

# APPOINTMENT OF JUDGES AND THE THREAT TO JUDICIAL INDEPENDENCE: CASE STUDIES FROM BOTSWANA, SWAZILAND, SOUTH AFRICA, AND KENYA\*

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At the end of the eighteenth century, English philosopher John Locke, who strongly influenced the 1688 English Revolution and the 1776 American Revolution, wrote that societies lacking established laws with the right of appeal to independent judges are still “in a state of nature” because such rights are essential to a civilized society.<sup>1</sup> Consistent with Locke’s philosophy, modern constitutional law theories often emphasize the importance of an independent judiciary as an indispensable element of the separation of powers.<sup>2</sup> The rule of law as a constitutional concept can only have meaning in a society which has an independent judiciary. The manner in which judges are appointed affects the independence of the judiciary. Judges who have been appointed on the basis of membership in political parties and/or political connections may not be perceived as impartial and independent by society. Indeed, history has proven that when politicians are permitted unfettered powers in judicial selection, the whole administration of justice is more likely to be put into disrepute.<sup>3</sup>

An assessment of whether a judicial selection process promotes an independent judiciary turns on two important considerations: first, the criteria for judicial selection, and second, transparency and openness in selection processes. The process of appointing judges is one of the major indicators that signifies whether a country subscribes to the rule of law and democracy. A political appointment process that pays lip service to merit will inevitably produce judges only chosen by their name and will continue to impact the judiciary years after. Constitutionally entrenched criteria for judicial selection is an important safeguard against appointments motivated by political considerations. The appointment process should ensure that persons selected have the necessary qualifications and experience. Generally, the prospects for an independent judiciary are enhanced when the judicial selection mechanisms are transparent.<sup>4</sup> Making judicial selections with openness and transparency allows principled public debate about the suitability of the judge.<sup>5</sup> Transparency is often manifested by publicly advertising judicial vacancies, disseminating the criteria for selection, and conducting public interviews.

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<sup>1</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 230 (Lawbook Exchange ed. 2010) (1698).

<sup>2</sup> See generally Douglas W. Hillman, *Judicial Independence: Linchpin of Our Constitutional Democracy*, 33 INTL. SOC’Y BARRISTERS Q. 382 (1998); see also Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 634 (2000).

<sup>3</sup> See J. VAN ZYL SMIT, THE APPOINTMENT, TENURE AND REMOVAL OF JUDGES UNDER COMMONWEALTH PRINCIPLES: A COMPENDIUM AND ANALYSIS OF BEST PRACTICE 28-29 (2015).

<sup>4</sup> See *id.* at 32; see also Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 589 (2005) (stating “generic calls for ‘transparency’ ... sound[s] appealing but the application of [this value] in the context of judicial appointments is cumbersome”).

<sup>5</sup> See VAN ZYL SMIT, *supra* note 3, at 47-48.

This Article discusses and compares the judicial appointment process in Botswana, Swaziland, South Africa, and Kenya, stressing the importance of fair, transparent, and merit-based judicial processes which enjoy public confidence.

## I. BACKGROUND INFORMATION

Solid institutions that enjoy public confidence are an essential feature of any successful democracy. Several studies have shown that countries with strong rule of law credentials tend to be more economically stable.<sup>6</sup> Most theories of judicial independence highlight the significance of judicial selection systems as a key and indispensable element of judicial independence.<sup>7</sup> Therefore, it is extremely important to design judicial selection mechanisms that produce judges whose independence, integrity, and impartiality are not in doubt.

Judicial independence is enshrined in several international and regional human rights documents,<sup>8</sup> as well as in most national constitutions.<sup>9</sup> *The Commonwealth Principles on Promoting Good Governance and Combating Corruption* (The Commonwealth Principles) emphasized that “an independent and competent judiciary, which is impartial, efficient, and

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<sup>6</sup> See generally Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 S. CT. ECON. REV. 1 (2003).

<sup>7</sup> See Tillman J. Finley, *Judicial Selection in Alaska: Justifications and Proposed Courses of Reform*, 20 ALASKA L. REV. 49, 50 (2003) (noting that Alexander Hamilton argued that life appointment and salary protection for federal judges contributes to judicial independence); see also David Schultz, *Minnesota Republican Party v. White and the Future of State Judicial Selection*, 69 ALB. L. REV. 985, 987 (2006) (“As a result, efforts to ensure that judges are independent and not indebted to political parties, special interests, or otherwise biased has been one goal which has influenced judicial selection methods.”); Shimon Shetreet, *The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges*, 10 CHI. J. INT’L L. 275 (2009) (examining the theories of judicial selection in various democracies).

<sup>8</sup> Tom Tso, *Indian Nations and the Human Right to an Independent Judiciary*, 3 N.Y. CITY L. REV. 105, 111 (1998) (noting international treaties that call for judicial independence to ensure fair proceedings: the 1948 Universal Declaration of Human Rights requires “independent and impartial” judicial proceedings, the 1985 the United Nations recommended member states adopt basic principles of judicial independence, and the 1996 the United Nations Commission on Human Rights issued a report which emphasized the importance of judicial independence in protecting human rights); see also Dane Ally, *A Comparative Analysis of the Constitutional Frameworks for the Removal of Judges in the Jurisdictions of Kenya and South Africa*, ATHENS J.L. 137, 139 (noting that human rights instruments at both the national and regional level recognize judicial independence).

<sup>9</sup> See James Melton & Tom Ginsburg, *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence* (Coase-Sandor Institute for Law & Economics Working Paper No. 612, 2014) (noting that two-thirds of constitutions written after 1985 contain judicial independence provisions).

reliable, is of utmost importance” to any democratic state.<sup>10</sup> There are debates within the sphere of judicial appointments about how the selection process can be made more transparent and better able to identify talent and enhance gender parity from a diverse pool of candidates.<sup>11</sup> Further, there is much debate over how to design an appointment system that strengthens judiciary principles of judicial independence, public confidence in the administration of justice, and the rule of law, generally.<sup>12</sup>

In an effort to integrate these principles, many African countries have implemented Judicial Service Commissions or Judicial Service Committees (JSC).<sup>13</sup> Using the JSC model to appoint judges is significantly less confrontational than other methods, such as the “tap on the shoulder” process used in the United States and England.<sup>14</sup> A model JSC is made up of judges, lawyers, and others outside the legal profession,<sup>15</sup> making this non-traditional composition successful.<sup>16</sup> According to the Bingham Research Centre, by 2015 more than 80% of Commonwealth member states utilized Judicial Services Commissions.<sup>17</sup>

In the United States, the judicial election processes have been negatively impacted by so-called “dark money.”<sup>18</sup> “Dark” refers to the underlying donors being undisclosed.<sup>19</sup> In response to concerns that executive and legislative officials were undermining judicial objectivity, the United States established judicial elections as a means of reformation.<sup>20</sup> A number of U.S. states elect judges, raising serious concerns over the

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<sup>10</sup> See COMMONWEALTH EXPERT GROUP ON GOOD GOVERNANCE AND THE ELIMINATION OF CORRUPTION, *FIGHTING CORRUPTION, PROMOTING GOOD GOVERNANCE* 10-11 (Commonwealth Secretariat 2000).

<sup>11</sup> See generally VAN ZYL SMIT, *supra* note 4, at 30-41.

<sup>12</sup> See Yvonne Mokgoro, *Judicial Appointments*, *ADVOCATE*, 43, 44-45 (Dec. 2010) (arguing an independent committee to oversee judicial appointments would strengthen judicial independence and public confidence in the judiciary); cf. Erin Delaney, *Searching for Constitutional Meaning in Institutional Design: The Debate Over Judicial Appointments in the United Kingdom*, 14 *INT’L J. CONST. L.* 752 (analyzing the design of the judicial appointments system in the United Kingdom).

<sup>13</sup> *SECURING JUDICIAL INDEPENDENCE: THE ROLE OF COMMISSIONS IN SELECTING JUDGES IN THE COMMONWEALTH* vii, viii (Hugh Corder & J. Van Zyl Smit eds., Siber Ink 2017).

<sup>14</sup> *Id.* at 40; see also *The Appointment of Judges By Independent Commissions in the Commonwealth*, BINGHAM CENTRE FOR THE RULE OF LAW, <https://binghamcentre.biicl.org/projects/the-appointment-of-judges-by-independent-commissions-in-the-commonwealth> (last visited Feb. 16, 2020).

<sup>15</sup> See VAN ZYL SMIT, *supra* note 3, at 36-38.

<sup>16</sup> *The Appointment of Judges By Independent Commissions in the Commonwealth*, BINGHAM CENTRE FOR THE RULE OF LAW, <https://binghamcentre.biicl.org/publications/cape-town-principles-on-the-role-of-independent-commissions-in-the-selection-and-appointment-of-judges> (last visited Feb. 16, 2020).

<sup>17</sup> VAN ZYL SMIT, *supra* note 3, at 38.

<sup>18</sup> Alicia Bannon, *The Rise of Dark Money is a Threat to Judicial Independence*, *ABA JOURNAL* (July 5, 2018, 7:15am), [http://www.abajournal.com/news/article/the\\_rise\\_of\\_dark\\_money\\_is\\_a\\_threat\\_to\\_judicial\\_independence](http://www.abajournal.com/news/article/the_rise_of_dark_money_is_a_threat_to_judicial_independence).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

influence of money in the election of judges and whether judicial independence will be undermined as a result.<sup>21</sup> It is argued that the election provides an opportunity for conflicts of interest that may undermine the fair distribution of justice.<sup>22</sup> It is further argued that it is unacceptable to raise money from lawyers and parties who would at one point appear before the judge they endorsed.<sup>23</sup> Additionally, there are those who are opposed to the appointment process. This opposition argues that appointment is like anointment and is therefore not good for society.<sup>24</sup> Supporters of the election method argue that the appointment process is characterized by “behind the scenes” influences.<sup>25</sup> In contrast, elections are not as subject to deal making because they take place in the public sphere.<sup>26</sup> The American Bar Association, in an attempt to alleviate dark money’s influence, included Rule 2.11 in the Model Code of Judicial Conduct.<sup>27</sup> Rule 2.11 requires a judge to disqualify himself if his impartiality might reasonably be questioned as a result of contributions to his election campaign.<sup>28</sup>

On April 3, 2009, England and Wales began to appoint the majority of their judges through a Judicial Appointments Commission (JAC).<sup>29</sup> This independent JAC is responsible for selecting judicial candidates based solely on merit.<sup>30</sup> There are approximately fifteen people serving on the English and Welsh JAC.<sup>31</sup> Most Commission members compete for each position during recruitment and ultimately appointment.<sup>32</sup> However, the Judges’ Council and/or the Tribunals’ Council will choose three members to hold positions *ex officio*.<sup>33</sup> Independent JACs are spreading across the region. Scotland has

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<sup>21</sup> *Id.*

<sup>22</sup> *See id.* (comparing how states elect judges and how money influences issues that arise in judicial appointments).

<sup>23</sup> *See* Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POLICY 273, 278 (2002) (“[T]he growing involvement of special interest groups in judicial campaigns may pressure a candidate to adopt the political or social agenda that arrives tied to a stack of cash.”).

<sup>24</sup> *See* Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POLICY 273, 307-08 (2002).

<sup>25</sup> Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J. L. & PUB. POLICY 467, 527 (1998).

<sup>26</sup> *See* Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POLICY 273, 275-85 (2002) (explaining the influence of money contributions on the public’s perception of judicial elections).

<sup>27</sup> *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 488, (2019) (discussing the standards for judicial recusal).

<sup>28</sup> MODEL CODE OF JUD. CONDUCT Canon 2, Rule 2.11 (AM. BAR ASS’N 2020).

<sup>29</sup> VAN ZYL SMIT, *supra* note 3, at 8.

<sup>30</sup> Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States?*, 34 FORDHAM URB. L. J. 387, 390 (2007).

<sup>31</sup> Josh Hunter & Pdraic Ryan, *The Entrenchment of Discretion: Prospects for Judicial Appointment Reform After a Trio of References*, 74 SCLR (2d) 118, 144 (May 6, 2016).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

established a similar body—the Judicial Appointments Board for Scotland—to select candidates for judicial appointments,<sup>34</sup> as well as Northern Ireland—the Northern Ireland Judicial Appointments Commission—for the same purpose.<sup>35</sup>

An independent judiciary is necessary so judges may act impartially for the benefit of the community, without prejudicial influence.<sup>36</sup> Members of the legal community should be more conscious of ensuring that judges can work in environments which allow them to administer justice consistent with their country's laws without external influence.<sup>37</sup>

Additionally, an independent, impartial, competent, and ethical judiciary is essential to the rule of law.<sup>38</sup> It is necessary for the fair and impartial resolution of disputes; for the interpretation of a written constitution; the clear, just, and predictable application of the law; and for holding governments and private interests accountable. Ensuring that the judiciary is fit to perform these tasks—often in situations of considerable pressure—requires a sound institutional structure to support the courage and integrity of individual judges. For this to be possible, the legal framework for that structure, in any jurisdiction, must include: 1) the system by which judges are chosen and appointed; 2) the terms of their tenure; and 3) the mechanism for deciding whether a judge should be removed from office.<sup>39</sup> In light of these requirements, important questions arise, such as who should appoint judges and by what process, what should be the duration of judicial tenure and how should judges' remuneration be determined, and what grounds justify the removal of a judge and who should carry out the necessary investigation and inquiries.<sup>40</sup>

## II. THE SOUTHERN AFRICAN CHIEF JUSTICES FORUM: THE LILONGWE PRINCIPLES AND GUIDELINES ON THE SELECTION AND APPOINTMENT OF JUDICIAL OFFICERS.

The Southern African Chief Justices' Forum (SACJF) is committed to promoting the independence of the judiciary as well as the decisional autonomy of individual judges.<sup>41</sup> The SACJF credits judicial independence,

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<sup>34</sup> VAN ZYL SMIT, *supra* note 3, at 206.

<sup>35</sup> *Id.*

<sup>36</sup> Tabeth Masengu, *The Vulnerability of Judges in Contemporary Africa: Alarming Trends*, 63.4 AFRICA TODAY 3, 15 (Summer 2017).

<sup>37</sup> *Id.*

<sup>38</sup> See COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT 9 (Commonwealth Secretariat et al., 2004), <http://thecommonwealth.org/history-of-the-commonwealth/latimer-principles>.

<sup>39</sup> VAN ZYL SMIT, *supra* note 3, at XXVI.

<sup>40</sup> *Id.*

<sup>41</sup> SOUTH AFRICAN CHIEF JUSTICES' FORUM, LILONGWE PRINCIPLES AND GUIDELINES ON THE SELECTION AND APPOINTMENT OF JUDICIAL OFFICERS 1 (2018).

in part, to the processes by which judicial officers are selected and appointed.<sup>42</sup> To that end, the SACJF developed a Judicial Service Commission made up of individuals from the region.<sup>43</sup> The SACJF considered varying international judicial appointment processes and research completed by the University of Cape Town's Democratic Governance and Rights Unit (DRGU).<sup>44</sup> From these sources, it constructed a regional strategy that provides guidelines and principles for the appointment and selection of judges throughout Africa.<sup>45</sup> These principles and guidelines contain jurisdictional directions for developing "legislation, policy, and practice[s] [for] the selection and appointment of judicial officers."<sup>46</sup> These guiding principles strive to secure a more independent judiciary with strong integrity.<sup>47</sup>

The Commission noted that "judicial independence is ensured through the integrity of the selection and appointment process along with the security of tenure of judicial officers."<sup>48</sup> Additionally, a process centered around integrity and transparency in judicial appointments bolsters trust and confidence of the public in judicial proceedings.<sup>49</sup> The implementation of the principles and guidelines are implemented subject to each country's national law.<sup>50</sup>

Research by DRGU of the University of Cape Town, and other reputable International Research Centres, including International Legal Instruments, cite the following fifteen principles as extremely important in the selection and appointment of judges:<sup>51</sup>

1. The principle of transparency should permeate every stage of the selection and appointment process;
2. The selection and appointment authority should be independent and impartial;
3. The process for the selection and appointment of judicial officers shall be fair;
4. Judicial appointees should exceed minimum standards of competency, diligence, and ethics;
5. Appointments of candidates should be made according to merit;

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

6. The appointment process should ensure stakeholder engagement at all relevant stages of the process;
7. Objective criteria for the selection of judicial officers should be pre-set by the selection and appointment authority, publicly advertised, and should not be altered during that process;
8. The judicial bench should reflect the diversity of society in all respects, and selection and appointment authorities may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench;
9. Candidates shall be sourced according to a consistent and transparent process;
10. The shortlisting of candidates shall be credible, fair and transparent;
11. Candidates shortlisted for interview shall be vetted and stakeholders invited to comment on the candidate's suitability for the appointment prior to the interview;
12. Interviews should be held for the selection of candidates for appointment to judicial office;
13. The final selection (decision) to recommend for appointment shall be fair, objective and based on weighing the suitability of the candidate for appointment against the criteria set for that appointment;
14. A formal appointment shall be made constitutionally and lawfully;
15. Provision shall be made for judicial officers to assume office timeously once appointed.<sup>52</sup>

It may be too early to assess the extent to which countries have adopted these principles. What is pleasing though is that they are being discussed and endorsed in an increasing number of countries, and one hopes that in the course of time they shall inform legislative reforms in the region and across the world.

#### A. The Commonwealth Context: the 2003 Latimer House Principles

The Commonwealth (Latimer House) Principles on the Three Branches of Government (Latimer House Principles)<sup>53</sup> delineate a relationship between the executive, parliamentary, and judicial branches.<sup>54</sup> These principles provide each commonwealth country with a framework that is consistent with each country's fundamental values.<sup>55</sup> The Latimer House Principles emphasize the separation of powers as a necessary element in a properly

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<sup>52</sup> *Id.* at 2-3.

<sup>53</sup> *See* COMMONWEALTH (LATIMER HOUSE) PRINCIPLES, *supra* note 38, at 9.

<sup>54</sup> *Id.* at 3.

<sup>55</sup> *Id.* at 9.

functioning democratic society.<sup>56</sup> Each branch of government must carry out its own constitutional duties with respect for the authority of the other branches and without exceeding the scope of its own authority.<sup>57</sup> In many commonwealth countries, both deliberate and unintentional violations of the separation of powers doctrine have resulted in political challenges and challenges to governance.<sup>58</sup> To date, the Latimer House Principles express the most detailed version of our shared understandings of the rule of law and its implications for each of the main branches of state.<sup>59</sup>

#### B. Latimer House Principle IV: Independence of the Judiciary

Principle IV advises that “[a]n independent, impartial, honest, and competent [j]udiciary” is fundamental in forming “public confidence and dispensing justice.”<sup>60</sup> Interpreting and applying legislation and national constitutions in accordance with the domestic law of each commonwealth country, and adhering to international human rights principles, is the primary role of the judiciary.<sup>61</sup> Principle IV offers a framework to help secure these aims:

1. Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:
  - i. equality of opportunity for all who are eligible for judicial office;
  - ii. appointment on merit; and
  - iii. that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historical factors of discrimination.
2. Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place.
3. Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought.
4. Interaction, if any, between the executive and the judiciary, should not compromise judicial independence.<sup>62</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> *See id.* at 9-16.

<sup>58</sup> THE COMMONWEALTH LATIMER HOUSE PRINCIPLES PRACTITIONER’S HANDBOOK 1 (Commonwealth Secretariat, 2017).

<sup>59</sup> VAN ZYL SMIT, *supra* note 3, at XVII.

<sup>60</sup> COMMONWEALTH (LATIMER HOUSE) PRINCIPLES, *supra* note 38, at 10.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 10-11.

With regard to judicial accountability, the Latimer House Principles establish a high standard for suspension or removal.<sup>63</sup> Such high standards are effectuated to ensure that the judiciary is “independent, effective, and competent” when interpreting the law.<sup>64</sup> The Latimer House Principles advise that judges should only be suspended or removed if they are clearly unable to discharge their duties due to “incapacity or misbehaviour.”<sup>65</sup> In furtherance of judicial accountability and transparency, any judicial disciplinary proceedings should be conducted fairly and objectively, with appropriate safeguards in place to ensure equitable outcomes.<sup>66</sup>

As previously indicated, approximately 80% of commonwealth countries have judicial appointment commissions that are mandated to make binding recommendations to the executive to appoint judges.<sup>67</sup> Judicial appointment commissions must be demonstrably independent with experienced members who are able to ensure selected candidates are qualified.<sup>68</sup> As such, best practice ensures the majority of each commission’s members hold positions within the legal field as either practitioners or academics.<sup>69</sup>

A commission may also include ‘lay’ members, such as those who work in human services. Such members offer a broader, less legalistic, perspective that reminds the committee of public sector concerns and promotes transparency.<sup>70</sup> The selection of these members must be designed to ensure that minorities are adequately represented.<sup>71</sup> Further, it is important to consider how the leader is selected as chair; the length of each member’s service; the security of that service through tenure; and how the commission’s ability to remain autonomous through funding and staffing requirements impact the commission’s continued and future independence.<sup>72</sup> Most importantly, the framework must ensure that the selection remain free from political influence.<sup>73</sup>

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<sup>63</sup> *Id.* at 10.

<sup>64</sup> *Id.* at 11.

<sup>65</sup> *Id.* at 10.

<sup>66</sup> *Id.* at 12.

<sup>67</sup> VAN ZYL SMIT, *supra* note 3, at XVII.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See COMMONWEALTH (LATIMER HOUSE) PRINCIPLES, *supra* note 38, at 20.

<sup>73</sup> VAN ZYL SMIT, *supra* note 3, at XVII.

### C. The Role of a Judicial Appointments Commission

Increasingly, a number of countries are shifting to judicial services commissions as a means of promoting fair judicial appointments.<sup>74</sup> To ensure transparency, commissions should accept applications for judicial vacancies through an open and public application process.<sup>75</sup> The commission then narrows down a select list of qualified candidates. During this evaluation the commission may consider documents that include application forms, references, and (when necessary) written tests.<sup>76</sup> Then the commission holds interviews that are open to the public.<sup>77</sup> This transparency allows the public to scrutinize the process and ensures the commission is held accountable.<sup>78</sup> Once this process is completed, the commission makes its recommendations to the executive branch.

In a majority of commonwealth countries, the executive is responsible for formally appointing judges.<sup>79</sup> The commission's role in the selection process and the role of the executive should be clearly reflected by the legal framework.<sup>80</sup> Best practice requires the commission to present the executive with a binding decision of its selection.<sup>81</sup> If the executive has veto power over the commission's recommendation, which is generally not advisable, then the executive should be required to specifically detail its reasons exercising that power.<sup>82</sup>

### III. COMPARISON OF COUNTRY APPOINTMENT PRACTICES: BOTSWANA, SWAZILAND, SOUTH AFRICA, AND KENYA

In recent years, the University of Cape Town and Bingham Research Centre, in connection with the Claude Leon Foundation, established an international research project to examine the selection processes and practices of Judicial Services Commission in the Commonwealth in greater depth.<sup>83</sup> The project brought experts together from a number of the larger Commonwealth jurisdictions, where commissions have some role in the selection of judges.<sup>84</sup> The following comparative overviews are drawn from

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<sup>74</sup> See generally VAN ZYL SMIT, *supra* note 3, at 129-201 (summarizing the legal frameworks for the appointment, tenure, and removal of judges in each commonwealth state).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at XVII-III.

<sup>78</sup> *Id.* at XVIII.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See HUGH CORDER, *CAPE TOWN PRINCIPLES ON THE ROLE OF INDEPENDENT COMMISSIONS IN THE SELECTION AND APPOINTMENT OF JUDGES 1* (Bingham Centre for the Rule of Law, 2016).

<sup>84</sup> *Id.*

the joint research project by University of Cape Town (UCT) Law and Bingham Research Centre mentioned above. The project's primary aim is summarized by Justice Kate O'Regan, who served on South Africa's Constitutional Court for fifteen years:

Appointing independent, competent and trusted judges is central to ensuring the rule of law in a democracy. The last few decades have seen the establishment of judicial appointment committees in many Commonwealth countries that have diminished the power of the executive over the appointment of judges. The Cape Town Principles provide welcome guidance on the processes and principles that should inform the work of these committees, which should in turn contribute to the enhancement of the rule of law and independence of the judiciary across the Commonwealth.<sup>85</sup>

The research findings enable a straightforward comparison of the commendable and concerning aspects of the JSC approaches in each of the countries under review. The research findings are summarized below, with respect to each country.

#### A. Botswana

After review of the previously mentioned reports, the areas of commendation according for the Botswana judicial appointment process are as follows:

**Advertising vacancies** – The JSC has begun to move away from head-hunting and is now publicly advertising vacancies for the High Court and the Magistrate Courts.<sup>86</sup> This is a welcome move towards transparency and widening the pool of candidates for judicial office.

**Role of the Law Society of Botswana** – The Law Society of Botswana (LSB) has taken a keen interest in driving reform in judicial appointments in the country. The LSB has engaged in litigation to enforce constitutional compliance when it comes to appointments.<sup>87</sup> The LSB sought to compel the President to appoint judges according to the recommendations of the JSC.<sup>88</sup> This is because the President had been sitting on names for a year

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<sup>85</sup> *Id.* at 1.

<sup>86</sup> Key Dingake, *Judges' Appointments and the Threat to Judicial Independence*, MMEGI ONLINE (May 31, 2019), <https://www.mmegi.bw/index.php?aid=81139&dir=2019/may/31>.

<sup>87</sup> See *Law Society of Botswana v. The President of Botswana*, High Court Case No. MHGB-000383-15 (2016); *Law Society of Botswana v. The President of Botswana*, Court of Appeal Civil Case No. CACGB 031-16 (2017).

<sup>88</sup> *Law Society of Botswana v. The President of Botswana*, High Court Case No. MHGB-000383-15 (2016), at 2.

when the LSB decided to institute litigation.<sup>89</sup> The LSB argued that Constitution requires the President to appoint judges on the advice of the JSC and to abide by the decision of the JSC.<sup>90</sup> The LSB lost in the High Court<sup>91</sup> but won in the Court of Appeal.<sup>92</sup> The LSB has also developed a position paper of the appointments of judges in Botswana.<sup>93</sup>

**Public representation on the JSC** – The Constitution makes provision for one ordinary citizen who is not a legal practitioner to be appointed to the JSC by the President.<sup>94</sup> This allows for the public to be directly represented by an individual who is not formally part of the structures of government.<sup>95</sup>

Adverse observations are as follows:

**Lack of Transparency** – The judicial appointment processes in Botswana are shrouded in mystery. Very few people know of the process and interviews are held *in camera*.<sup>96</sup>

**Court of Appeal vacancies not advertised** – The JSC is still not advertising vacancies for the Court of Appeal. There is no rational basis for the differentiation between the High Court and the Court of Appeal appointment procedures. The JSC, therefore, could do better with the Court of Appeal appointment process.<sup>97</sup>

**Absence of JSC operating procedures or regulations** – The JSC does not have guiding operating procedures and guidelines.<sup>98</sup>

**Shortlisting of candidates by the JSC** – It is not publicly known who in the JSC does the shortlisting, and on what criteria. This makes the process less transparent.<sup>99</sup>

**Presidential influence** – Judicial appointments in Botswana appear to be largely driven by political considerations, and the executive has much influence on who is appointed. As a result, there has been an outcry from

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<sup>89</sup> *Id.* at 3-4.

<sup>90</sup> *Id.* at 4-5.

<sup>91</sup> *Id.* at 42-44.

<sup>92</sup> Law Society of Botswana v. The President of Botswana, Court of Appeal Civil Case No. CACGB 031-16 (2017), at 54.

<sup>93</sup> See *LSB, Motumise vs The President, JSC and Others*, MMEGI ONLINE: THE MONITOR (Apr. 24, 2017), <https://www.mmegi.bw/index.php?aid=68317&dir=2017/april/24>.

<sup>94</sup> Dingake, *supra* note 86.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

both the public and the legal profession over the appointment of inexperienced judges.<sup>100</sup>

**Domination of JSC by Presidential appointees** – The JSC is dominated by individuals appointed by the President. There is very little independent representation. It is recommended that, at the very least, the JSC must consist predominately of members of the legal profession. All members of the JSC are presidential appointees except the member of the Law Society.<sup>101</sup>

**Limited participation of members of the public and civil society** – There is zero participation of civil society organisations and members of the public in judicial appointment processes.<sup>102</sup>

**Differences in the appointment of judges** – The judges of the Industrial Court of Botswana are appointed in terms of the Trade Disputes Act as opposed to the Constitution.<sup>103</sup> The JSC is not involved in their appointments, notwithstanding that the industrial court is of a court with concurrent jurisdiction with the High Court; so it is important that the appointments to that court mirror those of the High Court.<sup>104</sup>

**Questions of independence of JSC Commissioners** – The LSB has been engaged in debate on whether a representative of the LSB on the JSC is not required to report to the LSB and to get directions from the LSB. There is a divergence of opinion on this aspect, and the Law Society, at one point, had to withdraw its representative from the JSC for failure or refusal to report to the LSB and to take instructions from it.<sup>105</sup>

**Judicial discipline** – The constitution is silent on the process to be followed in disciplining judges. It was recommended that the law should be clear on the precise process to be followed when disciplinary proceedings are being instituted against a judge or judges.<sup>106</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Trade Disputes Act, c. 48:02, § 16 (2004).

<sup>104</sup> Dingake, *supra* note 86.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

## B. Swaziland

The 2005 Constitution of Swaziland and the Judicial Service Commission Act, 1982 (JSC Act) establish the powers of judicial appointment, discipline, and removal.<sup>107</sup> The JSC Act also requires that the Judicial Service Commission Regulations of 1968 continue to be enforced so long as its provisions are consistent with the Act.<sup>108</sup> The JSC Act mentions such regulations; however, the regulations could not be found after a diligent search.<sup>109</sup>

The curious relationship between the JSC Act and the 2005 constitution is complex, defying a simplistic explanation. The JSC Act defines the functions of the Judicial Service Commission.<sup>110</sup> However, it limits the scope of these functions by narrowly defining “judicial officers” to only include magistrates and the office of the Registrar or Assistant Registrar of the High Court or Court of Appeal.<sup>111</sup> This language effectively removes judges from the definition, resulting in a vague definition that leaves room for manipulation.<sup>112</sup> For example, the Minister for Justice can unilaterally change the definition of “judicial office” by public notice in the Gazette.<sup>113</sup> Additionally, by terms of the saved portions of section 113 of the 1973 constitution, the JSC regulates matters of appointment, disciplinary control, and removal of magistrates.<sup>114</sup> But, since the JSC Act deals with lower court appointments and mandates that the commission advise the King on judicial matters, there is a question of how effective such advice is without an independent judiciary under the present Act.<sup>115</sup>

It is not clear whether any regulations have been passed that address these concerns about judicial appointments under the present JSC Act. If the 1968 Regulations do in fact exist, it should be as limited in scope as the primary Act, i.e., the JSC Act 1982. Assuming the regulations also purport to regulate how judges of superior courts are appointed, it is doubtful that those aspects of the regulations would be valid because the scope of the

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<sup>107</sup> INTERNATIONAL COMMISSION OF JURISTS, JUSTICE LOCKED OUT: SWAZILAND’S RULE OF LAW CRISIS: INTERNATIONAL FACT-FINDING MISSION REPORT 12 (2015).

<sup>108</sup> IAN SEIDERMAN, 1 YEARBOOK OF THE INTERNATIONAL COMMISSION OF JURISTS 3, 16 (2004).

<sup>109</sup> See generally INTERNATIONAL BAR ASSOCIATION, SWAZILAND LAW, CUSTOM AND POLITICS: CONSTITUTIONAL CRISIS AND THE BREAKDOWN IN THE RULE OF LAW (2003) (discussing the lack of clarity regarding the provisions that were kept in the Constitution from the 1968 Regulations and the resulting risk of abuse due to lack of clarity) [hereinafter SWAZILAND LAW].

<sup>110</sup> *Id.* at 41.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*; see also Standards and Quality Act (2003) <http://extwprlegs1.fao.org/docs/pdf/swa142025.pdf> (Pursuant to legislation enacted by the King and Parliament of Swaziland, any change to legislation shall be published in the Gazette, an official government publication.).

<sup>114</sup> SWAZILAND LAW, *supra* note 109, at 40.

<sup>115</sup> *Id.* at 40-41.

primary Act is confined to the judicial offices listed therein. This would leave no regulations to guide the JSC in matters involving superior court judges. At any rate, and for reasons elaborated above, it is difficult to conceive the JSC as constituted under the Act carrying out functions allocated to it under the constitution.

A comprehensive review of the JSC Act may, therefore, be necessary in order to ensure that matters of judicial appointment, discipline and removal are comprehensively dealt with in legislation. The constitution is hardly the place to do this because by their nature, constitutions establish broadly framed general rules and principles regarding how things ought to be done. For example, the JSC Act would need to be amended to include judicial appointments to superior courts and all matters relating to the administration of the judiciary in order to bring it into harmony with the constitution. Additionally, the provisions of the JSC Act requiring that the JSC be constituted of five members would need to be amended to comply with the constitutional requirement of six members. Such small amendments to the JSC Act would help strengthen the judiciary.

### C. South Africa

The post-independence judicial selection mechanism in South Africa radically differs from the apartheid era. The post-1994 shift to the democratic dispensation is rooted in the need to build strong and resilient institutions that support democracy and the rule of law.<sup>116</sup> Despite these laudable aims, the judicial appointments process in South Africa faces many challenges.<sup>117</sup> These challenges include the transformation of the racial and gender composition of the judiciary; questions concerning the over-representation of the politicians and the subsequent impact on the independence of the judiciary; and questions of public confidence in an appointment process dominated by politicians.<sup>118</sup>

To help answer these questions, a brief historical background is necessary to sharpen perspective. South Africa transitioned from a system of parliamentary supremacy under apartheid, where parliamentary participation was denied to the majority black population, to a post-apartheid constitutional democracy.<sup>119</sup> The Constitution of the Republic of South Africa now vests the courts with extensive powers of review.<sup>120</sup> The

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<sup>116</sup> K. Malan, *Reassessing Judicial Independence and Impartiality Against the Backdrop of Judicial Appointments in South Africa*, 17 POTCHEFSTROOM ELECTRIC L.J. 1965, 1970-71 (2014).

<sup>117</sup> *See id.* at 1973-81.

<sup>118</sup> *Id.*

<sup>119</sup> D.M. DAVIS, JUDICIAL APPOINTMENTS IN SOUTH AFRICA, MIDDLE TEMPLE AND SA CONFERENCE: JUDICIAL INDEPENDENCE 40-41 (Dec. 2010).

<sup>120</sup> *See id.*

Appellate Division of the Supreme Court is now the Supreme Court of Appeal (SCA), an intermediate appeals court, and the Constitutional Court is now the highest court in the land.<sup>121</sup>

Before the advent of democracy in South Africa, the judiciary was almost exclusively made up of white males.<sup>122</sup> Black people, who constituted the vast majority of the populace, were excluded.<sup>123</sup> The judicial appointment process was shrouded in secrecy and subject to pervasive political influence.<sup>124</sup> The process of judicial appointment has changed dramatically following South Africa's transition from apartheid to constitutional democracy.<sup>125</sup>

The process of judicial appointment of judges in South Africa begins with a consideration of section 174(1) of the constitution, requiring a judge be "appropriately qualified" and "a fit and proper person."<sup>126</sup> These are the two most essential requirements because a person who is not appropriately qualified or is not a fit and proper person cannot be appointed as a judicial officer. Although the constitution does not expressly detail the content of these criteria, it is the author's view that the JSC is obliged to take into account the provisions of section 165(2) of the constitution. This provision requires that the judiciary must be independent, protect the constitution and uphold rights, and "apply the law impartially and without fear, favour, or prejudice."<sup>127</sup>

The JSC determines its own procedure. The JSC is comprised of representatives from "the judiciary, the legal profession including attorneys, members of academia, and advocates, political parties represented in parliament, members of the national and provincial executive, and presidential appointees."<sup>128</sup> While the JSC provides a collective definition, it is the responsibility of each of the above constituencies to define their role and approach.<sup>129</sup> The procedures of the JSC are generally transparent, in that when vacancies arise, the general public is encouraged to nominate candidates.<sup>130</sup> When the JSC plans to recommend a candidate to the President, interviews can be conducted publicly with media present to promote transparency.<sup>131</sup> However, the media is not present for the JSC

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 40.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> S. AFR. CONST., 1996, § 165(2).

<sup>127</sup> S. AFR. CONST., 1996, § 175(1).

<sup>128</sup> DEMOCRATIC GOVERNANCE AND RIGHTS UNIT, JUDICIAL SELECTION IN SOUTH AFRICA 11 (2013).

<sup>129</sup> *Id.*

<sup>130</sup> YVONNE MOKGORO, JUDICIAL APPOINTMENTS, MIDDLE TEMPLE AND SA CONFERENCE: JUDICIAL INDEPENDENCE 43, 45 (Dec. 2010).

<sup>131</sup> *Id.*

deliberations, resulting in media criticism about the deliberations taking place behind closed doors in order to prevent public scrutiny.<sup>132</sup>

Under section 174(2) of the constitution, the JSC is required to consider “the need for the judiciary to reflect broadly the racial and gender composition of South Africa” during the recommendation process.<sup>133</sup> This constitutional provision is meant as a remedy for the past racial imbalances within the judiciary.<sup>134</sup> While section 174(1) only requires that a candidate for judicial appointment be “fit and proper,” section 174(2) goes on to provide additional requirements to ensure that candidates from “previously disadvantaged communities” have the opportunity for consideration so long as they are also “fit and proper.”<sup>135</sup>

A questionnaire with a wide-ranging scope of questions is utilized as part of the recruitment process.<sup>136</sup> Candidates who are already judges utilize specified forms that differ from the forms utilized by those who are not prior judges.<sup>137</sup> The forms require candidates to provide information about: tertiary academic qualifications; employment particulars since leaving school or university; and membership of legal, political, community, and any secret organizations.<sup>138</sup> Candidates are also compelled to list any publications in the field of law and to provide an explanation for the most significant publications.<sup>139</sup> Candidates must indicate whether any writings have been cited in judicial decisions, indicating whether the citation was with approval or not, and must also identify who has reviewed the publications.<sup>140</sup> All candidates are required to state what they regard as their most significant contribution to the law and the pursuit of justice in South Africa.<sup>141</sup> The interviews are conducted in public and the process is transparent.<sup>142</sup> The report of the joint research project by University of Cape Town Law and Bingham Research Centre observed that, in relation to judicial appointments in South Africa, women are not sufficiently reflected.<sup>143</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> S. AFR. CONST., 1996, § 174(2).

<sup>134</sup> Lunga Khanya Siyo, *Judicial Independence in South Africa: A Constitutional Perspective* 42 (Dec. 2012) (unpublished LLM thesis, School of Law at the University of KwaZulu Natal).

<sup>135</sup> *Id.*

<sup>136</sup> Questionnaire for Candidates for Judicial Appointment, *Judicial Vacancies*, OFFICE OF THE CHIEF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA, <https://www.judiciary.org.za/index.php/judicial-service-commission/judicial-vacancies> (follow “Questionnaire For Judicial Appointment” hyperlink to download official questionnaire).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (see page 4-5 of Questionnaire for Judges and Page 12-13 of Questionnaire for Candidates for Judicial Appointment).

<sup>141</sup> *Id.* (see page 7 of Questionnaire for Judges and page 12 of Questionnaire for Candidates for Judicial Appointment).

<sup>142</sup> DEMOCRATIC GOVERNANCE AND RIGHTS UNIT, *supra* note 128, at 108.

<sup>143</sup> VAN ZYL SMIT, *supra* note 3, at 5-9.

There are allegations that the JSC considers race more heavily when appointing judges than it does merit.<sup>144</sup> Additionally, there is a belief that the JSC is considerably influenced by partisanship when appointing judges.<sup>145</sup> This belief is only furthered by the minister's authority to appoint judges outside the mechanisms of the JSC, and such exercise of this authority departs from the goal of judicial independence.<sup>146</sup>

In South Africa, the JSC and/or the President's power of judicial selection has been subject to judicial scrutiny in the past. The following cases shed light on how the courts have insisted that the decisions of the JSC must be rational and reasonable and/or that the President should not do anything relating to judges that undermines judicial independence.

In *JSC v. Cape Bar Council*, the Supreme Court of Appeal of South Africa was confronted with two main issues.<sup>147</sup> The first issue was whether the JSC properly interviewed candidates for vacancies in the Western Cape High Court, and if not, whether the decisions made were valid.<sup>148</sup> The second issue was "whether . . . the decision of the JSC not to recommend any of the candidates to fill in the . . . [advertised] vacancies was irrational, and therefore, unconstitutional."<sup>149</sup>

On the first issue, the court essentially held that the JSC was not properly constituted when it interviewed candidates for vacancies in the Western Cape because of the absence of the President of the Supreme Court of Appeal, among other reasons.<sup>150</sup> Regarding the second issue, the court held:

(a) since the JSC is under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend candidates for judicial appointment, it follows that, as a matter of general principle, it is obliged to give reasons for its decision not to do so; (b) the response that the particular candidate did not garner enough votes, does not meet that general obligation, because it amounts to no reason at all; (c) in a case such as this, where the undisputed facts gave rise to a prima facie inference that the decision not to recommend any of the suitable candidates was irrational, the failure by the JSC to adhere to its general duty to give reasons inevitably leads to confirmation of that prima facie inference. In the event, I agree with the finding by the court a quo that the failure by the JSC on 12 April 2011

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<sup>144</sup> AMY GORDON & DAVID BRUCE, TRANSFORMATION AND THE INDEPENDENCE OF THE JUDICIARY IN SOUTH AFRICA 24 (2007).

<sup>145</sup> *Id.*

<sup>146</sup> *See id.*

<sup>147</sup> *Judicial Service Commission v. Cape Bar Council* 2012 (11) BCLR 1239 (SCA) at para. 10 (S. Afr.).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at para. 55.

not to fill any of the two vacancies on the bench of the Court was irrational and unlawful.<sup>151</sup>

The court highlighted two important judgments related to the operations of the JSC.<sup>152</sup> Primarily, before the JSC can make decisions, it must be properly established, and secondly, the JSC's decision must be lawful, equitable, and rational.<sup>153</sup> In order to act equitably, the JSC must provide justification to unsuccessful candidates reflecting that the decision was made in accordance with the JSC's constitutional obligation to act fairly.<sup>154</sup> When the JSC acts through delegation of constitutional authority, it allows the unsuccessful candidate a meaningful opportunity to challenge the decision.<sup>155</sup> The processes for judicial appointment are critical to the independence of the system.<sup>156</sup> When appointment procedures are clearly stated in a constitutional manner, it ensures that appointments to the bench are done transparently and that judges are picked for the right reasons.<sup>157</sup>

The security of tenure is another important, albeit controversial, aspect of judicial independence that has been the subject of litigation.<sup>158</sup> “[A] judge of the Constitutional Court is appointed for a non-renewable term of 12 years or until the age of 70 years, whichever comes first.”<sup>159</sup> Judges who are not on the Constitutional Court “hold office until they are discharged from active service in terms of an Act of parliament.”<sup>160</sup> The Judges Remuneration and Conditions of Employment Act (Act) provides that Constitutional Court judges are to be discharged when they reach the “age of 70 years or after completing a 12 year term of office . . . , whichever occurs first.”<sup>161</sup> The Act awards the President discretion to discharge a Constitutional Court judge, if reasonable, for incapacity resulting from ill health or at the judges own request.<sup>162</sup> Additionally, should a judge fail to complete a fifteen-year term, his tenure is extended to meet the minimum twelve-year requirement.<sup>163</sup> Further, a judge who has completed his fifteen-year term and reached the age

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<sup>151</sup> *Id.* at para. 51.

<sup>152</sup> Lunga Siyo & John C. Mubangizi, *The Independence of South African Judges: A Constitutional and Legislative Perspective*, 18 POTCHEFSTROOM ELECTRONIC L.J. 817, 827 (2015).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 828-31.

<sup>159</sup> S. AFR. CONST., 1996, § 176(1).

<sup>160</sup> S. AFR. CONST., 1996, § 176(2).

<sup>161</sup> Siyo & Mubangizi, *supra* note 152, at 828

<sup>162</sup> *Id.* at 828-29.

<sup>163</sup> *Id.*

of sixty-five may notify the Minister of Justice should he wish to resign, and the President can then discharge him, accordingly.<sup>164</sup>

The seminal case, *Justice Alliance of South Africa v. President of South Africa*, illustrates how South Africa subscribes to the independence of the judiciary.<sup>165</sup> It highlights the importance of the non-renewability of a judge's term in office. The Constitutional Court compared the Act with the constitution and held that section 8(a) did grant the President the power to extend the term of office of the chief justice.<sup>166</sup> Further, the court held that section 176(a) of the constitution explicitly granted those same powers to Parliament.<sup>167</sup> The court reasoned that the intention to delegate such power would have been clear if intended by the drafters of the constitution.<sup>168</sup> Because the President's extension was not an act of Parliament, it was contrary to section 176(1), and thus, section 8(a) of the Act constitutes an unlawful delegation of authority.<sup>169</sup> The court cautioned that the open-ended discretion in section 8(a) "may raise a reasonable apprehension or perception that the independence of the chief justice and by corollary the judiciary may be undermined by external interference of the executive."<sup>170</sup> Additionally, the Constitutional Court held that "non-renewability is the bedrock of security of tenure and a protective mechanism against judicial favour in passing judgment," and non-renewable term limits "foster[] public confidence in the judiciary as a whole as judges can function without fear that their terms will not be renewed or inducement to seek to secure renewal."<sup>171</sup> The court determined that the chief justice could not be singled out amongst the members of the Constitutional Court and such action is contrary to section 176(1) of the constitution.<sup>172</sup>

The essential position taken by the court in this judgment is that the terms of office of Constitutional Court judges should be fixed. This principle establishes a means of providing stability and consistency to court functions. Additionally, fixed terms aids in preventing any perceptions of bias thereby enforcing South African values regarding independence in the judiciary.

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<sup>164</sup> *Id.*

<sup>165</sup> *Justice Alliance of South Africa v. President of South Africa* 2011 (5) SA 388 (CC).

<sup>166</sup> *Id.* at para. 52.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at para. 58.

<sup>169</sup> *Id.* at para. 62.

<sup>170</sup> *Id.* at para. 68.

<sup>171</sup> *Id.* at para. 73.

<sup>172</sup> *Id.* at para. 77.

#### D. Kenya

Based on this author's review of Kenya's judicial appointment process, the areas of commendation are as follows:

**Constitutional reforms on judicial appointments** – The 2010 Constitution of Kenya brought about extensive reforms to judicial appointments. The JSC was expanded and given more powers, and the appointment process became more open and transparent. Today, the Kenyan judicial appointments process is one of the most advanced in Africa.<sup>173</sup>

**Development of detailed guidelines for the JSC on judicial appointments** – Unlike most countries, Kenya has detailed operation procedures and guidelines for the JSC when dealing with judicial appointments. The First Schedule of the Judicial Service Act of 2011 provides step-by-step details of how the JSC should seek and recommend candidates for judicial appointment.<sup>174</sup>

**Relationship between the JSC and the Law Society** – The JSC and the Law Society of Kenya (“LSK”) have worked together on several occasions to ensure that judicial appointments are transparent and that competent and independent judges are appointed. When the LSK instituted litigation against the President for his failure to appoint candidates recommended by the JSC, the JSC applied to be joined in the proceedings and argued its case together with the LSK.<sup>175</sup>

**Active civil society and public participation** – Civil society in Kenya is generally very active and engaged, and this is true of judicial appointments. Civil society organisations participate through making submissions on candidates to the JSC and attending and observing the public interviews.<sup>176</sup>

**Transparency and openness** – Interviews are held in public and are streamed live on national television and radio. Members of the public are also permitted to attend and observe the interviews.<sup>177</sup>

**Wealth declaration** – Kenya is one of the very few countries that require judicial candidates to submit wealth declarations. Candidates declare their wealth together with that of their spouses. This is done in terms of national

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<sup>173</sup> See Njeri Thuki, *A Comparative Analysis of Judicial Councils in the Reform of Judicial Appointments Between Kenya and England*, 19 ANN. SURV. INT'L COMP. L. 45, 58-63 (2013).

<sup>174</sup> *Id.* at 71-73.

<sup>175</sup> Yash Ghai et al., *Constitutional Reforms and Judicial Appointments in Kenya*, SECURING JUDICIAL INDEPENDENCE 85, 101-07 (Hugh Corder & Jan Van Zyl Smit eds., 2018).

<sup>176</sup> *Id.* at 93.

<sup>177</sup> Njeri Thuki, *supra* note 173, at 71-73.

legislation and applies to public officials at specified levels in the legislation.

Conversely, the following observations of Kenya's judicial processes that are of concern are as follows:

**Presidential attempts to control the JSC** – It is a matter of record that the President has on several occasions attempted to remove members of the JSC from the Commission or to strip the JSC of some of its powers, to refuse to appoint candidates recommended by the JSC. These attempts have successfully been resisted and thwarted by the JSC. There has been an attempt, twice, to change the law to give the President discretion during appointments. The Law Society of Kenya has been in the forefront in ensuring that the President does not succeed in interfering with the processes of the JSC.<sup>178</sup>

**Over-representation of the judiciary on the JSC** – The judiciary is overly represented in the JSC in Kenya. This has led to problems in the functionality of the JSC, such as with judicial discipline, where junior members of the judiciary who sit on the JSC may find themselves having to discipline their seniors, or with promotions, where colleagues are considering the promotion of their colleagues on the bench.

**Difficulties in instituting disciplinary processes against judges** – It has been difficult for people to lodge complaints against judges with the JSC, and the JSC has been accused of being more interested in protecting judges than in investigating and acting on complaints of judicial misconduct.<sup>179</sup>

**Inadequacy of disciplinary procedures** – The procedures in the laws of Kenya relates only to the removal of a judge from office for misconduct, and the issue of reprimand is not dealt with by the constitution. When a judge is thus found guilty of misconduct, but the seriousness of the misconduct falls short of warranting removal from office, it is unknown what process is to be followed. This is a gap in the legal framework and it seems to have been an oversight on the part of the lawmakers.

#### E. Comparative Observations on Judicial Appointments and Independence

It is fair to say that politicians all over the globe may sometimes feel tempted to seek to control the judiciary for varying reasons, including coming up with trumped up charges against judges. For example, in July 2015 the judiciary in South Africa held an unprecedented press conference with

<sup>178</sup> *Id.* at 90-91.

<sup>179</sup> Ameze Guobadia, *The Role of Special Judicial Bodies in Judicial Appointments in Nigeria*, SECURING JUDICIAL INDEPENDENCE 137, 149 (Hugh Corder & Jan Van Zyl Smit eds., 2018).

twenty-seven of the country's top judges, led by Chief Justice Mogoeng.<sup>180</sup> The judiciary sought to respond to what it called "repeated and unfounded criticism of the government."<sup>181</sup> The chief justice believed it was necessary to reaffirm the judiciary's independence and protect the judges after the government failed to abide by a court order.<sup>182</sup> Kenyan Chief Justice Maraga, a strong proponent of an independent judiciary, has gone on record that he and other judges are prepared to pay "the ultimate price" to defend the constitution and thus the independence of the judiciary.<sup>183</sup>

When the judiciary is under attack, history has shown that strong, independent judicial leaders are able to resist such attacks. One example is Chief Justice Maraga of Kenya who, as previously mentioned, is on record publicly defending the independence of the judiciary.<sup>184</sup> Additionally, professional judicial associations can tackle threats to judicial independence collectively. In Africa, it is fair to say that while some chief justices have exhibited signs of being captives of the executive, others have shown admirable courage to defend the independence of the judiciaries. The judiciary can withstand attack if it has a strong chief justice. Conversely, in other countries, it is the chief justices who join the executive to hound independent-minded judges out of office. In Swaziland, for example, Justice Thomas Masuku, who had been on the Swazi bench since 1999, was suspended in June 2011 after he was accused of insulting the Swazi king.<sup>185</sup> The suspicious end of Masuku's judicial career in Swaziland was largely attributed to the chief justice at the time who acted as both the judge and juror in the case.<sup>186</sup> Masuku subsequently filed a complaint with the African Commission on Human and Peoples' Rights<sup>187</sup> and has since been appointed a judge in Namibia.<sup>188</sup>

In Swaziland, the leadership of the judiciary played a reprehensible role in undermining the institutional independence of the judiciary and that of

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<sup>180</sup> Stephen Grootes, *When Judges of the Land Said 'Enough!' to the ANC*, DAILY MAVERICK (July 8, 2015) <https://www.dailymaverick.co.za/article/2015-07-08-when-judges-of-the-land-said-enough-to-the-anc/>.

<sup>181</sup> Zuma, *Judges Meet After 'Unfounded' Criticism of Judiciary*, CAPE ARGUS at 2 (Aug. 28, 2015) <https://www.pressreader.com/south-africa/cape-argus/20150828/page/2/textview>.

<sup>182</sup> *Id.*

<sup>183</sup> *'We Are Ready to Pay Ultimate Price'-Kenya's Chief Justice*, APA NEWS (Sept. 19, 2017) <http://apanews.net/en/pays/kenya/news/we-are-ready-to-pay-ultimate-price-kenyas-chief-justice>.

<sup>184</sup> *Id.*

<sup>185</sup> INTERNATIONAL COMMISSION OF JURISTS, JUSTICE LOCKED OUT: SWAZILAND'S RULE OF LAW CRISIS: INTERNATIONAL FACT-FINDING MISSION REPORT 10 (2015).

<sup>186</sup> See Clement Mavungu, ICJ Oral Intervention on the Adoption of the Outcome Document of the Universal Periodic Review of Swaziland, INTERNATIONAL COMMISSION OF JURISTS (Mar. 15, 2012).

<sup>187</sup> *Advocates for Justice and Human Rights, Swaziland: Judges*, INTERNATIONAL COMMISSION OF JURISTS (June 9, 2014) <https://www.icj.org/cijlcountryprofiles/swaziland/swaziland-judges/>.

<sup>188</sup> Bodwa Mbingo, *Judge Thomas Masuku Gets Two Awards in Namibia*, PRESSREADER (Dec. 30, 2017) <https://www.pressreader.com/eswatini/observer-on-saturday/20171230/281908773522777>.

individual judges by failing to protect and defend the same.<sup>189</sup> A chief justice who goes so far as to issue a practice directive, abrogating fair process in allocating cases and allowing himself to intervene in allocating sensitive and political cases, fails the basic functions of the chief justice, namely, defending the independence of the judiciary. There have been recent developments in the Swaziland, Zambia, and Botswana in which the executive sought to purge independent-minded judges, requiring judges to close ranks and form judges' associations that can defend the independence of the judiciary.<sup>190</sup>

The creation of regional networks among judges is important to strengthen independent judicial institutions. Judges are forming regional associations that serve to denounce acts of interference.<sup>191</sup> During the sagas of Judges Masuku and Agyemang, judges from the region not only provided emotional support, but also lent their voices to the cause as advocates. The above-mentioned incidents were a precursor to the creation of the African Judges and Jurists' Forum, which seeks to enhance the rule of law, good governance, and economic growth through standard setting, judicial and legal reform support, and rule-of-law-related capacity-development initiatives.<sup>192</sup> Its creation shows that African judges are no longer satisfied with only being members of international bodies, such as the Commonwealth Magistrates and Judges Association. They want a creation of their own, where they can have an authentic, indigenous voice on matters that are particularly contentious in the region, even if they may be happening elsewhere.<sup>193</sup> The creation of such bodies sends a message that any undue interference with one judge interferes with the independence of all by harnessing the power of the judicial collective because judges are more vulnerable without allies. Once the bar, magistrates, academics, or civil-society organizations assert their influence, it is much harder for executives and chief justices to do as they please. Creating and maintaining relationships with stakeholders who are not part of the judiciary allows judges in the region to establish a sense of ownership in the judiciary and build a second line of defense for themselves.<sup>194</sup>

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<sup>189</sup> INTERNATIONAL COMMISSION OF JURISTS, *supra* note 185, at 5.

<sup>190</sup> VAN ZYL SMIT, *supra* note 3, at 28-29.

<sup>191</sup> See generally *Promoting Justice and Development in Africa*, AFRICA JURISTS, <http://africajurists.org> (last visited Feb. 21, 2020).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Tabeth Masengu, *The Vulnerability of Judges in Contemporary Africa: Alarming Trends*, 63(4) AFRICA TODAY 3, 14 (2017).

#### IV. CONCLUSION

A discussion of various methods of appointing judges should be assessed on the basis of whether they enhance the independence of the judiciary and whether they actually threaten judicial independence. After a review of various methods of appointing judges, the author is of the respectful view that one of the best methods of appointing judges is through the mechanism of an independent Judicial Services Commission. Particularly, one that operates in a fair and transparent manner, follows publicized guidelines, and is transparent regarding the criterion upon which judges are to be appointed. Where criteria are transparent and well known, candidates can assess their chances of success. It is also important that the JSC be granted all powers relating to transfer, suspension, and other disciplinary measures—short of removal—in order to guarantee the independent functioning of the judiciary. Judges are the ultimate guardians of the law and must be appointed in a manner that engenders public confidence. Only judges that are a product of fair appointment processes can apply the law fairly, rationally, predictably, consistently, and impartially.

