 INTRODUCTION

The preceding chapters distinguished factors that are pertinent to the appointment of women judges. These factors and the ones discussed in this chapter were either identified at the commencement of this research from the literature review or during the field work interviews. The factors examined herein are secondary, but not insignificant to discussions on increasing judicial diversity in the two jurisdictions. The first factor is the role of political actors in appointments. In respect of Zambia, this chapter examines the responsibilities of the President and National Assembly. While for South Africa, only the President's role is analysed here because a discussion on other political actors such as members of the JSC, was included in Chapter 5.[1389] The second factor is the legislative landscape for the advancement of women's rights in each jurisdiction. The third is the role of Civil Society Organisations (CSOs) and legal professional bodies in the appointment process and the extent to which they make contributions to the process. The objective of this chapter is not to provide an extensive examination of each of these factors. Rather, what is provided herein is a summary of notable aspects that are worth considering.

I begin each part with a discussion on the President's role in each jurisdiction and for the Zambian section, this includes a discussion on the role of the National Assembly in the appointment of judges. The next section in each part interrogates the legislative landscape for women's rights in each jurisdiction. What are the constitutional and/or legislative provisions regarding gender equality? Do they have any bearing on the appointment of women to the bench or are they insignificant due to the complex determinants involved in the appointment

[1389] See chapter 5, section 5 2.1 entitled 'The Composition of the JSC' and section 5.4.2 'When Politics and Power Collide on the JSC'.

process? The final parts of each section analyse the involvement of CSOs and legal professional bodies in the appointment process. Are they valuable stakeholders in the bid for a more gender equitable judiciary? Or is their involvement insufficient to influence goals to increase the number of women on the bench?

8.2 OTHER RELEVANT COMPONENTS IN THE ZAMBIAN APPOINTMENT PROCESS

8.2.1 The Zambian Political Actors in Judicial Appointments

8.2.1.1 The President

An ongoing theme in interviews with the Zambian participants was the excessive use of presidential power. Many of the interview participants stated that a discussion on the appointment of judges, was incomplete without considering the removal of judges. One concerning incident that was referred to several times, is worth mentioning here. It began on 30 May 2012 when Judges Nigel Mutuna and Charles Kajimanga of the High Court, and Judge Phillip Musonda of the Supreme Court, received a written letter of suspension from then President Michael Sata. The President held a press conference on the same day stating that by the powers vested in him under articles 98(2),(3) and (5) of the Zambian Constitution,[1390] he would appoint a tribunal to investigate allegations of incompetence and misbehaviour of the said judges.[1391] The judges applied for an *ex parte* order for leave to apply for judicial review and a stay of the president's decision, arguing that this action was contrary to removal procedures laid out in section 98 of the 1996 Constitution.

The Attorney General appealed the granting of the order and the Supreme Court in *Attorney General v Mutuna & Others,*[1392] held that there was no condition precedent to the President exercising his powers to remove judges from office. These powers were granted to

[1390] Constitution of Zambia, 1996
[1391] The judges had not known of the allegations before and neither had they been reported to the Judicial Complaints Authority, as prescribed under the Judicial Code of Conduct Act No. 13 of 1999
[1392] (Appeal No. 088/2012) [2013] ZMSC 38 (9 May 2013).

him as per article 98(2)(3) and (5) of the 1996 Constitution and thus the suspension was lawful.[1393] This decision was widely criticized with renowned academic Professor Ndulo stating that article 98 had not been drafted to become the conduit of executive influence over the judiciary.[1394] He cautioned that removing judges from the bench on spurious grounds was the greatest threat to judicial independence.[1395] Notably the majority judgment was written by then acting Chief Justice Lombe Chibesa-Kunda, who courted controversy when Sata attempted to appoint her as the permanent Chief Justice. This was problematic because she was past the constitutionally permissible age for appointment.[1396] The proposal to appoint her as Chief Justice was rejected twice by the National Assembly's Select Committee, which is responsible for ratifying all judicial candidates.[1397]

The arbitrary removal of the three judges and the illegal attempts to appoint a Chief Justice past the constitutionally permissible age, were considered as just some of the problems with the President's power in Zambia. This view appears to be supported by an independent report that found that the President's ability to control judicial personnel, makes the judiciary subject to significant pressure from the ruling party.[1398] In the New Constitution, the President still appoints judges subject to ratification from the National Assembly.[1399] The ratification process, further explained in the subsequent section, is meant to provide an additional layer of scrutiny. The President also has the power to remove judges, upon recommendation of the

[1393] Constitution of Zambia, 1996.
[1394] Elias Munshya, 'With Forked Tongues: Why Chibesakunda's Majority Ruling in Attorney General v. Mutuna & Others Is Flawed.', *Law, Theology,Politics & Culture*, 2013 <https://eliasmunshya.org/2013/07/01/with-forked-tongues-why-chibesakundas-majority-ruling-in-attorney-general-v-mutuna-others-is-flawed/> [accessed 12 February 2019].
[1395] Muna Ndulo, 'Professor Muna Ndulo on Judicial Independence and Supreme Court's Decision in Matter of Three Judge', *Zambian Watchdog*, 2016 <http://www.zambiawatchdog.com/professor-muna-ndulo-on-judicial-independence-and-supreme-courts-decision-in-matter-of-three-judges/> [accessed 20 April 2016].
[1396] The retirement age for the Chief Justice is 65yrs and Chibesa-Kunda was 70 at the time.
[1397] Elias Munshya, 'Kuya Bebele: Why Lombe Chibesakunda Should Vacate the Office of Chief Justice ', *Law, Theology,Politics and Culture*, 2013 <https://eliasmunshya.org/2013/09/11/kuya-bebele-why-lombe-chibesakunda-should-vacate-the-office-of-chief-justice/> [accessed 5 February 2019].
[1398] Bertelsmann Stiftung, *BTI 2018 Country Report- Zambia* (Gütersloh, 2018) <http://www.bti-project.org.> [accessed 12 February 2019].
[1399] Constitutional Amendment Act of 2016, Section 140.

Judicial Complaints Commission as per section 144 of the Constitution.[1400] However, it was argued that Constitutional provisions alone are insufficient to prevent political manoeuvring present in judicial appointments.

In one interview participant's opinion, 'he [the President] can ask for a particular person to be appointed, he can ask for a particular person to be removed from the list. So, the President is too powerful'.[1401] Another was more specific when stating,

> I just think it's the President who appoints, if the President is happy with you, you go through because we know that there are people whom the Law Association of Zambia have objected to and they have done it [appointed them despite objection].[1402]

The belief amongst many participants was that the President decided whose names would go to the National Assembly and that he didn't really comply with all the JSC recommendations. The implication was that the *de jure* method of appointing judges to avoid interference, was defeated by the *de facto* manner in which the President acted. There were concerns that the President had previously removed good candidates from the list in favour of 'not so competent' but deferential candidates.[1403] Justice Ngulube the chairperson of the JSC did agree that on occasion, the President has rejected some of the names on the list. Yet he stated that the reasons given for rejecting some names was the presence of additional intelligence that had not been made available to the JSC.

If the President's role is so influential, it begs one question. Has the appointment of more women to the Zambian bench been the President's aspirational goal or is it merely an unintended outcome? Kamatali has argued that in Rwanda, 'the increase in women with a law degree opened the door for women to enter the legal professions, including that of a judge; but

[1400] Previously the President appointed a tribunal to investigate and advise him in relation to the removal of judges. The JSC was not involved.
[1401] Interview with Legal Professional 3.
[1402] Interview with Legal Professional 7.
[1403] Interview with Advocate John Sangwa SC.

it took enabling government policies and institutions to push women through the door'.[1404] The appointment of more women to the Zambian bench started during the time when Sata was President from late September 2011 till October 2014. He was reportedly committed to appointing more women to key positions, because he believed they were capable and less corrupt than men.[1405] According to Justice Ngulube, President Lungu has continued this pattern and there is a deliberate move from government to appoint more women.[1406] The President's role, however must be examined alongside that of the National Assembly.

8.2.1.2 The Role of National Assembly

Zambia is one of ten countries in the Commonwealth that has legislative involvement in the appointment of judges to ordinary courts.[1407] On the one hand, the involvement of the legislature in judicial appointments can provide an additional procedural safeguard. This is because the presence of opposition party members in the process may allay fears of executive interference. However, van Zyl Smit suggests that 'because legislatures are very often the main theatre in which party politics are played out, their involvement in individual judicial appointments raises many of the same difficulties as that of the executive'.[1408] The legislature, in the form of National Assembly enters the judicial appointments process once the President submits nominee names and Curricula Vitae to the Speaker of the National Assembly.[1409] The Speaker then constitutes a Select Committee (herein referred to as the Committee) comprised

[1404]Jean-Marie Kamatali, 'Rwanda: Balancing Gender Quotas and an Independent Judiciary', in *Gender and the Judiciary in Africa: From Obscurity to Parity*, ed. by Gretchen Bauer and Josephine Dawuni (New York: Routledge, 2015), pp. 153–69 <https://doi.org/10.4324/9781315719603-17>.
[1405] 'Sata Wins Praise over Women Appointment', *Zambia Daily Mail Ltd*, 24 August 2014 <https://www.daily-mail.co.zm/sata-wins-praise-over-women-appointment/> [accessed 9 April 2018].
[1406] Interview with former Chief Justice Mathew Ngulube.
[1407] Other countries include Ghana, Kenya, Malawi, Maldives, Nigeria, Pakistan, Rwanda, Sierra Leone, and Uganda.
[1408] van Zyl Smit, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles', p.25.
[1409] National Assembly of Zambia. Response of the National Assembly of Zambia to the SADCJF Research Questions on Guidelines for Best Practices on Judicial Appointments in the SADC Region (Lusaka: National Assembly of Zambia, 2017), pp. 1–6.

of at least ten members, with equitable representation of political parties as per section 80 (3) of the New Constitution.[1410]

All candidates who have been recommended by the President are interviewed by the Committee, where they have an opportunity to respond to any adverse reports about them and also convince the Committee about their suitability to be a judge.[1411] Under section 10 of the National Assembly Powers and Privileges Act,[1412] the Committee has the additional power to order any person to appear before it and give evidence regarding judicial candidates.[1413] This includes relevant Civil Society Organisations in addition to the Law Association of Zambia (the LAZ), security agents and the Judicial Complaints Commission amongst others.[1414] The Committee then deliberates on the candidates to decide who it will ratify. A report is presented to the House with only the names of those candidates who have the unanimous support of the Select Committee.[1415] The report is presented to the full House for adoption by way of a motion and if the report is adopted, the appointment is ratified.[1416]

Interview participants had varying views about the process before the Committee. The judges who had appeared before the Committee spoke of how the experience was like a second interview. One judge stated that when she first appeared before the Committee for appointment as a High Court judge, the process felt intimidating because there were so many Members of Parliament (MPs).[1417] Further, she was asked whether she would be able to give 'balanced

[1410] Constitution of Zambia, 1996.
[1411] National Assembly of Zambia. Response of the National Assembly of Zambia to the SADCJF Research Questions.
[1412] *The National Assembly (Powers and Privileges) Act* 1965 (c. 12) (Zambia:Parliament of Zambia,) pp. insert page <http://www.parliament.gov.zm/sites/default/files/documents/acts/National Assembly %28Powers and Privileges%29 Act.pdf> [accessed 18 February 2019].
[1413] This act is to be read in tandem with the National Assembly Powers and Privileges Amendment Act 13 of 2016.
[1414] National Assembly of Zambia. Response of the National Assembly of Zambia to the SADCJF Research Questions'.
[1415] Proceedings of the Select Committee are strictly confidential and are therefore not open to the public. Members of the Committee and witnesses are also precluded from divulging proceedings.
[1416] Ibid.
[1417] Interview with Justice 2.

judgments or whether she would be more favourable to women'.[1418] She opined that this question was biased and not asked of men who were being interviewed for the same position. A High Court judge appointed in 2014 stated that she found the process fair and balanced, and that the Committee was comprised of more women than men. Though she noted that it was the men who 'gravitated' towards appointing more women.[1419]

For a third judge, her High Court interview before the Committee in 2008, was more rigorous than her JSC interview. In her second interview for a higher court in 2016, she noted that not only were there more women on the Committee, but they asked good questions which made her feel supported.[1420] A fourth judge particularly remembers that in her interview, the emphasis was on how young she was and whether she could handle being in a leadership position.[1421] Ironically in her opinion, the issue was more about her gender and less about her age, because questions were asked amongst the Committee, about whether 'another woman' was needed in leadership. This is because at the time, there were already two women heading senior courts.[1422] Further, she noted that the comment regarding another woman being appointed to a leadership position was voiced by a woman opposition MP and not a man.

This last comment from the judge was reminiscent of other comments made regarding whether more women on the JSC, would mean more women judges getting appointed.[1423] Reference to the number of women in the Committee and how they supported or opposed women candidates in interviews, was indicative of an expectation; that since only 16% of the MPs in 2017 were women, they should show solidarity with women who sought judicial

[1418] Ibid.
[1419] Interview with Justice 5.
[1420] Interview with Justice 8.
[1421] Interview with Justice 4.
[1422] Constitutional Court President Justice Hildah Chibomba and head of the Supreme Court Chief Justice Irene Mambilima.
[1423] In Chapter 4, under section 4.6.3, I discussed different views regarding whether women would support each other or whether they would rather concern themselves with their own social mobility.

appointments. The presence or absence of a critical mass of women in the Committee appeared to be more important (to the women judges interviewed), than the presence of women on the JSC. This could be because the process in the National Assembly is public in the sense that there is a larger audience and the proceedings are available to follow on radio frequencies. Therefore unlike in the private JSC process, the candidates were more vulnerable, hence the emphasis on needing support.

In respect of other interview participants, the emphasis was less on the composition of the Committee and more on its efficacy. Despite the acknowledgment that the Committee is comprised of a few opposition members, it was felt that its effectiveness is still undermined by Presidential power. At least half of the interview participants described the process at the National Assembly as a 'rubber stamping' process.[1424] It was argued that 'politics are involved; if the President appoints you, and the President belongs to a party that has the majority, chances are the majority will support the President's appointment'.[1425] The ratification of at least three judges over the years who had adverse intelligence reports presented against them, was cited as evidence of the power of the majority. [1426] The Patriotic Front, which is the ruling party, had a 42% majority in the National Assembly after the 2016 elections. After numerous by-elections, this number increased to 53.9% by 2018.[1427] For Mr Chishimba, the issue was not about who had majority, but rather about MPs concerns in respect of whether a candidate was politically inclined or not. [1428] The judicial track record of a judge seeking promotion, could determine whether they were viewed as an asset or a liability.

[1424] This view was expressed across all the four sections of interview participants.
[1425] Interview with Judge 4.
[1426] These included one allegation of social impropriety and another of lack of relevant experience for the court the person was being recommended to.
[1427] Statistics obtained from the National Assembly.
[1428] Interview 12 April 2017.

The other half of the interview participants asserted that the ratification process was legitimate and not merely a rubber stamp. One example given as proof of this was the rejection of President Sata's bid to appoint Chibesa-Kunda as the permanent Chief Justice.[1429] A second example was given of a lawyer whose name was not ratified despite being known as a pro-government supporter. It was stated that intelligence reports connected him to criminal activity.[1430] It was also asserted that the diversity of the Committee ensured that only the right people's names were put forward to the main house. Thus, even though government did have the majority in the National Assembly, the presence of opposition members on the Committee safeguarded against nepotism. Hence the list that went to the main floor of the House of the National Assembly, was likely to be balanced.

With the different views provided about the ratification process, it is difficult to arrive at a conclusion about whether the National Assembly is indeed just a rubber-stamping body. It has been argued that good practice requires that the dangers of politicisation and deadlock be managed.[1431] This is done through a combination of carefully designed legislative procedures and a respectful and constructive attitude on the part of politicians to the constitutional role of the judiciary.[1432] In the Zambian scenario, a deadlock appears unlikely because the National Assembly is controlled by the ruling party. A respectful and constructive attitude to the role of the judiciary would determine how members of the Committee conduct themselves. If the view is that an independent and capable judiciary is of paramount importance, then presidential influence would play a minor part in decisions to ratify a suitable candidate. This would also mean that considerations about what type of judgments a potential judge could make, become less important in the context of the greater goal of an independent judiciary.

[1429] Thought the counter-argument to this was the illegality of the action was the cause of the non-appointment and not the independence of the ratification process.
[1430] Interview with Mr Mweenge.
[1431] van Zyl Smit, ' The Appointment, Tenure and Removal of Judges under Commonwealth Principles, p.20.
[1432] Ibid.

It has been suggested that there is a tendency for legislatures to act strategically as part of a larger political contest or bargaining.[1433] The National Assembly is comprised of politicians and while their involvement in the appointment process is not without its negatives, it is important for two main reasons. First, it legitimises the process by including an extra branch of government. Secondly, even if uncommon, the instances where certain names have not been ratified are encouraging because it indicates that at least there is some agreement across parties, about what attributes they will not condone in a judge. The example of justice Chibesa-Kunda also shows that the National Assembly will not condone illegal appointments, irrespective of whether the ruling party has the majority or not. The efficacy of the ratification process can only truly be measured if one has sight of the list that goes from the JSC to the President and compares that to the list given to the National Assembly. Since this information is not publicly available, it is difficult to know how influential the process in the National Assembly is.

8.2.2 Legislative Landscape for Women's Rights

Historically women in Zambia have been largely stereotyped as housewives, while men tended to present themselves as masters of their households.[1434] Public leadership has also been a 'historically male-dominated, socially valued political domain'.[1435] Prior to 2016, the Zambian Constitution had minimum direct reference to gender equality. Section 23 (3) of the 1996 Constitution stated that 'no law shall make any provision that is discriminatory either of itself or in its effect'.[1436] Section 23(3) included grounds for discrimination which included 'sex'.[1437]

[1433] Ibid at p.25
[1434] Alice Evans, '"For the Elections, We Want Women!": Closing the Gender Gap in Zambian Politics', *Development and Change*, 47.2 (2016), 388–411 (p.388) <https://doi.org/10.1111/dech.12224>.
[1435] Ibid.
[1436] Zambia, *Constitution of Zambia 1996*.
[1437] The Gender Equity and Equality Bill which has numerous measures to ensure and promote' gender equality and equity in cross cutting spheres of life' still has not been passed in National Assembly since 2015. For more details see Zambia. *The Gender Equity And Equality Bill 2015* (Lusaka: National Assembly of Zambia) <http://www.parliament.gov.zm/sites/default/files/documents/bills/gender equity and equality bill 2015.pdf>[accessed on 4 January 2020].

A new Bill of Rights was drafted to be included in the New Constitution and it held promising novel provisions respect to women. Amongst others, there was an equality provision that stated equality of both genders, which included equal treatment and opportunities.[1438] However, the referendum on the adoption of the Bill of Rights failed to garner over 50% votes from eligible voters taking part in the presidential elections.[1439] Therefore, it was not included in the final Constitution.

Notwithstanding the absence of a more progressive Bill of Rights, section 8(d) of the New Constitution enshrines equality as a national value and principle.[1440] There are also provisions for gender equity in the National Assembly, in a requirement that the two Deputy Speakers should be of different genders.[1441] The New Constitution also established a Gender Equity and Equality Commission, the first in Zambian history.[1442] Further, pertinent for this discussion is section 259 which states:

> (1)Where a person is empowered to make a nomination or an appointment to a public office, that person shall ensure—
>
> (b) that fifty percent of each gender is nominated or appointed from the total available positions, unless it is not practicable to do so.[1443]

This effectively requires that both the JSC and the President intentionally consider women for judicial vacancies. The effect of these new aspects of the gender machinery are yet to be seen. None of the interview participants referred to these constitutional provisions as a catalyst for the increase of women in the judiciary. Perhaps this is because these constitutional changes only happened in the latter part of the studied period (2013-2017). Therefore I would surmise

[1438] Section 51(1) National Assembly of Zambia, *Bill of Rights* (National Assembly of Zambia, 2015), pp. 1–27.
[1439] Cephas Lumina, 'Zambia ' s Failed Constitutional Referendum : What Next ?', *ConstitutionNet*, 2016, pp. 1–7 <http://constitutionnet.org/news/zambias-failed-constitutional-referendum-what-next> [accessed 19 August 2019].
[1440] *Constitution-of-Zambia-Amendment-Act-No-2-of-2016* (Lusaka: National Assembly of Zambia) 2016.
[1441] Sections 45 (1) and 82 (3) respectively.
[1442] Section 231.
[1443] Constitution of Zambia Amendment Act No 2.

that in the Zambian study, women's rights legislation appears to have had minimum effect on the feminisation of the judiciary.

8.2.3 The Involvement of Civil Society Organisations (CSOs) and the Law Association of Zambia

CSO's are only involved in the judicial appointment process, when they make submissions to the National Assembly during the ratification stage. However, as per section 10 of the Powers and Privileges Act, only selected organisations can appear before the Committee.[1444] Over the years, Transparency International Zambia (TIZ) has consistently appeared before the Committee. The Foundation for Democratic Process (FODEP) is also an identified CSO that appears before the National Assembly and previously, as did the Southern African Centre for the Constructive Resolution of Disputes (SACCORD).[1445] The role of TIZ in the process is to verify candidates' legal and academic qualifications and their professional track record.[1446] In an interview with the former President of the TIZ, he stated that they were highly regarded by the Committee and some names had been dropped from the list because TIZ said they had not met the minimum years required as practitioners.[1447]

The representative from FODEP argued that while their input was useful to the Committee, the added value of CSOs was irrelevant if a decision has already been made about an appointment even before the ratification process.[1448] In his opinion, this was the case on some occasions when he had appeared before the Committee, because he was asked to comment on particular names on the President's list. Both representatives of the organisations admitted that there were an insufficient number of CSOs involved in the process to make a substantial impact. Mr Habasonda argued that it was especially important to have more CSOs

[1444] National Assembly of Zambia, *Chapter 12 The National Assembly (Powers and Privileges) Act*.
[1445] Tabeth Masengu 'Research Report on the Zambian Judicial Appointment System', p.16.
[1446] Ironically, the verification of professional and legal qualifications is not done by the Intelligence Agency.
[1447] Tabeth Masengu 'Research Report on the Zambian Judicial Appointment System', p.16.
[1448] Interview with Mr Mweenge.

who worked directly with communities and governance matters, appearing before the Committee, as this would produce better results.[1449] Indeed, there was a consensus amongst interview participants that in the Zambian appointment process, CSOs were not or could not be an influential factor. Yet, there were mixed responses regarding whether there should me more engagement from CSOs, especially in the early stages of the process.

One group believed that there would be no extra benefit of having CSOs involved from the start of the judicial appointment process, as most CSOs were not concerned with judicial governance work. One participant alluded to them as people who would create 'extra noise'.[1450] Another added that apart from FODEP and TIZ, other CSOs were not objective and would have nothing relevant to say.[1451] A third stated that:

> [I]think the starting point for me is for civil society to redeem its name, in the past four or five years I think they have not been as vibrant as they were in the past. There are several reasons, I think one of them is funding. I think civil society has been heavily run on donor-funding but, then it has reduced. So, from the perspective civil society is viewed with suspicion that also weakens their mobilization of popular support because everyone would be asking which side you fall.*[1452]*

Conversely, even though he admitted that Civil Society has been weakened, Advocate Sangwa SC insisted that CSOs were another potential check of the process. Their utility he added, was dependent on whether they made well informed submissions.[1453] A senior judge suggested that the involvement of more CSOs would mean public involvement in the vetting of appointments and positive criticism was always welcomed.[1454] Another surmised that if judges were applying for promotion, then CSOs who had appeared in their courts would be useful in assessing a candidates' human rights record.[1455]

[1449] Interview on 19 April 2019.
[1450] Interview with Legal Professional 3.
[1451] Interview with Mr Kalandanya.
[1452] Interview with Advocate John Sangwa SC.
[1453] Interview on 13 April 2017.
[1454] Interview with Justice 1.
[1455] Interview with Justice 4.

Finally, in addition to having a member on the JSC, the Law Association Zambia (LAZ) also appears before the National Assembly to give comments on candidates. All interview participants conceded that the input from the LAZ was relevant, informed and necessary. Some judges spoke of how negative comments from the LAZ had resulted in candidates being rejected, but representatives from the LAZ stated that a minimal number of candidates had been rejected based on their reports in this study period.[1456] It was argued that insufficient weight was given to submission from the LAZ, which defeated the point of inviting them as interested parties.[1457] Further, negative comments on a list of appointments made by the President was considered by some as challenging the president's decisions.[1458] Hence it was suggested that the role of the LAZ would be more meaningful, if they commented on the JSC shortlist before it went to the president.[1459] In the absence of this change, the LAZ insisted that their input would continue to be used sparingly by the Committee.

8.2.4 Conclusion

The first part of this chapter has provided a summary of four factors that could be influential in the judicial appointment process in Zambia. The President's powers can and arguably do play an important role in appointments. Though there is no empirical evidence of the exact influence, anecdotal evidence and the structure of the appointment system does make this a reasonable conclusion. The National Assembly in theory is an effective mechanism to ensure that the presidential powers are not abused. Legislative involvement provides the appointment process with an extra layer of public legitimacy, because the third branch of government is also involved. However, the proportion of the National Assembly in favour of the ruling party means that the names coming from the Presidency, will often be ratified. On women's rights,

[1456] Tabeth Masengu 'Research Report on the Zambian Judicial Appointment System',16.
[1457] Interview with Advocate John Sangwa SC.
[1458] Interview with Legal Professional 5.
[1459] Tabeth Masengu 'Research Report on the Zambian Judicial Appointment System', p.5.

constitutional amendments that promote gender equality have not been a catalyst for change. While they are useful for having a framework for equality goals, they have not yet been an important factor in the feminisation of the bench.

Finally, CSOs appear to play a miniscule role in the process, an increase in the number of CSOs making submissions to the National Assembly will not change any patterns of appointments. This is because their submissions are limited to the ratification process and in the absence of seriously adverse evidence, candidates' names are likely to be sent to the House for ratification. The influence of the LAZ is stronger, as their presence on the JSC does mean that they are involved from the beginning of the process. However, because the LAZ only has one member on the JSC in comparison to political and other members, their presence on the JSC appears to be insufficient, to make a mark. The measure of the LAZ's gravitas would lay in the National Assembly, when they present reports to the Committee. The evidence in this research shows that submissions from the LAZ are a deciding factor, only in some instances.

8.3 OTHER RELEVANT FACTORS IN THE SOUTH AFRICAN APPOINTMENT PROCESS

8.3.1 The President's Role

As discussed in Chapter 5, the President has distinct powers in regard to judicial appointments.[1460] If the vacant position is for appointment to any High Court and the Supreme Court of Appeal (excluding the President and Deputy), the President must appoint the candidates recommended by the Judicial Service Commission (JSC).[1461] In respect of Constitutional Court vacancies, the JSC must prepare a list of nominees with three names more than the number of appointments to be made.[1462] The President may make appointments from the list or request a supplemented list from which he must make appointments.[1463] The

[1460] Chapter 5 entitled 'South Africa's Judicial Service Commission−Friend or Foe?'.
[1461] As per section 174 (6) of the South African Constitution.
[1462] For example, if there is one vacancy, the JSC must send at least four names to the President.
[1463] Section 174 (4) (a)-(c).

President nominates candidates for the Chief Justice, Deputy Chief Justice, President and Deputy President of the Supreme Court of Appeal (SCA). After they are interviewed, he appoints them after consultation with the JSC and leaders of the parties represented in National Assembly.[1464]

Little is known about how the President decides which candidates to select from the list of Constitutional Court appointees sent by the JSC. Even less is known about how he decides who to nominate for the leadership positions in South Africa's two top courts. What is clear however is that he has the power to influence gender representativity on the bench for these positions. There have been instances where the President has not done so, despite the paucity of women in the judiciary. For example, in 2012 only two of the eleven justices on the Constitutional Court were women. Four names were sent to the President for a vacancy on the Constitutional Court and the only woman on the list was current SCA President Mandisa Maya. The President selected now Deputy Chief Justice Ray Zondo.[1465] In the studied period, there were four Constitutional Court appointments interviews held in 2013, 2015 and 2017.[1466] The interview in 2013 had five male candidates and of these, Justice Mbuyiseli Madlanga was appointed.[1467]

At the time, there were still only two women on the Constitutional Court and critics believed that the JSC should have re-advertised the position, to allow for women to be nominated.[1468] In 2015 only women were nominated, guaranteeing that the eventual appointee

[1464] He acts in his capacity as Head of the National Executive as per section 175(3).
[1465] Interviews held on 9 June 2012 at the Southern Sun OR Tambo hotel in Johannesburg.
[1466] The October 2016 JSC interviews were cancelled after Justice Ronnie Bosielo withdrew, leaving an insufficient number of candidates.
[1467] The other candidates were Judge Selby Baqwa, Justice Ronnie Bosielo, Judge Brian Spilg and advocate Jeremy Gauntlett SC.
[1468] Serjent at the Bar, 'Female Talent Does Not Get a Foot in Highest Court ' s Door', *Mail & Guardian*, 7 December 2012, pp. 1–6 <https://mg.co.za/article/2012-12-07-female-talent-does-not-get-a-foot-in-highest-courts-door> [accessed 5 August 2018].

would be the third woman on the court.[1469] This was the first time there had been three women on the court since 2008.[1470] In 2017, Justice Leona Theron was the only woman interviewed on a five person interview list.[1471] She was subsequently appointed. It is worth noting that the Presidency provides no reasons as to why particular candidates are selected. It has been said that in 2015 and 2017, the President felt compelled to appoint women to the Constitutional Court because of numerous debates and campaigns during the studied period.[1472] In respect of the SCA, prior to the 2015 nomination of Justice Mandisa Maya as Deputy President, there had never been a woman nominated for any of the SCA leadership positions. The Constitutional Court has also never had a woman Chief Justice or Deputy Chief Justice. [1473]

It is acknowledged that the appointments of women mentioned above constitute progress, because previously male candidates were nominated and appointed to most senior positions. Yet one must consider the context, in order to understand how much influence the President has over the feminisation of the Constitutional Court, its leadership and the leadership of the SCA. As per the Constitution, the President consults the JSC and leaders of National Assembly before he appoints the Chief Justice and Deputy Chief Justice. However, this is not necessary for the President and Deputy President of the SCA positions.[1474] He only needs to consult the JSC, which means there is less accountability for the heads of the SCA, than there is for the Constitutional Court. Furthermore, over the years the President has merely informed the leaders of National Assembly parties about his choices, with no real consultation.[1475]

[1469] Justice Nonkosi Mhlanthla formerly of the Supreme Court of Appeal was appointed after interviews on 9 July 2015.
[1470] The women justices at that time were Justices Yvonne Mokgoro, Kate O'Regan and Bess Nkabinde.
[1471] Judge Jody Kollapen, Justice Steven Madjiedt, Justice Malcom Wallis and Justice Bossie Mbha.
[1472] Information obtained from discussions with judges at various meetings.
[1473] Justice Ray Zondo was nominated and appointed as Deputy Chief Justice in 2017.
[1474] Section 174(3) of the South Africa Constitution.
[1475] Interview with JSC Commissioner B who is also a member of the opposition.

This means that the President's nomination, even if it appears unwise or unexplainable to others, is final.[1476] When asked to reflect on the presidential powers regarding these important appointments, two interview participants stated that the leadership positions should be treated like all other judicial positions. Candidates should apply, be shortlisted and then be recommended for appointment, because senior judicial positions should be competitive.[1477] Another argued that while the President's powers were constitutionally granted, the safeguards weren't enough to ensure that he did not appoint people who would be loyal to him.[1478] It was suggested that the President should merely have a ceremonial role. This is because of concerns that these presidential powers could be used to 'retreat into populism, rather than advance the constitutional project.'[1479]

Contrary views were that as head of the ruling party, the President had won the right to make these important decisions.[1480] Furthermore, it was argued that considering the sum of judicial appointments, the President's role was minimal. What was more important was greater accountability and openness, because 'at the end of the day, a decision still has to be made'.[1481] A senior advocate stated the presidential powers were a reflection 'of the balance of executive powers and separation of powers in a democracy' and that this was what the Constitution had in mind.[1482] He argued that a particular process should not depend on the identity of the individual holding the power. Therefore, changes should not be made because of concerns about who is in power. Advocate Ngalwana SC stressed that there was nothing wrong with the presidential powers to appoint.[1483] Rather, the problem arose when they were used erroneously

[1476] For example, controversy arose in 2011 when the President nominated Justice Mogoeng as Chief Justice. There was widespread criticism about this nomination, because the President had ignored then Deputy Chief Justice Dikgang Moseneke and several other senior Constitutional Court justices.
[1477] Interview with Judge President Kgomo and JSC Commissioner 3 A.
[1478] Interview with Aarti Naarsee.
[1479] Interview with Alison Tilley.
[1480] Interview with Justice B.
[1481] Interviews with Judge President Mlambo and Judge E respectively.
[1482] Interview with Legal Professional S.
[1483] Interview on 7 July 2017.

to make questionable appointments. He further advanced that the only reason people were worried about presidential powers was because President Jacob Zuma had abused his.[1484] In essence, concerns about presidential powers and their ability to stifle goals for gender diversity were related to trust.

8.3.2 What about Legislative Protection of Women's Rights?

The South African Constitution has been an inspiration for a few other Constitutions in the region because of its expansive Bill of Rights.[1485] During constitutional negotiations, women's groups mobilised to ensure that they had a presence at the negotiation table.[1486] Justice Mokgoro states that women 'were there in their consciousness and they were there in recognising the need to strengthen the position of women in South Africa'.[1487] Hence, what emerged in the Bill of Rights is a result of women's efforts to ensure that their concerns were included. For instance, the Equality clause in section 9 of the Constitution prohibits both direct and indirect forms of discrimination on amongst other grounds − gender.[1488] Additionally in order to promote equality, section 9(2) allows for the establishment of legislative and other measures, 'designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'.[1489]

Included in the equality clause is the requirement that National Legislation should be enacted to prevent or prohibit unfair discrimination.[1490] The Promotion of Equality and Prevention of Unfair Discrimination Act is one such form of legislation.[1491]

[1484] During his tenure President Zuma was involved in numerous scandals which included allegations of fraud, abuse of power and public funds amongst others.
[1485] The Kenyan Constitution, Zimbabwean Constitution and Malawian Constitution all drew heavily from the South African Constitution.
[1486] Rutherfurd Living History Program, 'Yvonne Mokgoro' (North Carolina: Duke University, 2009), pp. 1–48(p.12-13) <http://livinghistory.sanford.duke.edu/interviews/yvonne-mokgoro/>.
[1487] Ibid, p.13.
[1488] Section 9(3) of the South African Constitution.
[1489] Section 9(2) of the South African Constitution.
[1490] Section 9(4).
[1491] South African Government, *Promotion of Equality and Prevention of Unfair Discrimination*, 2000 <https://www.gov.za/documents/promotion-equality-and-prevention-unfair-discrimination-act>.

Section 8 of the Act states that:

> Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including-
>
> (h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
>
> (i)systemic inequality of access to opportunities by women as a result of the sexual division of labour.

This legislation is added protection against discrimination and could be invoked in instances where a woman alleges that she has not been appointed to a judicial position because of her gender. Such an instance has not yet occurred.

Additionally, the Constitution contains section 174(2) also known as the transformation clause, which was discussed in detail in Chapters 3 and 5 of this thesis. It explicitly requires that the JSC consider the gender composition of the bench when appointments are being made. This obligates those who appoint judges to ensure that they are consciously mindful of the need to diversify the judiciary. This section of the Constitution is constantly referred to in JSC interviews and in statements from the Presidency, when appointments are announced. Thus, it would appear to have aided in creating impetus for gender diversity. The constitutional clause and other legislation have also emboldened advocacy efforts from CSOs.

8.3.3 Civil Society, Legal Professionals Organisations and Judicial Appointments

A key rationale for the creation of the JSC was to establish a system of judicial appointments that was more open and independent.[1492] One of the ways in which this is achieved is through the JSC's procedures specifically requiring input from the organised legal profession. The Judicial Service Commission Act defines 'institutions' in its schedule as amongst others the Black Lawyers Association (BLA),the National Association of Democratic Lawyers(NADEL),

[1492] Wesson and Du Plessis, p.193.

the General Council of the Bar (GCB) and other organisations.[1493] These three mentioned bodies have representatives on the JSC. They are also involved in other aspects of the process together with other identified institutions with an interest in the work of Commission. There are two avenues of involvement. The first, is by nominating candidates for judicial vacancies when they arise.[1494] To understand the importance of the process and how the identified institutions can be decisive, consider results from a study undertaken by Oxtoby and Masengu on the nomination process in the period October 2010- October 2016.

A total of 379 candidates were nominated for 174 judicial vacancies in this period, with 238 nominations made by 51 different types of organisation.[1495] In analysing the success of nominations, none of the organisations listed had a success rate of more than 45%. The most frequent nominators were the BLA and the NADEL with 27% and 20% of the nominations respectively. They were followed by the South African Chapter of the International Association of Women Judges (SAC-IAWJ) with 11% of the nominations and the South African Women Lawyers' Association (SAWLA) with 4.6%.[1496] What is notable is that only 23% of the BLA nominees were women (15 out of 65), and only 29% of NADEL's nominees were women (14 out of 49).[1497] These organisations are the most successful in regard to nominations and – from observations of JSC interviews − they are also the most respected. One response to the paucity of women nominees, has been that women are not represented enough in the BLA and the NADEL membership. Thus the organisations can only nominate the candidates who are

[1493] South Africa, *Judicial Service Commission Act* 2003 (Pretoria: Department of Justice and Constitutional Development) <http://www.justice.gov.za/legislation/regulations/r2003/2003_r423_gg24596-jsc.pdf> [accessed 8 May 2017].
[1494] Section 3(b) of the Act.
[1495] See Oxtoby and Masengu.
[1496] Ibid at p.551.
[1497] Oxtoby and Masengu, .p.559.

available.[1498] In the absence of gender disaggregated membership data from these organisations however, it would be difficult to assess whether this is true.

The second way organisations provide input to the JSC, is by making comments on shortlisted candidates. The input of the organised legal profession and related organisations plays a significant role when candidates are interviewed by the JSC. Ordinarily, comments from these organisations tend to focus on their members alone, unless they have a negative encounter with a non-member. Both positive and adverse comments are regularly put to candidates during the interviews.[1499] However, the effect of these comments is often unpredictable. While adverse comments from professional bodies can naturally be harmful to a candidate, there are instances of candidates being appointed despite serious criticism of their judicial attributes.[1500] Nonetheless as mentioned earlier, support from organisations such as the BLA and the NADEL is widely favoured. This is in part because they were both conceived during apartheid when there was a need to counter discrimination against black lawyers and human rights abuses.[1501] In addition, both organisations are concerned with transforming the legal profession and developing a legal and judicial system that makes access to justice a reality for disadvantaged people.[1502] From observations, women endorsed by these organisations have a higher chance of appointment than those without their endorsement.

The legal profession is not the only sector of society that provides comments to the JSC. Civil Society Organisations (CSOs) and individuals are also encouraged to do so and have done so in the past. The study by Oxtoby and Masengu found that there were 222 individual

[1498] It has been said in JSC interviews, that women are not always willing to be nominated and shy away from the process.
[1499] Oxtoby and Masengu at p.550.
[1500] Ibid.
[1501] BLA was founded in 1977 with the NADEL forming a decade later in 1987.
[1502] For BLA, see <https://www.blaonline.org.za/about.html> [accessed on 20 November 2016] and KwaZulu-Natal Law Society "National Association of Democratic Lawyers Overview" *KZNLS* (undated) <https://www.lawsoc.co.za/default.asp?sl=&id=1972> (accessed 20-11-2016).

nominators, with five of them having made more than five nominations over the years.[1503] CSOs had made eleven nominations over the same period. CSOs in this context does not include legal bodies such as Legal Aid South Africa or the Commission for Gender Equality (CGE) who made five and four nomination respectively.[1504] CSOs appear to have had a greater impact outside of the JSC process, than within it. In October 2012, the Democratic Rights and Governance Unit (DGRU)[1505] and Sonke Gender Justice[1506] filed a complaint with the CGE alleging gender discrimination in the judiciary and specifically in judicial appointments.[1507]

The complaint made to the CGE specifically asked for the following relief amongst others:

1) That the CGE constitute an appropriate investigation into what appears to be gender discrimination in the appointment of judicial officers.
2) That the CGE investigate why there are significantly more male judicial officers currently in office than female officers and why this disparity continues to exist despite the contents on section 174(2) [of the Constitution].
3) That the CGE establishes a monitoring capability in respect of appointments to the judiciary to ensure there is no gender discrimination and this monitoring should encompass both acting and permanent appointments.[1508]

This complaint was ground-breaking, and it received wide media coverage.[1509] The CGE investigation lasted four years and the final report is discussed later in this section. However during the four years, CSOs continued to use other avenues to advance their cause. In 2013, members of Civil Society wrote to President Jacob Zuma and four leaders of the opposition, in

[1503] Oxtoby and Masengu, p.550.
[1504] The study was unable to collate the number of comments that CSOs made on candidates once they had been shortlisted.
[1505] An applied research unit situated in the Public Law Department at the University of Cape Town, that advances social justice and constitutional democracy in Africa.
[1506] A non-governmental organisation that strives to strengthen government, civil society and citizen capacity to act to promote gender equality amongst others.
[1507] The President, Chief Justice, the JSC and the Ministry of Justice and Constitutional Affairs were all respondents.
[1508] Democratic Governance and Rights Unit and Sonke Gender Justice. CGE Complaint on Gender Transformation in the Judiciary. (Cape Town: DGRU, 2012), pp. 1–19.
[1509] See for example 'Time to Break the Judiciary's Glass Ceiling for Women - UCT and Sonke Gender Justice Network Instigate Complaint with the Commission for Gender Equality', 2012 pp1-2< http://www.makeeverywomancount.org/index.php/community/announcements/4427-press-release-time-to-break-the-judiciarys-glass-ceiling-for-women-uct-and-sonke-gender-justice-network-instigate-complaint-with-the-commission-for-gender-equality> [accessed on 21 August 2019]

respect of the Constitutional Court shortlist which had four men.[1510] The signatories to the letter were mainly from the women's rights movement but also included organisations in judicial governance, media, human rights litigation and faith institutes. [1511]

The correspondence expressed concern that only men had been interviewed for the vacancy, especially in light of the gender obligation in section 174(2) of the Constitution. The letter asked the President to invoke his powers under sections 174(b) and (c) of the Constitution, which allowed the President to request the JSC to provide him with a supplemented list of candidates. This was permitted if the first list he received was unacceptable. In this instance, the CSOs asked the President to request the addition of women candidates to be considered. The President did not respond. A letter was also sent to the larger opposition parties, requesting them to reject the President's selection from the all-male list, forcing him to request the JSC to re-advertise. Only one response was received, and it was from the Democratic Alliance (the main opposition). They stated that while they recognised the paucity of women on the bench, they respected the prerogative of the JSC to recommend whom it saw fit and the President's prerogative to appoint from the recommended list.[1512]

Despite the failure of efforts regarding that Constitutional Court vacancy, that marked the beginning of a galvanised effort to strive for gender equity on the bench. There was an increase in public discussions about gender transformation and the CGE started to attend and monitor the interviews. There was also a recognisable shift in focus regarding the discussion on transformation.[1513] In 2014 a coalition of CSOs created Judges Matter, an organisation which tracks and illustrates the JSC process by amongst other things, providing transcripts of

[1510] The letter dated 1 March 2013 is on file with the author. It had a total of 46 organisation and individual signatures.
[1511] Ibid.
[1512] Letter dated 8 March 2013, also on file with the author.
[1513] In a survey conducted by the author, media reporting on the topic increased over time, as did meetings amongst gender concerned CSOs.

the JSC interviews and information about candidates.[1514] The creation of Judges Matter provided a platform for detailed information on the JSC processes and in 2014, it started to live stream the JSC interviews. This has resulted in immense public engagement with the streaming website and other social media channels.[1515]

The publicity of the JSC interviews also resulted in a better understanding of stereotypical attitudes about women, both in the profession and from the commissioners too.[1516] In JSC interviews, the commission has also been mindful of the effect of live streaming on public attitudes about how the JSC operates. On one occasion, an interview of a woman candidate for a leadership position became quite heated. Mid-way through the interview, one of the commissioners alerted the Chief Justice to the fact that the public was watching them and following the process via social media.[1517] The Chief Justice thereafter ensured that the interview took a more moderate approach. Having more people watching the process has in some way also forced the JSC commission to confront the challenges that women face in the profession and judiciary.

These challenges were laid bare in the eventual release of the CGE's Investigative Report in 2016. Amongst others, it recommended that the JSC should actively engage in practical solutions to improve gender diversity on the bench and that they should consult with other relevant stakeholders when doing so.[1518] One of the JSC responses to the CGE Investigative report was the creation of a committee specifically tasked with tackling the gender

[1514] See <https://www.judgesmatter.co.za/.> [accessed on 27 November 2019].
[1515] Judges Matter have active Twitter and Facebook accounts where members of the public regularly comment.
[1516] For instance, when Judge Nare F Kgomo was interviewed for a leadership position, he made sexist remarks that female lawyers were attracted to private practice and expensive cars which obviated their availability for the Bench. To date his interview has been viewed 395 515 times. See <https://www.youtube.com/watch?v=q5wJuhi4Tuo.> [accessed on 27 November 2019]
[1517] The JSC Interview of Judge Shane Kgoele held on 19 April 2017 at the Office of the Chief Justice, Midrand, South Africa.
[1518] Commission for Gender Equality (CGE). CGE Investigation Inquiry into Gender Transformation In the Judiciary. (Cape Town: CGE, 2016).

discrimination present in the appointment of acting judges.[1519] This committee would not have been established had the initial complaint to the CGE not been made in 2012. Several of the interview participants recognised the effects that CSOs have had on the process, especially in respect of gender transformation. Judge President Dunstan Mlambo advanced that comments from CSOs who litigate were especially required, because they could provide information about a potential candidate's legal acumen in court.[1520]

One commissioner said CSOs commented on candidates' character which is necessary because legal professional organisations can be biased.[1521] Another judge welcomed CSOs participation in the process but cautioned against the use of live streaming of interviews, because those records could be harmful for candidates in future.[1522] There were also some critical views about the involvement of CSOs. A senior judge stated that there was a danger that comments from CSOs could sometimes be ill informed or were a case of 'sour grapes', because of grudge against the candidate.[1523] A journalist who has been following the appointment process for four years, believed that CSOs needed to be relevant all throughout the year and not just when the JSC interviews happened.[1524] She emphasised that constant engagement in matters of judicial governance and gender transformation would be beneficial in the long term.

In conclusion, input from the legal professional bodies is critical for the process, especially since some of them are expressly mentioned in the JSC Act. However in respect of women, the number of women nominated by the main organisations remains quite low.[1525] This

[1519] This committee was established in 2017 and is led by SCA President Mandisa Maya.
[1520] Interview on 17 April2017.
[1521] Interview with Commissioner B.
[1522] Interview with Judge 13.
[1523] Interview with Justice 10.
[1524] Interview with Aarti Naarsee.
[1525] Women candidates are more likely to be nominated by women's organisations than by legal professional bodies, even though the legal bodies have large number of women in their membership.

is said to be a possible reflection of the sexism and patriarchy that is present in the legal profession.[1526] The absence of gender disaggregated statistics of members in reports from the main legal professional organisations and the lack of responses to the CGE queries for input on its report, seems to support this view.[1527] In respect of CSOs, it is difficult to empirically quantify their impact on the process. What is certain is that their involvement has resulted in the CGE Investigative report and the establishment of the Committee on acting appointments. The presence of CSOs in the interview room, coupled with their comments and media articles about the process, would appear to have assisted the goals for gender transformation. It is however difficult to empirically quantify just how much, because as analysed in earlier chapters, there are various other factors that affect the process.

8.3.4 Conclusion of the South African factors

The second part of this chapter has focused on other influential factors that may affect the appointment of women to the South African courts. The President's discretion in nominating the heads of the Constitutional Court and the SCA is a critical factor in appointments. This is also true in regard to his discretion when he selects from the list of ordinary Constitutional Court candidates. Several interview participants argued that presidential discretion could be abused, especially if he didn't consult widely.[1528] Despite these views, it was also clear that what is problematic is the exercise of these constitutional powers and not the said constitutional powers themselves. It is obvious though, that in respect of gender diversity, the president will determine when South Africa gets its first woman Chief Justice or Deputy Chief Justice and whether the complement of women on the Constitutional Court will ever reach 50%.

[1526] Interview with Justice 10.
[1527] Commission for Gender Equality. CGE Investigation Inquiry into Gender Transformation In the Judiciary. (CGE), pp. 29-33.
[1528] Interviews with Thandi Modise, Legal Professional S, Advocate Vuyani Nlangwana SC , Justice 11 and Journalist R.

Unlike in Zambia, in South Africa, constitutional and legislative imperatives have been pivotal to the appointment of more women to the bench. They have been used to urge the CGE to investigate appointments and to remind the JSC of their obligation to consider gender when making recommendations. They have also been used to galvanise CSOs when there was little progress in the appointment of women. In respect of legal professional organisations, they can be influential because they nominate, make comments on candidates and have members sitting on the commission. While the legal professional organisations are influential in the process, civil society involvement outside of it, appears to have been more overtly beneficial.

CHAPTER 9
CONCLUDING THE TALE OF TWO JURISDICTIONS

9.1 INTRODUCTION

This thesis has explored a number of closely related aspects in respect of women and judicial appointments in South Africa and Zambia. Focusing on the two jurisdictions as separate entities, it has provided an in-depth study of how and whether various aspects of the judicial appointment process lead to equal representation of women and men on the bench. This final chapter commences with a comment on the contribution that this research has made to scholarship. This is then followed by a summary of some of the main findings and some reflections on the results in each jurisdiction. Though this research is not a comparative study, the succeeding section reflects on some of the common elements present in the two case studies, while noting where they differ. The penultimate section notes the difficulties underlying research on the judicial appointment process and concludes with general recommendations for the acquisition and retention of gender equitable courts.

9.2 CONTRIBUTION TO EXISTING SCHOLARSHIP FROM A SUB-SAHARAN PERSPECTIVE

The gap in scholarship from an African perspective on gender and judging was highlighted in the introduction of this thesis. Although there have been a few additions to scholarship since 2013, this thesis is written in a context in which the majority of the scholarship is from the global North. While the body of scholarship from the global North was important in framing questions and providing theories, it was imperative to recognise that context shapes research results. Thus a key element of this research was to uncover any patterns or theories that either dispute existing literature, or confirm it, but with different results. It was also vital to establish new theoretical and substantive theories that consider the importance of the context that is being studied. In essence where possible, it was necessary for this study to be 'Africanised' in

the geographic location of the case studies and in the building of theory. The methodology though not unique, was selected because of the paucity of a focus on women and judicial appointments in African countries. Much like the African Feminist Judgment Project,[1529] the bid to Africanise this study was centred on establishing a possible alternative African approach, to gender and judging. I recognise that there are various possible African approaches to gender and judging in Africa. However, the approach adopted herein focused on privileging the voices of all actors concerned with the judicial appointment process, as opposed to selecting only specific groups of actors. It also highlighted the necessity of considering the judicial appointment process against the backdrop of other political and legal challenges in the respective countries. This approach provides new evidence in respect of the problems faced in achieving gender diversity and the possible applicable solutions.

Given this approach, it was important to establish additional original justifications for the importance of gender diversity in courts. Outlined in Chapter 2, the argument that gender diversity enhances an extended definition of independence and supports judicial impartiality, is a distinctive one. While it is not distinctively African because it applies to other judiciaries, the argument does reflect the need to look beyond established theories in order to contribute to global scholarship. If gender diversity is considered as a means to an end and not an end in itself, then it is pertinent that the means (gender diversity) should be informed by recognised judicial ends. Impartiality and independence are recognised judicial ends because they are consistently listed in international guidelines or frameworks regulating judicial conduct.[1530] Creating a link between the justifications for gender diversity and established judicial outcomes is arguably a strong motivation for a concerted effort for judicial diversity.

[1529] For a reminder of the project, see Chapter 2, under the section 2.3.2 'Whose Voice is Being heard'.
[1530] As discussed in Chapter 6, these include the UN Basic Principles, The Bangalore Principles and the Practioners Guide on the International Standards for Independence and Accountability.

In addition, this thesis makes a valuable addition to scholarship because it critically engages with the notions of impartiality and independence, in respect of the JSCs and not just in respect of judges. By assessing the detailed workings of two JSCs in the region, it approaches judicial independence and accountability from a different vantage point. Unlike most discussions that focus on independence and accountability in respect to judges alone, this thesis also examined these values in respect of JSCs too. It considered the importance of context in judicial appointments and provided novel arguments based on the peculiar needs of the societies studied.[1531] Accordingly, it is submitted that this thesis is an attempt at finding African solutions to African problems.

Methodologically, this is the first known study in the gender and judging field to include perspectives from these four groups of relevant stakeholders in the judicial appointment process.[1532] These different units of study provided rich reflections from different perspectives, that other studies have lacked. A few studies have focused on interviews with women judges[1533] and others with women lawyers.[1534] A recent International Development Law Organization (IDLO) report also interviewed women judges, lawyers, bailiffs and law students in Tunisia.[1535] A previous study in England and Wales on judicial independence interviewed judges,

[1531] For instance, the argument that the independence of the South African JSC must include the ability to transform the judiciary in the face of opposition from those who would not want a change in the status quo.
[1532] In addition to an extensive literature review, the author consulted with five international experts in the field in order to ascertain whether similar studies existed.
[1533] For examples see Kathy Mack and Sharyn Roach Anleu, 'Skills for Judicial Work: Comparing Women Judges and Women Magistrates', in *Gender and Judging*, ed. by Erica Schultz and Gisela Shaw (Portkland: Hart Publishing, 2013), pp. 211–32 <https://doi.org/10.5040/9781474200127.ch-009>; Josephine Dawuni, 'To "Mother" or Not to "Mother": The Representative Roles of Women Judges in Ghana', *Journal of African Law*, 60.3 (2016), 419–40;Elaine Botelho Junqueira, 'Women in the Judiciary: A Perspective from Brazil', in *Women in the World'S Legal Professions*, ed. by Ulrike Schultz and Gisela Shaw (Portkland: Hart Publishing, 2003), pp. 437–50 <https://doi.org/10.5040/9781472559395.ch-024>.
[1534] The Law Society of England and Wales, *Advocating for Change: Transforming the Future of the Legal Profession Through Greater Gender Equality International Women in Law Report*, 2019; Rosemary Hunter, *Discrimination Against Women Barristers: Evidence from a Study of Court Appearances and Briefing Practices*, *International Journal of the Legal Profession*, 2005, XII; Rudo Runako Chitapi, 'Women in Law: Navigative the Tension'..
[1535] International Development Law Organization, *Women's Professional Participation in Tunisia's Justice Sector: Pathways and Opportunities* (Rome, 2019) <https://www.idlo.int/publications/womens-professional-participation-tunisias-justice-sector-pathways-and-opportunities> [accessed 26 November 2019].

politicians, civil servants and practitioners, but gender and judging was only a part of the entire study.[1536] The Osgoode Society for Canadian Legal History has done a number of interview with judges, lawyers and those in the justice system in Ontario. However, the interview archive reveals that the interviews were not focused on gender and judging.[1537]

No known study in common law jurisdictions has combined judges and lawyers with JSC members and journalists and/or CSO's. In doing so, this study has probed the subject from previously unresearched empirical angles, while providing rich and holistic data of perspectives from those in or around the judicial appointment process. This study has also contributed to existing scholarship by choosing to privilege the voices of women judges − in particular, Zambian and South African women judges. This research sought to understand the humans behind the judicial robe and to gain insight into the impact of choosing a judicial career. This study expanded on existing literature by highlighting the importance of considering women's intersectional identities, even when they are in privileged judicial positions. Various aspects of women's lives inform their role as judges and their performance. Consequently, this study emphasised the need to intentionally consider the intersectionalities of women's multiple identities in specific societies and how they affect different facets of their lives.

It is reiterated, that the broader context of the jurisdictions of where women operate should not be underestimated and that is why the second part of Chapter 3 was dedicated to context. The historical and judicial backdrops of each country have to be considered against the broader contextual landscape that the two judiciaries and societies operate in. Therefore, the two studies are discussed separately below, in order to stress some of the main findings. The first is the Zambian case study which provided interesting lessons.

[1536] See Chapters 7 and 9 in Graham Gee and others, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: Cambridge University Press, 2015).
[1537] See their Oral History Collection at https://www.osgoodesociety.ca/oral-history/?s=2009&sort=&sort_order=&post_type=oral-history.

9.3 THE ENIGMA THAT IS THE ZAMBIAN JUDICIAL APPOINTMENT PROCESS

The Zambian judiciary has surpassed the 50% threshold for women in decision making positions, previously mandated by the SADC Gender protocol. The progress is even more outstanding when one recognises that the Chief Justice and the Presidents of the Supreme Court and Court of Appeal, are all women. A new constitutional amendment in 2016 brought with it the establishment of new courts and amendments to the constitutional article regarding judicial appointments. Yet it cannot be considered as the cause of the progress in gender diversity. In respect of concluding the Zambian part of this study, this section discusses the process of appointment, the legal profession from where candidates are drawn, and the political dynamics present in the appointment process.

9.3.1 Are Numbers Important? The JSC, the Legal Profession and Statistics

The first part of this sub-section is dedicated to a review of some of the main findings in regard to three aspects: the JSC's function as an appointment body, the determinant aspects of the legal profession and the absence of disaggregated statistics in various important institutions.

9.3.1.1 The JSC

The recruitment process administered by the JSC and the composition of the JSC were two of the formal aspects analysed in Chapter 4. The JSC headed by a retired Chief Justice had eight members at the end of 2017. It has been argued that the gender composition of the appointing body can affect gender diversity on the bench.[1538] However in the Zambian case study, it was determined that this was not the case. The JSC had appointed a number of women in the five year study period and yet there were no more than two women sitting on the JSC in the first four years (2013-2016). By the end of 2017, all of the commissioners were men. Interview participants explained the Zambian situation by advancing arguments that women had been

[1538] For a reminder, see Sally J Kenney, 'Which Judicial Selection Systems Generate the Most Women Judges? Lessons from the United States'; Yung Yoon 'Democratization and Women's Legislative Representation' .

appointed on merit, that the queen bee syndrome prevented women from 'looking out for each other', and that women were not naturally biased in favour of women.

However, despite these arguments, there was still an agreement that the presence of women on the JSC is important for making male commissioners aware of any sexist tendencies, for symbolic reasons, and for the sake of societal equality. Despite being a jurisdiction that has already reached judicial parity, these arguments are still used. It is suggested that the continued use of these arguments is evidence that the justifications for gender diversity on the JSC take us beyond the remit of the appointment of judges. They resonate with broader concepts of gender mainstreaming, public policy goals of equal representation, and societal concerns about inclusion.

9.3.1.2 The Legal Pool

Chapter 7 discussed important determinants for the attainment of judicial office such as experience, the requisite qualifications acquired in university and work experience in the respective legal pool. As an aspiring lawyer, one's success is dependent on the ability to enter a limited number of law schools and then successfully complete the ZIALE process− a process that has been heavily criticised.[1539] The small number of practising certificates issued in Zambia over the period of study, points to a serious problem in the legal profession.[1540] The practice of law is elite in many jurisdictions but in Zambia, this is even more profoundly the case, because of the small number of practitioners in comparison to the population. Of all five years, 2017 had the highest number of practising certificates issued (1112) for the entire population. Therefore, it is fair to suggest that not everybody who could be an advocate is getting an opportunity to be one. The elitism of the practice of law lends itself to a population

[1539] A detailed discussion on ZIALE is available in Chapter 7, under 7.3.2 'The Structure of the Profession'. As of writing, only 5 out of 342 candidates passed the October 2019 bar exams.
[1540] See section Chapter 7, section 7.3.2 for further details

of people who have endured a gruelling and long process of qualification and who are financially able to support themselves during this time. This can have an effect on the general diversity of judicial candidates. To reiterate, gender diversity in the judiciary is more than just having more faces of women. Striving for gender diversity can and should include a desire for women with diverse socio-economic backgrounds, professional experiences, ethnic groups, religions and other societal identities and more.

On a positive note however, the presence of constitutionally enshrined detailed qualifications for those with judicial aspirations has been beneficial to women. They know what they need to acquire in order to be considered for appointment. This means that despite the small size of the legal pool, women have navigated the complexities of what is considered as relevant experience. This is in part because the JSC has taken a position to ensure that the judicial candidates are selected from various backgrounds. Candidates have been registrars from within the judiciary, magistrates, advocates in the Ministry of Justice and advocates in private practice. Thus, Zambia has managed to avoid the pitfall of relying mostly on private practitioners – the professional group where women face the most obstacles. The JSC sees legal experience as holistic, encompassing various aspects of legal practice that each provide a unique contribution to the bench. The establishment of specialised High Courts means that those who have mostly been engaged in criminal work, can operate in criminal courts without concerns of whether they are competent in civil matters. Yet there are so many aspects of the professional pipeline that one is unable to assess because of the lack of statistics.

9.3.1.3 The Numbers

Disaggregated data from the main university the UNZA, the ZIALE, the Ministry of Justice and the LAZ could have added an even richer element to the discussion of results in Chapter 4. The absence of this data made it difficult to establish whether the presence of more women on the bench is commensurate with the number of women obtaining LLB degrees and working

in the legal sector. Levin and Alkoby experienced similar problems with their research on the Canadian judicial bench. This led them to advocate for government policies regarding the collection of data, in order to establish benchmarks.[1541] The use of data for benchmarks in Zambia would assist in establishing why the judiciary is the only arm of government that is doing well in terms of goals for gender diversity. With relevant data, one could possibly compare two different career paths for women in different arms of government. For instance, a comparison of the career trajectories of women in law versus women in politics could be enlightening. One could explore whether women are doing well in the judiciary, because they are shielded from the popularity process that is present in running for legislative positions. However, one cannot effectively probe these issues in the absence of detailed disaggregated data from relevant sectors.

Secondly, accurate data would also be useful to prove or disprove the notion amongst some interview participants, that there is no gender discrimination present in the practice of law or in the acquisition of legal skills and experience. The denials of the existence of gender discrimination could be what Cohen refers to as the deployment of 'linguistic and conceptual strategies to downplay the issues'.[1542] The patriarchal nature of Zambian society makes it improbable that gender discrimination would be absent, yet that was the view of half of the participants (albeit all men). Data would be useful too in order to ascertain if the number of women graduating with LLB degrees, could be compared to men and then cross referenced with who is obtaining the majority of traineeships in private practice. One could also use the statistics of trainee advocates in law firms and compare them to associate positions and the figures for who makes partner.

[1541] See Avner Levin and Asher Alkoby, 'Shouldn't the Bench Be a Mirror? The Diversity of the Canadian Judiciary', *International Journal of the Legal Profession*, 26.1 (2019), 69–88 <https://doi.org/10.1080/09695958.2018.1489818>.
[1542] Mathilde Cohen, '"Judicial Diversity in France: The Unspoken and the Unspeakable"', *Law & Social Inquiry*, 2018, 1–33 (p.2).

Finally, I posit that accurate, disaggregated data would also be useful in dispelling myths that persist in various parts of the legal pools about who is being favoured by the JSC. Interview participants from private practice argued that they were being side-lined for those from within the judiciary, while those from the judiciary, that is registrars and magistrates argued that they were being ignored in favour of advocates from private practice. This resulted in an erroneous belief that the judiciary would perform better if these problems were alleviated. Future exploration of the legal pools in Zambia could provide evidence that confirms or disputes this belief.

9.3.2 Visibility, Knowledge and Confidence in the Appointment Process

9.3.2.1 The Importance of Visibility and Knowledge in aiding Transparency

The most contentious element in the Zambian study was the privacy of the appointment process. However upon examination the issue was not so much that the JSC interviews were held behind closed doors, but rather how the entire recruitment process leading up to closed door interviews, lacked transparency. The JSC was meant to alleviate concerns that the judicial appointment process would be tainted with nepotism and patronage. It was a move from the executive style of appointment that plagued the judiciary between 1973 and 1994. Notwithstanding, the opaque method of appointing judges has made the JSC more vulnerable to scepticism, even when events occur that cannot be directly attributed to them. The furore that arose after the *Hakainde Hichilema & Others v Edgar Lungu & Others* Constitutional Court matter is the best example.[1543] The lack of visibility and knowledge about how people are appointed or even who appoints them, appears to have affected the legitimacy of the JSC.

Hence the overwhelming view from interview participants was that vacancies should be publicly announced, interview dates should be publicised, and the names of shortlisted

[1543] See Chapter 4, under 4.4.1 'The Constitutional Court Ruling on the Election petition'.

candidates should be published. This is not only necessary for the process in respect of new candidates, but for sitting judges seeking appointment to higher courts. They too deserve to have a promotion process that is devoid of suspicion, in order to avoid adverse perceptions about their new appointments. A second element lacking in the JSC process is a diversity of stakeholders. Escobar-Lemmon et al submit that the inclusion of civil society in the selection process may be particularly important for new ideas and norms to penetrate traditional processes.[1544] Only two CSOs are involved in the ratification process and there are no members from Civil Society on the JSC. It would be worthwhile to include more members from CSOs in the parliamentary process and at least two members on the JSC. The JSC is quite small and these additions could be made with minimum logistical or financial strain. The addition of these members would also make the appointment of judges less of an elite process suited for those with power.

9.3.2.2 Confidence in the process and the legitimacy of women appointees

The distrust in the appointment process from a number of interview participants was more pronounced when interview participants reflected on the appointment of women judges. This study found that the high number of women judges in Zambia does not equate to a lack of sexism or prejudice in society. The sexism was apparent in views about the *Hichilema* judgment and in the four views that questioned the capability and competence of women.[1545] A more transparent process would assist with these negative views because people would know who is being considered, what their background is and why they are worthy of appointment. However, there is still the problem of perceptions of illegitimacy raised in Chapter 4. These arise from the perceived incompatibility between the authoritative role of a judge and the

[1544] Maria C Escobar-Lemmon and others, 'Appointing Women to High Courts', in *Research Handbook on Law and Courts*, ed. by Susan Sterett and Lee.D Walker (Northampton: Edward Elgar Publishing, 2019), pp. 200–212 (p.206).

[1545] These were that better qualified men were passed over, that they had failed to succeed in private practice, that they were political appointees being moved around and that those in high positions were beholden to the authorities.

archaic view of women's standing in society A more transparent process would alleviate this by engendering confidence in the JSC. Consequently, transparency also has the potential of invalidating illegitimacy perceptions of women−at least in the short term.

9.3.3 Can the Process ever be Depoliticised?

The role of political actors and their ability to influence the appointment process was examined in Chapter 4. The necessity of presidential and legislative involvement in the process was not in dispute. What was disputed was how much involvement the President should have in the process and how many presidential appointees the JSC should have on it. The belief that there is no room for politicking in the appointment of judges is understandable. The appointment process should be devoid of undue political interference and hidden agendas. The independence of the judiciary starts with the independence of the appointment process and interference in the latter affects the former. Nonetheless, the judiciary is an arm of government and to reduce the President's role to a mere ceremonial one, may be viewed as a prohibition on his ability to govern. The lack of transparency is also a contributor here, as the names sent by the JSC to the President are not published, for reasons related to security intelligence.

While the level of background checks by the intelligence services is commendable and necessary to safeguard the integrity of the judiciary, it appears that this comes at a cost. If there was a bid to either have the President publish the names he receives from the JSC or to change his powers of appointment, it would require a constitutional amendment. The goal would then be to have a more decentralised appointment process. This could conceivably be one that either requires the President to appoint all candidates the JSC recommends or one that leaves the power to appoint (not just to ratify appointments) to the National Assembly. These possible models do not guarantee that the process will be devoid of political dynamics. If the members of the JSC are predominantly presidential appointees, the President can still have an influence by ensuring his appointees vote for candidates of his choice. If the final decision is left to the

National Assembly, MPs could be involved in political horse-trading that sees one party support the other, if the latter party offers some benefits.

Eventually one realises that it is not possible to entirely remove political actors from the process, because judicial governance is an extension of politics in itself. In truth, as Gee et al argue, 'decisions about whom to select as judges, and how to select them, inevitably have political dimensions, whether in terms of ideological politics, party politics, identity politics, regional politics or institutional politics'.[1546] The current and past Presidents used their power to ensure that more women were being appointed as judges. Hence the current gender equity on the Zambian bench did benefit from political policy/intervention. This is an indication that political involvement does not necessarily equate to negative results for women. The key challenge is that of finding ways in which political actors can be accountable for how they operate in the appointment process. The first step in doing this, is greater transparency.

9.4 TAKING STOCK OF THE SOUTH AFRICAN APPOINTMENT PROCESS

The subsequent section is a discussion on some of the main findings in the South African case study. These findings are in respect of the JSC process, the tension between judicial appointments and political agendas, the legal profession and other influential stakeholders.

9.4.1 Publicity v Transparency: Finding a Reasonable Balance

This sub-section discusses the workings of the JSC by highlighting the values, and sometimes pitfalls, of the South African appointment process. It does this by summarising findings regarding some visible and non-visible aspects of the JSC.

9.4.1.1 What is Visible from the Outside

This study was greatly aided by the public nature of the South African judicial appointment process. The results discussed in Chapter 5 were obtained from participant observation,

[1546] Gee and others, *The Politics of Judicial Independence in the UK's Changing Constitution*, p.159 .

watching interviews online and access to interview transcripts over the years. There is no denying that the JSC's efforts to have a transparent process have been pivotal in achieving transformation objectives. Public knowledge of the process has been important for judicial transparency and for symbolic reminders that the judiciary is operating in a new, free South Africa. However, this publicity is contentious. The disadvantages of public scrutiny examined in Chapter 5 are worth reflecting on. Candidates' personal details are publicly aired. If they have a terrible interview as Judge Nozuko Mjali had, this has ripple effects and potential candidates may ask themselves if the process is worth it, especially since there is no guarantee that they will be appointed.

Commissioners need to be sensitive to the effects that a particular type of questioning may have on a candidate and if need be, it is suggested that they could ask the audience to leave and the cameras to be turned off, for periods of sensitive questioning. Such safeguards could be helpful because despite the negative aspects of public interviews, there is currently no suitable alternative. To hold all judicial interviews in private after sixteen years of public interviews, would cause great consternation, suspicion and even anger. It would also undoubtedly result in litigation from various stakeholders, because the bar has already been set for what is defined as a transparent process in a constitutional democracy.

The gender composition of the JSC also requires some mention. At the end of 2017, there were more women JSC members than in previous years (eight women) and over the period of study, there has also been an improvement in how issues concerning women are dealt with in interviews. This cannot wholly be attributed to the presence of more women on the JSC; because while some women have had more feminist perspectives than others, so have some men. Once again, the number of women on the JSC appeared to have no clear bearing on the actual number of women getting appointed, despite some interview participants thinking it did. However, it was agreed that the presence of more women on the JSC would have symbolic

benefits and that more women could provide a possible antidote to discrimination. An increased presence of women could also enhance perceptions of the JSC's impartiality, and it could encourage the use of gender-mainstreaming concepts in the JSC's operations.

9.4.1.2 What Happens Behind Closed Doors

Notwithstanding the discussion above in regard to the publicity of the interviews, important decisions are still made behind closed doors. These are the most important interactions, because that is where actors exercise influence and freely air their discontent about a candidate. It is behind closed doors that most Judges President make the case for why a candidate should or should not join their court. The importance of these private interactions was not lost on the Cape Bar Council and the Helen Suzman Foundation, whose litigation focused on issues of constitutional inconsistency, illegality and transparency.[1547]

Rightly or wrongly in respect of some appointments, explanations are sought as to why the JSC's selection excluded a preferred candidate. It will be interesting to observe what the effects of the Constitutional Court decision in *Helen Suzman Foundation v JSC & Others* will be. The JSC has to determine standards for the manner in which deliberations can be released and what can be released will determine how far the concept of transparency will go. The JSC could limit access to the audio recordings, only to the directly affected parties and the court concerned. Alternatively, audio recordings could be replaced with transcripts that could redact the names of which JSC members are making which statements, so as to encourage frank debates.

Whatever decision is made, it is necessary to maintain some manner of privacy not just for JSC members, but also for future candidates who want to protect their own privacy and reputations. This especially applies to positions where the contestation results from the

[1547] For a reminder see Chapter 5, under 5.3.2 'The Selection of Candidates and the Cape Bar Litigation' and 5.3.3 'The JSC Deliberation Process and Helen Suzman Foundation Litigation'.

misunderstood notion of ‘transformation’ candidates versus ‘meritorious’ candidates. Having a bench that has racial and gender diversity is not the antithesis to merit. As proposed in Chapter 5, the definition of merit should not be limited to technical experience, but should include one’s life experience, commitment to constitutional values, community engagements and much more. The JSC’s ability to conduct itself independently cannot be limited to the absence of political influence or political considerations. It has to include the JSCs ability to make hard decisions, even if unpopular so as to advance the important transformation project. This was one of the most valuable aspects that the interviewed JSC members emphasised. They do not always get things right but in a process such as this, the definition of who is a right or wrong appointee, is sometimes in the eyes of the beholder.

9.4.2 The Antagonists in the Legal Profession

It is critical that interventions to improve gender diversity extend beyond the confines of the JSC. In spite of over two decades of democracy in South Africa, the results in Chapter 7 revealed that racism and sexism are still dominant features in the legal pools. The greatly skewed gender and race patterns in the attorneys’ and advocates’ profession are a cause for concern, because they symbolise one common view: that excellence, expertise and invariably power, are still the privy of predominantly white males. This is not uncommon in jurisdictions with diverse societies and one has to consider the long lasting effects of apartheid policies. However in a country that is predominantly black, the disaggregated data is a reminder that while the judiciary has made great strides to transform racially, the legal profession still struggles to do so. The free market nature of the provision of legal services means that attorneys and advocates depend on clients for professional success. Unlike the magistracy, who are employed by the Department of Justice, attorneys and advocates are susceptible to contexts where their gender and/or race determines what type of work they will receive– if any.

This determines whether attorneys will hold any sort of meaningful power in law firms such as a directorship or even better, equity partner. In respect of advocates, the acquisition of silk status continues to be a mark of one's esteem amongst peers and a license to charge very high fees. In efforts to highlight the enormity of skewed briefing patterns, the Gauteng High Court has initiated a project that records the race and gender details of advocates who appear in the Gauteng Motion Court.[1548] Motion Court is where unopposed applications are heard, mostly from the private sector. The aim is to collate data that disproves arguments that private sector companies are making efforts to diversify who they brief. Yet even in the presence of this evidence, in the absence of legislation, companies in the private sector cannot be forced to brief more black attorneys and advocates and/or more women. The highly gendered nature of both the professions and the stratification of the partnership route for attorneys will remain as it is, and women will continue to leave if the private sector does not do more to aid transformation goals.

On a positive note, there has been an increase in the appointment of judges from the magistracy. It is the most racially and gender-transformed legal pool in South Africa but is still plagued by negative perceptions about independence, corruption and lack of relevant experience. In respect of gaining relevant experience, it is submitted that women would benefit from a constant rotation system in the courts that sees them move between civil court and criminal court. This would assist in allaying perceptions in regard to whether magistrates have enough civil law experience to be considered for judgeship. There is also limited research on the magistracy, with a stark paucity of literature and research studies. This is not specific to South Africa and it is a common problem in the region, even though the magistracy is the coalface of the judiciary. Future research could interrogate the structural, operational and

[1548] See https://www.businesslive.co.za/bd/national/2016-11-18-exclusive-advocates-races-and-genders-to-be-recorded-at-pretoria-court/.

governance aspects of the magistracy. This could include aspects such as the appointments and retention of magistrates, the possible gendered nature of magisterial work and the weight and volume of magistrates' decisions.

Finally, the lack of acting appointment opportunities was identified as an impediment for women with judicial ambitions. A transparent and generally uniform acting appointment process across the country would allow more women to become familiar with the quality and quantity of High Court work. A starting point for change would be an amendment to the guidelines on acting appointments issued by the JSC in 2016. This amendment could contain a clause that states that every High Court should have a quota system for acting appointments. There could be a requirement that at least 50% of the acting appointment nominees sent to the Minister of Justice for approval, should be women. In addition, each committee could strive to find a balance in its nominees, to ensure that a fair number are coming from the magistracy and not just the attorneys and the advocates' profession. In the absence of these more stringent requirements, acting appointments or the lack of them, will continue to be a hindrance for women.

9.4.3 Political Power and Political Will

Chapters 5 and 8 discussed the extent to which political actors in the South African process can and do influence the appointment process. Even though the majority of interview participants felt strongly that the political component of the JSC is too big, the drafters of the Constitution must have had a good reason for their inclusion. The MPs and members of the NCOP represent their constituencies and people's interests and the variation in parties speaks to this. The Minister of Justice is a critical actor and the attitudes of the two different ministers during interviews, was often indicative of whether a candidate had any chance of being recommended. Other political members' motives are often also easy to interpret because of party ideologies and statements made in the interviews. The same does not apply to the four presidential

appointees. This is because as lawyers they often ask questions that test a candidate's legal aptitude or that enquire about why a candidate decided a case in a certain way. However, their internal motives are unknown because they are appointed by the President and there is no information regarding how or why particular appointees are selected.

Thus the role of the four appointees warrants further investigation because they are not clear political actors, yet by virtue of how they were appointed, they must share some common ideologies or perspectives with the President. In respect of the President himself, absent a Constitutional amendment he will continue to be the determinant of who leads the South African Judiciary, the SCA and who sits on the Constitutional Court. It has been argued that 'weak political commitment is located in the presidency and the executive holds tremendous actual and symbolic power in the appointment of judges'.[1549] Therefore, the President should be identified as a critical site of intervention and such interventions need to extend beyond written letters, as in 2013. It is accepted that the President has the power to use his discretion when appointing, but it would be useful if stakeholders engaged with him on how this discretion is used. This is especially relevant because the Constitution encourages positive action in regard to under-represented groups.

9.4.4 Allies in the Quest for Gender Diversity on the Bench

In Chapter 8, it was determined that CSOs and legal professional organisations can be and are influential in the process. Whether it is by using sustained advocacy campaigns, providing JSC interviews online, nominating candidates and endorsing or rejecting others, the avenues for intervention in the process are available. The number of women nominated by big organisations like the BLA and the NADEL is still low considering that their membership has a large number

[1549] Gretchen Bauer and Rachel Ellet, 'Delayed Indigenization and Feminization of the Judiciary', in *Gender and the Judiciary from Obscurity to Parity* , ed. by Josephine Dawuni and Bauer, Gretchen, 1st edn (New York: Routledge, 2015), pp. 33–48 (p.42).

of women. Both organisations have taken steps to equip their members outside of the interview process. The BLA holds an annual Trial and Advocacy Training event, aimed at giving lawyers the skills to become good and effective litigators.[1550] Since 2017, the NADEL in conjunction with the LSSA have hosted Judicial Skills workshops that seek to empower attorneys by exposing them to the skills required of judicial officers.[1551]

These initiatives are generic and not primarily for women. It appears that the necessity of providing women with more opportunities and skills training because of previous disadvantage, is still underestimated. The influence of the NADEL and the BLA can and should extend beyond current practices to specific interventions that recognise the structural problems in the profession. These organisations should also partner with Judges Matter and other CSOs working on governance issues. Doing so would create a stronger ally for women and it would also maximise the different skills and opportunities that each sector has. The results of the CGE Investigative Report on the lack of gender transformation can be a springboard to delve into deeper structural problems and bring all relevant stakeholders together. This will however require that the NADEL, the BLA, the GCB and others be willing to cooperate with a request for information. It would also require a willingness from the organisations to undergo an organisational introspection, into whether their women members are adequately supported.

9.5 THE VALUE OF USING TWO CASE STUDIES

The introduction of this thesis stated that this study would not be comparative study because of the disparate nature of the two jurisdictions. Instead, I sought to explore them as separate sites of research that could reveal valuable evidence. However, at this juncture it is useful to reflect on some important themes that extend across both jurisdictions.

[1550] See http://www.blalec.co.za/training/trial-advocacy-training/.
[1551] See Nomfundo Manyathi-jele, 'What It Means to Be a Judge Tackled at Judicial Skills Training Course', 2017.

9.5.1 The Importance of Feminist Perspectives on the JSC.

This study argued that women judges and JSC members in both jurisdictions are in decision-making positions as per the Maputo Protocol and SADC Protocol. In both jurisdictions, the gender composition of the JSC was not directly related to a greater gender diversity on the bench. However in both studies, participants relied on wider interpretations of diversity amongst others, to argue that more women on the JSCs could be a catalyst to infuse gender-mainstreaming processes in the JSC. Participants in both countries also highlighted the indispensability of a feminist perspective amongst all JSC members, not just women. They argued that this feminist perspective is one that is committed to advancing women's rights and equality between men and women. Furthermore, this commitment, should be displayed in how JSC members interact with women judicial aspirants.

9.5.2 High Expectations of Judicial Appointment Bodies

The two JSCs had a number of dissimilarities. One is composed of up to 26 members while the other only has eight. The South African JSC is publicly known and seen, while the Zambian JSC is a largely unknown body with members who are not publicly seen or heard from. In the former, apart from a few positions, the decisions of the JSC lead to guaranteed appointments, while in the latter, it appears that this is not the case. However the two JSCs are similar in two manners. First, they are both the product of a desire to have a more merit based type of appointment system, where judicial appointments are not the sole domain of the executive. The existence of both JSCs is supported by the Constitutions and hence the JSCs can not easily be disbanded. The JSCs have great power; this has ramifications for judicial independence, judicial governance and even political change. This power should not be taken lightly as it comes with expectations that the JSC will be an independent, accountable, trustworthy and consistent body in the important task of appointing judges.

Secondly, in respect of both jurisdictions, the old adage seems to apply: 'To whom much is given, much is required'. The expectations of both JSCs are very high and the appointment bodies do not have much room for error. One 'wrong appointment' could and did lead to bigger concerns about judicial governance, thereby affecting both of the JSCs' legitimacy. In Zambia, the negative Constitutional Court decision in the *Hichilema* case led to much debate and acrimony in respect of general judicial appointments and the operations of the JSC. In South Africa, the *Cape and Helen Suzman* matters, which were initiated because of the non-appointment of particular people, resulted in questions about the workings of the JSC and whether it conducted itself as it should. It would seem that irrespective of whether a JSC holds public interviews or not, the public is monitoring the process and drawing conclusions that extend beyond just one round of appointments.

9.5.3 Societies Need a New Type of Judge

Women were previously excluded from law and judicial decision-making processes because it was believed that only men mastered the traits of authority, assertiveness, objectivity, power and articulation.[1552] In both jurisdictions, there was an overwhelming belief that judging in contemporary societies requires so much more than these five values. Rather, there is now some appreciation of values that were previously dismissed as undesirable in judges. Judicial traits such as good listening skills, honesty, compassion, humility and patience are now not only largely accepted, but even highly desired by both JSC members and citizens. In constitutional democracies and the era of megapolitics, it would seem that a new type of judge is required; a judge that requires the judicial traits mentioned above and more. This study concluded that women are not lacking in respect of these essential character traits. Further, in both jurisdictions there was also consensus that women are not devoid of the practical requirements of judges, such as technical experience, competence, forensic skill and intellectual rigour. Instead the lack

[1552] Ifill, 'Racial Diversity on the Bench', p.442.

of acting appointments in South Africa in particular, and the dynamics in private practice in both countries, some of which are discussed below, may make the acquisition of these skills difficult.

9.5.4 The Glass Ceiling exists in Different Forms

In Chapter 7, this thesis referred to Dawuni and Kang's suggestion that the nature of a country's legal profession may have an influence on whether women rise to the top of the judiciary. They argue that in countries with fused legal professions, women are more likely to rise in their judicial careers as opposed to countries with split legal profession.[1553] On the face of it, this appears to be the case in this research as Zambia, with a fused legal profession, is faring well with women judges. By contrast, in South Africa which has a split legal profession, women have struggled to gain relevant experience needed for judicial appointment. However, it is submitted that just because Zambian women have fared well in the judiciary, does not mean that the fused legal profession is without its challenges. Women in private practice are still faced with similar challenges as those in South Africa, particularly in respect of obtaining weighty legal matters, and making partner or director in law firms. In other words, the glass ceiling in corporate firms exists in both jurisdictions, just in different forms.

There is another glass ceiling that presents itself in the form of acquiring silk status. In Zambia, only 6% of the SCs are women while in South Africa, women make up only 20% of those that have acquired silk status. The prestige and privilege that comes with silk status is undeniable and yet silk status is elusive to women across the study, regardless of whether a legal profession is fused or not. Silk status is and will remain the domain of men for a long time, unless and until there is a re-engineering of the qualifications to become a State Counsel or Senior Counsel. In the absence of this, the glass ceiling will continue to exist. Finally, on a

[1553] Dawuni and Kang, p.56.

related note, the South African JSC's current reliance on attorneys and advocates in the stratified and gendered context described in Chapter 7, may be unwise. It is suggested that in the short term, the South African JSC take a deliberate approach to appoint more magistrates. They could be appointed in somewhat of a 'tenure track' manner much like registrars in Zambia are appointed. In the short term, this could improve gender transformation statistics.

9.5.5 The Need to Consider the Judicial Working Environment

Earlier in this thesis it was stated that the use of the term 'feminisation of the judiciary' in this context, was a specific reference to the increase of women judges. I suggest that another definition of the feminisation of the judiciary could be a change in the institutional culture and practices of judiciaries. In both jurisdictions across different courts, it was undeniable that women are constantly faced with the challenge of combining their judicial career and family commitments. There was a unanimous view that judicial work is not conducive for young mothers, single mothers and even some married women, because they still carry the majority of responsibility in respect of children.

Despite the presence of more women on the Zambian bench, the expectations for late shifts and extra hours still persist. The Mjali and other interviews in South Africa revealed that one has to either work double shifts in order to maintain a family life and judicial career or opt not to have a family life at all. It is clear that the judicial role is both mentally and physically strenuous for women who want to perform optimally in the judiciary, while still being available to meet their personal commitments. Hence, there is need for a 'better understanding of societal and professional expectations in relation to gender in the judiciary'.[1554] A deeper analysis of how judiciaries support or don't support women's lived experiences which includes motherhood and family obligations in both jurisdictions, is also necessary.

[1554] Livia Holden, 'Women Judges in Pakistan', *International Journal of the Legal Profession*, 26.1 (2019), 89–104 (p.94)<https://doi.org/10.1080/09695958.2018.1490296>.

9.6 FINAL REFLECTIONS

One cannot fully comprehend the nature of various aspects of the appointment process by relying on research reports and limited published material. This is because there is much more to a judicial appointment process than meets the eye. Graham Gee in his research on the Judicial Appointments Commission (JAC) for England and Wales, came to a similar conclusion. He stated that 'it is tricky for outsiders such as academics to capture accurately and then to make sense of all of the various institutional dynamics at play in the long and formal processes of the JAC'.[1555] He acknowledged 'the real risk that academic critiques of judicial influence might be outdated, overstated or simply wrong, whether in whole or in part'.[1556]

Armed with Gee's reflections, the act of accurately capturing all the institutional dynamics involved in the two jurisdictions in this research involved a fine balance. This study was not only a consideration of the Zambian and South African JSCs, but it specifically examined their record and conduct in respect of women. Still, other aspects of the processes were explored that also required a recognition of the changing nature of environments. The dynamics in the legal pools continue to evolve. The concept of what is expected of a worthy judge and their main characteristics, may also have been affected as political events unfolded during this study. For instance, important political actors such as the Zambian President, JSC members in both jurisdictions and the Zambian Chief Justice all changed during the five year focus period. Consequently, measuring their influence and impact on the process required an awareness of the fluid nature of politics. These elements and more are evidence of how complex the judicial appointment process can be, and the recommendations provided below take this into consideration.

[1555] Graham Gee, 'Judging the JAC :How Much Judicial Infleunce over Judicial Appoitments Is Too Much?', in *Debating Judicial Appointments in an Age of Diversity*, ed. by Graham Gee and Erika Rackley (Abingdon: Routledge, 2018), pp. 152–82 (155).
[1556] Ibid, p.156.

9.7 FUTURE AREAS FOR POLICY ENGAGEMENT AND RESEARCH

Before proceeding to specific recommendations, it is worthwhile to mention two general reflections that would be useful to academics and practioners globally. The first is the significance of fieldwork interviews that capture all relevant stakeholders where possible. This would include uncommon interview participants in the gender and judging field, such as journalists and CSO members depending on the particular jurisdiction. Focusing attention on judicial appointers, lawyers and judges primarily might suggest an exclusivity about whose opinions are important, and thus deprive researchers from hearing other uncommon but rich perspectives.

Second, it is acknowledged that varying methods of judicial appointments worldwide mean that participant observation as a form of data collection, is not always possible. This is especially so because the judicial appointment systems in common law and civil law jurisdictions vary greatly. Having said that, in jurisdictions where it is possible, researchers would benefit from either non-participatory, moderate or active forms of participant observation. In jurisdictions where judicial interviews involve parliamentary ratification or senate confirmations as in the USA, the presence of researchers in the room would be invaluable. Non-participatory observation could take the form of listening to radio/podcasts that transmit audio input from interview proceedings or watching interviews online. Active forms of participant observation could take the form of informal discussions with appointers and judges and presenting research at legal workshops where one has an opportunity to engage with relevant actors. Further, participating in events organised by women judges' associations could provide information that judges and lawyers are not ordinarily willing or able to share. In essence, though this thesis has emphasised the importance of context in gender and judging, the methodological framework adopted for this study can prove useful to other researchers in

other parts of the world. Relevant alterations to the methodology could be made in order to suit the particular circumstance of a jurisdiction.

Inspired by the two case studies, the rest of this concluding chapter suggests more specific interventions that can be adapted to other sub-Saharan jurisdictions. The interventions herein are regarded as 'soft' measures for increasing gender diversity. They do not include 'hard' measures such as the proposal of quotas because recent constitutions in a number of countries now explicitly call for positive actions in regard to the appointment of women.[1557] Hence it is necessary to rather focus on other non-established interventions.

The first intervention is a deliberate re-imagining of the importance of gender diversity and a re-orientation of efforts to increase the number of women on the bench in countries that are performing poorly. One way to do so is to encourage what Malleson refers to as a 'shift in the conceptualisation of the problem away from the under-representation of marginalised identity groups to the over-representation of dominant identity groups'.[1558] Reframing the problem has the potential to affect the framing of potential solutions. In addition, these dominant identity groups are not limited to men, but can extend to ethnic groups, religious groups and other societal identities.

A second proposal is that policy makers and those tasked with overseeing the goals of the SADC Gender Protocol need to look at substantive changes in the judiciary, beyond increasing women's participation. The importance of such an approach has already been recognised by the ICJ Kenya office, in partnership with the East Africa Magistrates and Judges Association

[1557] For instance section 174 (2) of the South African Constitution and section 259 of the Zambian Constitution enshrine positive action. Other examples include the Kenyan Constitution says that no more than 2/3 of appointments should be one gender and the Zimbabwean Constitution that requires that all genders are equally represented in all institutions and agencies of government.

[1558] Kate Malleson, 'The Disruptive Potential of Ceiling Quotas in Addressing Over-Representation in the Judiciary', in *Debating Judicial Appointments in an Age of Diversity*, ed. by Graham Gee and Erika Rackley (Abingdon: Routledge, 2017), pp. 259–82.

(EAMJA). At the time of writing, the two organisations had issued a call for the creation of a regional gender policy.[1559] The research for the gender policy would include an examination of 'judiciary internal procedures, policies, practices and ways of engendering the same in order to create an enabling environment for all judicial officers'.[1560] Taking a lead from this, future policies in respect of women in decision- making positions in the SADC region, could include guidelines for creating women-friendly environments for judges. This could include policies regarding the provision of childcare for judges at the courts or improved maternity policies in the judiciary. It would also be beneficial for women to have flexible work schedules that would enable optimal performance of judicial duties, while ensuring overall well-being of judges.

Some feminists could argue that such measures would only seek to reinforce women's roles as mothers and home keepers, while discouraging men from taking more familial responsibilities. These sentiments are recognised and if there are male judges who bear a large share of familial responsibility, these measures should be extended to them too. However based on this research and interactions with various judges in the region over the years, the reality is that there are a number of women judges who are single mothers or who bear most of the familial responsibilities. In light of this, it is relevant to suggest measures that can alleviate their particular situations, while recognising that these measures may not be applicable in other societal contexts. In the SADC region, these measures have the potential to not only expand labour participation by ensuring that women can be appointed to the bench and retained, but they also operationalise gender main-streaming.

Third, future research should also focus on identifying various changes and shifts on micro and qualitative levels in the judiciary and in the legal profession. These could include changes

[1559] International Commission of Jurists Kenya Section, 'A Regional Gender Policy for Judiciaries in East Africa A Call for Expression of Interest Introduction' (Kenya: International Commission of Jurists, 2019), pp. 1–2 <https://icj-kenya.org/jdownloads/Opportunities/Call For Expression of Interest- Regional Gender Policy For Judiciaries.pdf> [accessed 28 November 2019].
[1560] Number 6 on the Terms of Reference.

in regulatory practices that govern how legal professionals function. In addition, changes in membership of the judicial appointment bodies or shifts in the data of who gets appointed to courts, especially Constitutional Courts and Courts of Appeal, could also be noted. Any fluctuations regarding the legal pools from which judges are drawn over a given period of time, could also prove telling in regard to changing political environments. Identifying changes and shifts is 'not only for prediction about future macro changes, but for the richer explanations that are possible and for the observations of variations and deviance from norms that may provide the clues to social innovation'.[1561]

Fourth, regional stakeholders need to go beyond providing guidelines for appointment such as the Lilongwe Principles. The diversity challenges faced in judiciaries start in the legal professions. Thus, in cooperation with the Southern African Development Cooperation Lawyers Association (SADCLA), the Southern African Chief Justices' Forum (SACJF) should establish and encourage regular annual gender audits in the legal professions and judiciaries. Reporting should be encouraged as a means of placing pressure on decision-makers and ensuring that there are continuous efforts to diversify judiciaries and the legal profession. Highlighting the importance of collating disaggregated data would be critical for such an initiative. Additionally, regional stakeholders should spearhead efforts to create a network of African scholars who can draw on each other's insights, while providing current research data that can enhance regional judicial governance efforts. Regional multidisciplinary workshops and collaborative initiatives amongst academics should be encouraged and funded, in order to build a body of scholarship that is lacking in the region.

Fifth, the impact of professional mentoring and solidarity for and amongst women can not be understated. The IDLO recommended that national, regional and international organisations

[1561] Menkel-Meadow ' The Comparative Sociology' , p.899.

should be supported, to 'ensure women have a network of supporters and mentors as well as access to equal education opportunities'.[1562] Mentoring opportunities should be main-streamed into universities, by partnering legal professionals with women law students to expose the students to real life legal practice. Mentoring could also include exposing students to skills equipping workshops, in order to capacitate them for the practice of law.[1563] Women who are qualified lawyers and are in different pools of the profession would also benefit from skills transfer workshops and pairing with more experienced legal professionals to expose them to more weighty legal matters and quality work. A mentorship relationship with a judge would also grant the legal professional insight into the workings of the judiciary.

Lastly, women judges could also benefit from mentoring programmes amongst themselves. A shared exchange between men and women judges would ensure adequate skills transfer, in areas of strength. Ultimately, all the suggested recommendations require political will and support. A favourable legal and social context for gender equity in the justice sector will be a culmination of various factors that are encouraged and supported by those with the power to make decisions. This includes Heads of State, Ministers of Justice, Chief Justices and even members of legislative bodies. The quest for gender diverse judiciaries is a governance issue and it requires a multi-sector governance response.

[1562] International Development Law Organization, *Women Delivering Justice: Contributions, Barriers, Pathways* (Rome, 2018) <https://www.idlo.int/sites/default/files/pdfs/publications/IDLO - Women Delivering Justice - 2018.pdf> [accessed 26 November 2019].
[1563] For example, the author previously led a Norwegian funded partnership with DGRU at the University of Cape Town and the South African Chapter of the International Association of Women Judges (SAC-IAWJ). It mentored almost 150 women law students in the period 2015-2018. See http://www.dgru.uct.ac.za/news/launch-2019-womens-pioneer-programme

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Appendix A
INTERVIEW SCHEDULE
RESEARCH ON GENDER AND JUDICIAL APPOINTMENTS

QUESTIONS FOR JUDGES

A. Introduction

1. What is your designation and which court are you based in?

B. Relevant Factors in the Judicial Appointment Process

1. Looking at the appointment process, in your opinion, what important factors are considered when a candidate is being assessed for judicial appointment?

Probes; *Describe what you have experienced as being important requirements for appointments. Is it only about what a candidate can bring to the bench jurisprudentially or are there other influential factors?*

2. Do the factors you have identified have a greater bearing on women candidates as opposed to men?

Probes: *Describe any aspects that you believe are easier or harder for women to meet. Are they given ample experience in private practice or in government departments?*

3. When were you interviewed and have you been through the process more than once?
4. Reflecting on your own judicial interview/s, what would you say struck you the most about the process?

Probes: *Describe the context of your interview: who was there, how long was it, were some questions unfair/invasive? Was there any part where you felt that some questions asked of you would not be asked of a man?*

5. Do you think the appointment process creates an equal playing field for men and women?

Probes: Are the requirements for judicial appointment neutral; are there other relevant factors that are taken into consideration that women may be lacking in?

6. For South African judges only: What do you think of the practice of appointing only people who have acted in the court in question for which they are being interviewed for?

Probes: *Describe what you making of the acting appointment system. Is it necessary and do you believe acting experience is the only way the JSC can know if one is ready to be a judge?*

7. How does the acting appointment process work in your court?

8. Would you suggest any changes?

C. The Appointment Body

1. What are your thoughts on the composition of the JSC in your jurisdiction?

Probes: *Describe the number of commissioners, role they play, is it too big, small or just the right size?*

2. Are there any members of the JSC that you believe are more influential than others and if so why?

3. During your interview/s, can you remember how many commissioners were female?

4. What kind of gender dynamics did you observe in your interview and in other interviews (where applicable)?

5. Do you think the number of women on the JSC had any bearing on whether you got appointed?

6. Do you believe that the gender composition of the JSC has any effect on the number of women getting appointed?

Probes: *Describe your thoughts on this issue. If there were more women on the JSC, do you think more women would get appointed or is it irrelevant?*

7. For Zambian Judges: Does parliamentary ratification have any bearing on women getting appointed?

Probes: *Does having parliament ratify recommendations ensure that there are more supporters (advocates) for women candidates or is parliamentary ratification more of a formality?*

D. Publicity and Transparency of the Process

1. Describe how much of your judicial appointment process is public and how much of it is a private process?

Probes: Who is involved at which stage, is there any part of it that the public can participate in?

2. Do you believe the process you have described is the best suited for your jurisdiction?

3. Would there be need for any improvements in the process and if so, why?

4. If improvements are suggested, would they increase the chances of more women getting appointed?

5. What is the role of the legal profession during this process in your jurisdiction- if any?

6. Is it necessary for the legal profession and/or Civil society to be involved and if your answer is yes, how can they do so? If the answer is no, please explain.

7. What is the role of political leadership in the appointment process if any?

Probes for South African judges: What do you think of the role of the opposition members on the JSC and the members of the ruling party? What about the president's role in the process re nominating heads of the SCA and CC and deciding who is appointed to the CC?

Probes for Zambian judges: What do you think of the role of MP's in the appointments, both ruling party and opposition members and of the President too.

Appendix B
RESEARCH ON GENDER AND JUDICIAL APPOINTMENTS

QUESTIONS FOR JUDICIAL SERVICE COMMISIONERS

A. Introduction

1. What is your designation and what is your role on the JSC?

B. Relevant Factors in the Judicial Appointment Process

1. Looking at the appointment process, in your opinion, what important factors are considered when a candidate is being assessed for judicial appointment?

   Probes; Describe what you have experienced as being important requirements for appointments. Is it only about what a candidate can bring to the bench jurisprudentially or are there other influential factors?

2. Do the factors you have identified have a greater bearing on women candidates as opposed to men?

Probes: *Describe any aspects that you believe are easier or harder for women to meet. Is the structure of the legal profession conducive for women? Are they given ample experience in private practice or in government departments?*

3. Reflecting on your own role as a Commissioner, what aspects of candidates' interviews have struck you the most?

Probes: *Describe any incident that surprised/shocked you. Were/are there particular issues such as integrity, honesty or experience that stand out as areas of concern or applause?*

4. Do you think the appointment process creates an equal playing field for men and women?

Probes: Are the requirements for judicial appointment neutral; are there other relevant factors that are taken into consideration that women may be lacking in?

5. For South African commissioners only: What do you think of the practice of appointing only people who have acted in the court in question for which they are being interviewed for?

Probes: *Describe what you making of the acting appointment system. Is it necessary and do you believe acting experience is the only way the JSC can know if one is ready to be a judge?*

6. There have been concerns about the opaqueness of the acting appointment system and how this negates womens' chances for permanent appointment because most acting positions go to men. Do you have any comments on this?

C. The Appointment Body

1. What do you think about the composition of the JSC that you are on?

Probes: *Describe the number of commissioners, role they play, is it too big, small or just the right size?*

2. How do you describe your role/responsibilities on the JSC?

Probes: *Are you acting for a constituency or in your personal capacity as a specific leader?*

3. How do you think the JSC has performed in the last five years generally?

4. How many commissioners on your JSC are female?

5. Do you believe that the gender composition of the JSC has any effect on the number of women getting appointed?

Probes: *Describe your thoughts on this issue. If there were more women on the JSC, do you think more women would get appointed or is it irrelevant?*

D. Publicity and Transparency of the Process

1. Describe how your JSC functions or operates once a position becomes vacant?
2. Do you believe the process you have described is the best suited for your jurisdiction?
3. Would there be need for any improvements in the process and if so, why?
4. If improvements are suggested, would they increase the chances of more women getting appointed?
5. What is the role of the legal profession during this process in your jurisdiction- if any?
6. Is it necessary to have engagement from the legal profession and/or Civil society and if your answer is yes, how can they be involved? If the answer is no, please explain.
7. What is the role of political leadership in the appointment process if any?

Probes for South African JSC members: What do you think of the role of the opposition members on the JSC and the members of the ruling party? What about the president's role in the process re nominating heads of the SCA and CC and deciding who is appointed to the CC?

Probes for Zambian JSC member: What do you think of the role of MP's in the appointments, both ruling party and opposition members and of the President too.

Appendix C
RESEARCH ON GENDER AND JUDICIAL APPOINTMENTS

QUESTIONS FOR MEMBERS OF THE LEGAL PROFESSION

A. Introduction

1. What is your designation and which section of the legal profession do you fall under?

B. Relevant Factors in the Judicial Appointment Process

1. Looking at the appointment process, in your opinion, what important factors are considered when a candidate is being assessed for judicial appointment?

Probes; Describe what you have experienced as being important requirements for appointments. Is it only about what a candidate can bring to the bench jurisprudentially or are there other influential factors?

2. Do the factors you have identified have a greater bearing on women candidates as opposed to men?

Probes: *Describe any aspects that you believe are easier or harder for women to meet. Is the structure of the legal profession conducive for women? Are they given ample experience in private practice or in government departments?*

3. Do you have any aspirations for judicial office and if so what are the areas that you believe you would need to excel in?

Probes: *Do you need to get more experience in particular areas of law, have acted on the court (if in South Africa), and be a more active member of certain organizations?*

4. Do you think the appointment process creates an equal playing field for men and women?

Probes: Are the requirements for judicial appointment neutral; are there other relevant factors that are taken into consideration that women may be lacking in?

5. For South African members of the profession only: What do you think of the practice of appointing only people who have acted in the court in question for which they are being interviewed for?

Probes: *Describe what you making of the acting appointment system. Is it necessary and do you believe acting experience is the only way the JSC can know if one is ready to be a judge?*

6. For South African members of the profession only:

   There have been concerns about the opaqueness of the acting appointment system and how this negates womens' chances for permanent appointment because most acting positions go to men. Do you have any comments on this?

7. For Zambian members of the profession only: Do you believe your legal experience/background gives you an advantage over other would be judicial aspirants with a different legal background?

Probes: If you are from private practice, do you think that makes you better qualified than those from public service and vice versa?

C. The Appointment Body

1. What do you think about the composition of the JSC?

Probes: *Describe the number of commissioners, role they play, is it too big, small or just the right size?*

2. What do you think about the JSC's performance in general in regards to appointments in the last five years?

Probes: Have they been good appointments? Any surprising ones or people who should have been appointed but weren't?

3. How has it performed in regards to women?
4. Do you believe that the gender composition of the JSC has any effect on the number of women getting appointed? If so, why?

Probes: *Describe your thoughts on this issue. If there were more women on the JSC, do you think more women would get appointed or is it irrelevant?*

5. Are there any members of the JSC that you believe are more influential than others and if so why?

D. Publicity and Transparency of the Process

1. What are your thoughts on the current appointment process for judges?

Probes: Is it transparent enough? Are there any problematic areas in your view?

2. Do you believe the process in your jurisdiction is the best suited for the country?

Probes: Is the system private/public depending on your jurisdiction a good one?

3. Would there be need for any improvements in the process and if so, what would they be?

4. If improvements are suggested, would they increase the chances of more women getting appointed?
5. What is the role of the legal sector group that you belong to, in this process if any?

Probes*: if you are a member of the law society or magistrate's association or the Bar, what is the role of your body? Does it nominate people or provide comments?*

6. Is it necessary to have engagement from the legal profession and/or Civil society and if your answer is yes, how can they do so? If the answer is no, please explain.
7. Is there a role for political leadership and/ involvement in the appointment process and if so, is it helpful?

Probes: For South Africans, comment on roles of opposition members, ANC in the process and the president as the nominator of the heads of SCA and CC and final decision maker for CC appointments.

Probes: For Zambians, comment on the role of MP's both opposition and ruling party and the president.

Appendix D
RESEARCH ON GENDER AND JUDICIAL APPOINTMENTS

QUESTIONS FOR JOURNALISTS OR CSO MEMBERS OR OTHER CONCERNED BODIES

A. Introduction

1. What is your designation and which media house, Institution or CSO do you represent?

B. Relevant Factors in the Judicial Appointment Process

1. Looking at the appointment process, in your opinion, what important factors are considered when a candidate is being assessed for judicial appointment?

   Probes; Describe what you have experienced as being important requirements for appointments. Is it only about what a candidate can bring to the bench jurisprudentially or are there other influential factors?

2. Do the factors you have identified have a greater bearing on women candidates as opposed to men?

Probes: *Describe any aspects that you believe are easier or harder for women to meet. Is the structure of the legal profession conducive for women? Are they given ample experience in private practice or in government departments?*

3. During the time you have been following/been engaged with the process, what elements have struck you the most?

Probes: Describe any incident that surprised/shocked you. Were/are there particular issues such as integrity, honesty or experience that stand out as areas of concern or applause?

4. Do you think the appointment process creates an equal playing field for men and women?

Probes: Are the requirements for judicial appointment neutral; are there other relevant factors that are taken into consideration that women may be lacking in?

5. For Zambian participants only: What do you think about parliament's role in the appointment process?

Probes: *Is it necessary to ensure a wide consensus or does it just prolong the process?*

6. For South African participants only : What do you think of the practice of appointing only people who have acted in the court in question for which they are being interviewed for?

Probes: *Describe what you making of the acting appointment system. Is it necessary and do you believe acting experience is the only way the JSC can know if one is ready to be a judge?*

7. There have been concerns about the opaqueness of the acting appointment system and how this negates womens' chances for permanent appointment because most acting positions go to men. Do you have any comments on this?

C. The Appointment Body

1. What do you think about the composition of the JSC?

Probes: *Describe the number of commissioners, role they play, is it too big, small or just the right size?*

2. What do you think about the JSC's performance in regards to appointments generally in the last five years?

Probes: Any surprising appointments, people who should have been appointed etc?

3. How has it performed in regards to women?

4. Do you believe that the gender composition of the JSC has any effect on the number of women getting appointed?

Probes: *Describe your thoughts on this issue. If there were more women on the JSC, do you think more women would get appointed or is it irrelevant?*

D. Publicity and Transparency of the Process

1. What are your thoughts on the current appointment process for judges?
2. Do you believe the process in your jurisdiction is the best suited for the country?
3. Would there be need for any improvements in the process and if so, why?

4. If improvements are suggested, would they increase the chances of more women getting appointed?

5. Is it necessary to have involvement from journalists and/or Civil society and if your answer is yes, how can they do so? If the answer is no, please explain.

6. What is the role of political leadership in the appointment process if any?

Probes: For South Africans, comment on roles of opposition members, ANC in the process and the president as the nominator of the heads of SCA and CC and final decision maker for CC appointments.

Probes: For Zambians, comment on the role of MP's both opposition and ruling party and the president.

Appendix E
Ethical Clearance Granted by University of Cape Town

Faculty of Law

Research Ethics Committee

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30 September 2016

Ms Tabeth Masengu
c/o **DGRU – Public Law Department**
Level 6, Kramer Law Building
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Email: tabeth.masengu@uct.ac.za

Dear Ms Masengu

Re: Clearance Process for L0030-2016 (EXP): *"The Judicial Appointment Process and Gender in the Judiciary: The Case of South Africa and Zambia"*

Thank you for your revised application submitted. The Faculty's Research Ethics Committee very much appreciates the considerable effort put into the documentation.

This study has been carefully considered and all ethical issues have been adequately addressed.

Ethics clearance is hereby granted as of 29 September 2016 and is subject to renewal for another 12 months.

Please note that any material changes to the proposal will need to be cleared as an amendment.

With best wishes,

Signature Removed

pp
Ms D Jefthas
REC Reviewer

cc: Prof H Corder, Public Law Department, UCT
Prof E Brems, Ghent University