SADC LA REPORT ON THE INDEPENDENCE OF THE JUDICIARY IN ESWATINI, ZIMBABAWE, AND ZAMBIA

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PART A:

JUDICIAL INDEPENDENCE IN CONTEXT

1. Background

After a series of regional advocacy missions[1], research products[2] and solidarity campaigns [3]aimed at addressing challenges faced by the judiciary in SADC, the SADC Lawyers Association came to the realisation that there is need for the legal profession to institutionalise its advocacy to promote judicial independence and impartiality. By so doing, the legal profession did not seek to label any judiciary as lacking independence or to take an extreme alarmist stance to declare attacks on judicial independence, but it is recognised that there have been serious attacks on judicial independence by the Executive arm of the state in the recent history of SADC. This warrants grave concern on the part of the SADC Lawyers' Association. The SADC Lawyers' Association also realises that it is the traditional role of the legal profession to support independence of the judiciary. This is not done through only reacting to perceived challenges that manifest in the quest to maintain judicial independence, but through proactive advocacy and engagement to improve existing practices and challenge policies that are no longer adequate to guarantee judicial independence and impartiality. Key amongst these approaches will be to encourage development of quality legal professionals under strong and independent bar Associations to provide a strong foundation for building resilient judiciaries in SADC.

SADC-LA accordingly set out to institutionalise systemic, coordinated regional action to promote independence of the the judiciary. The action must be underlain by mutual respect, candour and unwavering commitment to outcomes that add value to the rule of law and ultimately afford equal access to justice for SADC citizens. Judicial independence lies at the heart of a well-functioning judiciary and is the cornerstone of a democratic, market-based society based on the rule of law.[4]

[1] SADC-LA has conducted Fact Finding Missions aimed at investigating perceived challenges to judicial independence in Tanzania (2018), Zambia (2017), Zimbabwe (2019) and Lesotho (2019-21)
[2] Please visit the resource platform on our website www.sadcla.org to access research reports with respect to promotion of judicial independence.
[3] A Regional Solidarity Webinar in support of independence of the Judiciary in Zimbabwe, Eswatini and Tanzania was conducted in 2020.
[4] Guidance for Promoting Judicial Independence and Impartiality, USAID Office of Democracy & Governance, January 2002

The first step has been to conduct this here presented detailed research to establish the state of the independence and impartiality of the judiciary in SADC. This will produce empirical evidence to direct policy and advocacy level strategies for upscaling efforts to guarantee judicial independence and impartiality by the legal profession. The other key pillars or steps have been the establishment of a regional reference group on independence of the Judiciary and legal profession (RRG-IJLP) in SADC and a Regional Support Fund (RSF) collectively sponsored by the region's Bar Associations under the SADC Lawyers Association to promote research and advocacy.

It is hoped that this research will present a credible pilot with an adequate panoramic view of the key issues impacting judicial independence and impartiality both positively and negatively. Further that using these findings, the agency of non state actors and state actors alike can be mobilised to advance the mutual interest of rule of law and access to justice in the SADC Region.

2. Layout of the report

The researchers mainly relied on desktop research for the purposes of this report. The nature of this report required the researchers to heavily rely on and refer to international practices and best standards. For these purposes, the researchers considered primary and secondary resources. Primary resources consulted included relevant local and foreign legislation, case law and International and Regional Treaties, Conventions and Guidelines. Secondary resources used included renowned Human Rights Body reports such as the United Nations, Human Rights Watch and Freedom House.

International and regional best practices provide the background to the discussion on threats and challenges identified in this report and how these may be addressed in the context of each research country. Consideration of comparative examples from neighbouring countries and their judicial frameworks are present throughout the report. The researchers also include

an in-depth comparative study of one international country as further foundation for the protection and promotion of judicial independence.

The individualised country reports follow in which the researchers provide a brief background to each country and its unique challenges with judicial independence. The case studies speak to each country and its specific provisions that constitute and regulate judicial independence. Each country report also includes a discussion of best practices to shed light on the challenges and threats to the concerned country's judicial systems. Finally, conclusions and recommendations are made based on the discussions in this report.

3. Judicial independence in context

Judicial independence is the ability of a judge to decide a matter without pressure, inducement, fear, or favour. It is also the ability of the Judiciary, as an institution, and courts not to be subject to improper influence, be it from other spheres of government, private, or partisan interests.[5] An independent Judiciary promotes fundamental human rights by ensuring that the rights of individuals within its jurisdiction are respected and protected. It is a cornerstone of the rule of law and ensures that important checks and balances are in place to ensure democratic systems.[6]

Judicial independence is therefore vital to upholding fundamental rights as guaranteed in international human rights instruments and ensuring adherence to the national Constitution and the guarantees it provides to citizens. Judicial independence specifically speaks to the appointment process of judges, judge experience and qualifications, security of tenure, rules and procedures relating to the removal of judges, the degree to which the Executive and legislative spheres of government practically interfere with judges, and judicial decision-making.[7]

[5] Ramjathan-Keogh K "The importance of promoting judicial independence in the Southern African region" (December 2016) *Goal 16 of the Sustainable Development Goals: Perspectives from Judges and Lawyers in Southern Africa on Promoting Rule of Law and Equal Access to Justice* at 10 available at https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book.pdf (accessed 12 February 2021).
[6] Ramjathan-Keogh (2016) 10.
[7] Ramjathan-Keogh (2016) 10.

Liberty can be severely affected if there is no proper separation of powers between the Judiciary, Legislature and Executive.[8] The Judiciary must therefore have the power to independently scrutinise laws which the Legislative authority passes to ensure it does not violate the Constitution or infringe upon fundamental rights. Similarly, when the Executive enforces laws and administrative policies the Judiciary ensures these adhere to constitutional standards and are not prejudicial to fundamental rights.[9]

4. Indicators for monitoring judicial independence

Judicial capture should also be strongly guarded against to ensure the protection of judicial independence. During judicial capture judicial officers are subjected to the control of an authority, other than the law, during the performance of their judicial functions. In most cases, the Judiciary is captured through the Executive branch of government. Such capture is done by the ruling elite as a strategic way of protecting their political hegemony. Alternatively, judicial capture is done through the Executive by certain (often internal) or external commercial forces, as a means of protecting and advancing their business interests. If not addressed, judicial capture will lead to the collapse of the rule of law and the democratic system, as courts will no longer be able to enforce the law. It is the role of judicial officers, lawyers, and civil society to resist and undo judicial capture. Some indicators pointing towards judicial capture are:[10]

(a) *Issuance or attempts to issue retrogressive practice directives by judicial leaders* - Practice directives that undermine the individual independence of judges or the institutional independence of the Judiciary.

(b) *Arbitrary case allocation* - Case allocation based on non-legal considerations and tendencies to allocate politically sensitive cases to specific judicial officers who are renowned for, or prone to, loosely interpret or enforce the law.

(c) *Retrogressive court decisions in sensitive legal matters* - A pattern or consistent negative approach to how courts deal with sensitive matters. For example, how judicial officers deal with bail applications by Human Rights Defenders or members of the opposition.

[8] Ojwang J B *Constitutional Development in Kenya* (1990) Acts Press 151.
[9] Nkhata C M "Comparative analysis on judicial independence between Zambia and Lesotho" 2020 *SADC LA Resource* 2-4.
[10] "SADC LA Indicators" (2021) SADC LA Lesotho Fact-Finding Mission.

Another example is how courts deal with cases where certain persons have a commercial interest. In countries like Zimbabwe and Zambia, for example, one should possibly investigate how commercial cases involving cartels or in which Chinese companies have an interest in, are dealt with by courts.

(d) *Bribery* - Bribery of judicial officers and senior court managers by members of the Executive, cartels, or commercial forces.

(e) *Improper relationships involving judicial officers* – Business or commercial relationships which undermine the institutional or individual autonomy of judicial officers, for example, land allocations without security of tenure as is the case in Zimbabwe. Political associations or affiliations which undermine judicial autonomy i.e., judicial officers attending political parties and events, judicial officers who are members of political parties, or participate in processes of political parties.

(f) *Legislative/Constitutional rules which subordinate the Judiciary to the Executive* – Rules and laws which allow the Executive to dictate judicial selection and appointments, allow the Executive to tamper with the security of tenure for judicial officers, allow Judicial underfunding, or practices that usurp the jurisdiction of the courts by allowing arbitrary determination of judicial salaries and conditions of service by the Executive.

(g) *Threats against the Judiciary or judicial officers* - Indirect or direct threats against judicial officers who are perceived to be independent and impartial, and where those threats appear to have resulted in judicial partiality.

(h) *Improper public pronouncements* - Improper public pronouncements or statements by judicial officers, which show partiality and acquiescence to certain political and economic interests.

5. Best practices and guidelines for judicial independence

Various regional and international instruments provide best practices and guidelines to ensuring an independent Judiciary. The Kingdom of Eswatini, Zambia, and Zimbabwe are all member states to the United Nations and therefore must give effect to international instruments, treaties, and principles that affect or speak to state parties. This section, therefore, deals with a range of best practices and guidelines that apply to the Kingdom of Eswatini, Zambia and Zimbabwe by way of international or regional instruments.

5.1. Separation of powers

There seems to be a strong prevalence to and continued abuse of Executive power in sub-Saharan Africa. To avoid improper influence in the Judiciary it is crucial that judicial independence is founded upon a strong separation of powers doctrine.[11] The Judiciary is tasked with ensuring that public power is exercised in accordance with the law and that the courts are protected from undue interference from either the Legislature or the Executive branch.[12]

5.2. Promotion of the independence of the Judiciary and adequate judicial resources

Judicial independence must be enshrined in the Constitution or at the highest possible legal level to ensure the protection of the Judiciary.[13] The Basic Principles on the Independence of the Judiciary[14] provide that it is the duty of government and its institutions to respect and promote the independence of the Judiciary and further note that a competent, independent, and impartial Judiciary is essential to upholding the Constitution and the rule of law.[15]

Furthermore, individual judges should have both personal and substantive independence. The former speaking to terms and conditions of judicial service that ensure Judges are not subject to any Executive control. The latter meaning that when exercising his or her judicial functions the Judge is only subject to the law and his or her conscience.[16] Therefore, there must be a symbiosis in the relationship between Parliament and the Judiciary taking into account the respect for Parliament's primary law-making responsibility, on the one hand, and

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[11] See in general the Ellett R "The Politics of Judicial Independence in Lesotho" (2012) *Freedom House Report* at 21 (Hereafter the Freedom House Report 2012) available at https://freedomhouse.org/sites/default/files/Politics%20%20of%20Judicial%20Independence%20in%20Lesotho.pdf (accessed 11 February 2021).

[12] The Freedom House Report (2012) 93.

[13] Article 26 of the African Charter on Human and Peoples' Rights of 1986 (hereafter the Banjul Charter) provides that "State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

[14] Article 1 The United Nations Basic Principles on the Independence of the Judiciary of 1985 (hereafter the UN Basics Principles on the Independence of the Judiciary) available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx (accessed 12 February 2021).

[15] *Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels* Resolution of the General Assembly (24 September 2012) 67th Session A/RES/67/1 available at https://undocs.org/A/RES/67/1 (accessed 12 February 2021).

[16] Section 1 of the International Bar Association Minimum Standards of Judicial Independence of 1982 (hereafter the IBA Standards) available at https://www.icj.org/wp-content/uploads/2014/10/IBA_Resolutions_Minimum_Standards_of_Judicial_Independence_1982.pdf (accessed 12 February 2021).

the Judiciary's responsibility for the interpretation and application of the law on the other.[17] It is evident that the legislative function is the primary responsibility of Parliament, but Judges can aid in the interpretation of these pieces of legislation. Courts therefore must have the power to declare legislation unconstitutional or invalid.[18]

The Executive also plays an important role in protecting and promoting the independence of the Judiciary and its Ministers should not pressure judges (either in public or private) or make statements that adversely affect the independence of individual judges or the Judiciary as a whole.[19] Undue pressure or interference can also manifest in judicial decisions. Therefore, judicial decisions handed down by the courts should not be subject to arbitrary revision.[20]

Judges must have the jurisdictional power to review administrative actions and to punish individuals for contempt of court. A well-functioning Judiciary must be endowed with vast powers to resolve disputes among citizens, and between citizens and the state. If most of this power is vested in administrative bodies (under the control of the Executive or Legislature) it undermines the proper functioning of the judicial system.

To ensure true independence of the Judiciary and to guard against undue interference the Judiciary should have jurisdiction over all issues of judicial nature. It should also have exclusive authority to decide whether an issue submitted for its judgment falls within its jurisdiction, as prescribed by law.[21] After all, the importance of a competent, independent, and impartial

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[17] Principle II (a)-(b) of the Commonwealth Principles on the Three Branches Government (Latimer House) of 2003 adopted in 2009 (hereafter Commonwealth Latimer Principles) available at https://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf (accessed 12 February 2021). The objective of these Principles is to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values.

[18] Principle I(1) of the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence of 1998 (hereafter the "Latimer House Guidelines") available as an Annex at https://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf (accessed 12 February 2021).

[19] Section 16 of the IBA Standards.

[20] Article 4 of the UN Basic Principles on the Independence of the Judiciary. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the Judiciary, in accordance with the law. Principle 2.1 of the Bangalore Draft Code of Judicial Conduct of 2001 (hereafter the Bangalore Principles) available at https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (accessed on 12 February 2021) (the Bangalore Code) provides that "a judge shall perform his or her judicial duties without favour, bias or prejudice."

[21] Article 3 of the UN Basic Principles on the Independence of the Judiciary. Section 4(f) of the Principles on the Right to a Fair Trial and Legal Assistance in Africa of 2003 also provides that "there shall not be any inappropriate or unwarranted interference with the judicial process nor shall decisions by judicial bodies be subject to revision

Judiciary cannot be underestimated. It is essential to the protection of human rights as all other fundamental rights ultimately depend on the proper administration of justice.[22] After all, the function of the Judiciary is to interpret and apply national constitutions and legislation, and to consider international human rights conventions and international law, to the extent permitted by the domestic law of the country.[23]

A Judge should therefore be able to assess the facts of each case without interference and by being permitted to follow his or her understanding of the law. The Judge must be able to execute this function without influence, inducement, pressure, or threat.[24] Therefore, the Judge must also not have inappropriate connections with the Executive and Legislature or appear to be so connected.[25]

Apart from the above, there is also a duty on the Judge (as an individual) to uphold the status and independence of the Judiciary. Judges should therefore not use the prestige of the judicial office to advance their private interests or to convey or permit others to convey the impression that anyone is in a position that allows them to improperly influence the Judge in the performance of his judicial duties.[26] Article 1 of the Universal Charter of Judges provides:

> The independence of the judge is indispensable to the impartial justice under the law. It is indivisible. It is not a prerogative, or a privilege bestowed for the personal interest of judges, but it is provided for the Rule of law and the interest of any person asking and waiting for an impartial justice. All institutions and authorities, whether national or international, must respect, protect, and defend that independence.[27]

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except through judicial review, or the mitigation or commutation of sentence by competent authorities, in accordance with the law."

[22] Preamble to the Bangalore Principles.

[23] Principle IV of the Commonwealth Latimer Principles.

[24] Principle 1.1 Bangalore Principles.

[25] Principle 1.3 of the Bangalore Principles. Principle 2.2 of the Bangalore Principles further provides "A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the Judiciary." Also see Principle I (5) of the Commonwealth Latimer Principles.

[26] Principle 4 of the Bangalore Principles.

[27] Article 1 of The Universal Charter of Judges of the International Association of Judges of 1999 as amended in 2017 (hereafter the Universal Charter of Judges) available at https://www.unodc.org/res/ji/import/international_standards/the_universal_charter_of_the_judge/universal_charter_2017_english.pdf (accesses 12 February 2021).

5.3. Tenure, security, conditions of service and remuneration of Judges[28]

5.3.1. Tenure and retirement

Judges must have guaranteed tenure until their age of retirement unless they are unfit to continue service.[29] A judge's appointment must therefore be free from time limitations and if a legal system provides for a time limitation, the conditions of appointments must ensure that judicial independence will not be endangered by such limitation.[30] The judge further has a right to retirement with an annuity or pension in accordance with his or her professional category.[31] After retirement, the judge is free to perform other activities within the legal profession, provided that it is not ethically inconsistent with his or her prior judicial duties. A Judge who exercises this right cannot be deprived of his or her pension.[32]

Although judge tenure is guaranteed by the UN Principles, the promotion of judges is not expressly provided for. Principles 12 and 13 merely state that a promotional system should be based on objective factors, specifically on ability, integrity, and experience.[33] The UN Principles further support the independent service of the Judiciary by requiring that the assignment of cases within the court be kept a matter of internal judicial administration.[34]

5.3.2. Remuneration

It is imperative that judges receive a level of remuneration that will utterly secure economic independence which, in turn, ensures a Judge's dignity, impartiality, and independence.[35] To ensure financial security a judge's salary should also not be reduced during his or her term of judicial service[36] and the judge's salary should not be dependent on the results of the judge's work or performance.[37]

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[28] Article 11 of the UN Basic Principles of the Independence of the Judiciary expressly provides that tenure, security, conditions of service and the remuneration should be adequately provided for by law.
[29] Article 12 of the UN Basic Principles on the Independence of the Judiciary. Section 4 (l)-(m) of the Principles on the Right to a Fair Trial in Africa. Part IV (b)-(d) of the Commonwealth Principles. Article 2-2 of the Universal Charter of Judges also provides that any change to the judicial obligatory retirement age cannot have retroactive effect.
[30] Article 2-2 of the Universal Charter of Judges.
[31] Article 8-3 of the Universal Charter of Judges.
[32] Article 8-3 of the Universal Charter of Judges.
[33] Principles 12 and 13 of the UN Principles.
[34] Principle 14 of the UN Basic Principles of the Independence of the Judiciary.
[35] Section 14 of the IBA Standards. Article 8-1 of the Universal Charter of Judges.
[36] Article 8-1 of the Universal Charter of Judges.
[37] Article 8-1 of the Universal Charter of Judges.

5.3.3. Physical security of judges

The physical security of Judges is also important in protecting the independence of the Judiciary. Ideally, security for the Judge and his or her family must be provided by the State. Furthermore, to protect the natural flow of judicial debates leading from the nature of judicial work, states must put adequate protective measures in place for the courts.[38]

5.3.4. Judicial selection processes and appointments

The UN Principles[39] provide that judicial selection processes must safeguard against improper motives for judicial appointments. There must be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinions, national or social origin, property, birth, or status. The only acceptable exception to the latter is the requirement that a candidate for judicial office must be a national of the country concerned.

While the participation of the Executive and Legislature in judicial appointments and promotions does not threaten independence *per se*, it does leave room for encroachment on judicial independence if not properly regulated. Therefore, the final decision regarding appointments and promotions of judges must be vested in an independent judicial body that is mostly comprised of members of the Judiciary and legal profession.[40]

The Lilongwe Principles[41] also underpin the guidelines for the selection and appointment of Judicial Officers, the Principles include:

(a) Transparency should overarch every stage of the selection and appointment process.

(b) The selection and appointment authority should be independent and impartial.

(c) The process for the selection and appointment of judicial officers must be fair.

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[38] Article 2-5 of the Universal Charter of Judges.

[39] Principle 10 of the UN Basic Principles on the Independence of the Judiciary.

[40] Section 3(a) of the IBA Standards. The only exception to this is provided for in section 3(b) which states that "appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily." Unfortunately, the latter is not the case in the Kingdom of Lesotho.

[41] Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers of 2018 at 3 (hereafter the Lilongwe Principles) available at http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/Lilongwe%20Principles%20and%20Guidelines%20on%20the%20Selection%20and%20Appointment%20of%20Judicial%20Officers.pdf (accessed on 13 February 2021) provides for regional principles and guidelines on selection and appointment of judges in Africa. These are principles and guidelines to assist Southern African jurisdictions in the development of legislation, policy and practice on the selection and appointment of judicial officers. The overriding purpose of the guiding principles and best practices is to promote the independence and integrity of the Judiciary.

(d) Judicial appointees should exceed minimum standards of competency, diligence, and ethics.
(e) Appointments of candidates should be made according to merit.
(f) The appointment process should ensure stakeholder engagement at all relevant stages of the process.
(g) 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.
(h) The judicial bench should reflect the diversity of society in all respects, and the selection and appointment authorities may actively prioritise the recruitment of appointable candidates who enhance the diversity of the bench.
(i) Candidates shall be sourced according to a consistent and transparent process.
(j) The shortlisting of candidates must be credible, fair, and transparent.
(k) Candidates shortlisted for an interview should be vetted and stakeholders invited to comment on the candidate's suitability for appointment before their interview.
(l) Interviews should be held for the selection of candidates for appointment to judicial office.
(m) The final selection (decision) to recommend an appointment must be fair, objective, and based on weighing the suitability of the candidate for appointment against the criteria set for that appointment.
(n) Formal appointments must be made constitutionally and lawfully.
(o) Provision shall be made for judicial officers to assume office timeously once appointed.

From the above Principles, the Commission created the Lilongwe Guidelines[42] for the selection and appointment of Judicial Officers. As far as practicable these principles and guidelines should be applied to all judicial appointments, including short-term, acting, and contractual appointments, subject to variations in the constitutional and legislative frameworks governing such appointments. In jurisdictions where the appointment of contract judges remains an important supplement to the bench, measures should be taken to ensure that such candidates are appointed through the same process as permanent appointees.

[42] The Lilongwe Principles 4.

Where abridged appointment processes take place for the appointment of acting judges, the same principles of merit, fairness, transparency, and rationality of the appointment should apply. [43]

In terms of transparency, the Lilongwe Principles[44] provide that appropriate records of each stage of the appointment and selections processes should be kept by the selection and appointment authority. These records should also be available to interested parties. This transparency requirement enhances the integrity of the process. As far as possible, this process should also promote record-keeping and transparency by developing legislation, policies, and practices.

The Lilongwe Principles also speak to the independence of the selection and appointment authorities.[45] It provides that the Chief Justice should represent the Judiciary on the selection and appointment authority. Furthermore, the selection and appointment authority must be independent, impartial, and not subject to the direction or control of any person, ministry, body, or organisation. It recommends a broad involvement from a wide range of representatives. It further provides for a comprehensive selection and appointment body, comprising one-third of judicial officers, as well as members of the legal profession, teachers of law, and lay specialists. There should also be fairness[46] at all levels of the selection and appointment process which ensures safeguards against abuse of discretion, arbitrary interference, and unconscious bias.

It also provides that appointments should be made on[47] merit and that judicial appointees should exceed the minimum standards of competency, diligence, and ethics through a rigorous interviewing and vetting process. The criteria listed for admirable appointments which increase public confidence in the Judiciary include:[48]

> In order to be appointable, judicial officers should, at a minimum: (a) hold a recognised law degree; (b) hold an appropriate level of post-qualification experience; (c) be a fit and proper person; (d) be competent to perform the functions of a judicial officer; (e) possess good

[43] The Lilongwe Principles 14.
[44] Principle (i) of the Lilongwe Principles.
[45] Principle (ii) of the Lilongwe Principles.
[46] Principle (iii) of the Lilongwe Principles.
[47] Principle (iv) and (v) of the Lilongwe Principles.
[48] Principle (vii) and (viii) of the Lilongwe Principles.

written and communication skills; (f) be able to diligently render a reasoned decision; (g) not have any criminal convictions, other than for minor offences; (h) not have any ongoing political affiliation after appointment.

The publication of criteria for the selection of judicial officers supports the principles of fairness and transparency. The Lilongwe Principles and Guidelines require that the criteria should be pre-set (in line with the rule of law) by the selection and appointment authority, advertised at the opening of the recruitment process, and should not be altered during the process. Additionally, a set criterion acts as a guide to candidates and provides objective standards to hold the selection and appointment authority accountable.

The Lilongwe Principles[49] require a minimum qualification criterion that candidates are expected to meet, if not exceed. It is proposed that this criterion should include:

(i) academic qualifications, including, at minimum, a recognised law degree,
(ii) a specified minimum level of post-qualification experience,
(iii) ethical (fit and proper) standards,
(iv) competence to perform the functions of a judicial officer including the appropriate personal skills, adequate cultural and legal knowledge, and analytical capabilities,
(v) good written and communication skills, and
(vi) an ability to make reasoned decisions, and to do so diligently.

Candidates should furthermore be fit and proper persons to hold judicial office.[50] The fit and proper requirement must consider the candidate's ability to uphold the provisions of the applicable Constitution and Judicial Code of Ethics. This is also guided by the Bangalore Principles of Judicial Conduct.[51] The Lilongwe Principles also requires a candidate to, immediately after appointment, remove themselves from all interests which may affect their ability to carry out their judicial duties. As a minimum requirement, the Principles and Guidelines require appointees not to hold political office or have any active political affiliations or membership. It is advised that dependent on domestic laws, candidates should not have any previous criminal convictions besides minor offences.

[49] The Lilongwe Principles 7.
[50] The Lilongwe Principles 8.
[51] The Bangalore Principles.

The selection and appointment of a bench that represents and reflects the society in all respects, and suggests that the recruitment of appointable candidates who enhance the diversity of the bench are actively prioritised, is provided for.[52] Appropriate grounds to diversify the bench include the diversity of academic, personal, social, and professional background, gender, race, culture, ethnicity, disability, geographical and regional representation, religion, language, and people who have worked with those groups and are thereby aware of specific issues or challenges experienced by the groups. Diversity of age groups on the bench may be considered to ensure continuity and progressive retirement.

Guidelines for the sourcing of candidates are also provided[53] which state that candidates for an appointment may be sourced through applications, nominations, proposals, direct searches, or invitation to express interest and apply. The second guidelines note that regardless of how candidates are sourced, no distinction may be drawn between candidates in the selection and appointment process once their names are sourced.

Guidelines for shortlisting provide that[54] objective criterion should be developed to guide the process for the shortlisting of appointable candidates. These criteria should be agreed upon and publicised before the shortlisting process and the body responsible for shortlisting should be made known to stakeholders and the candidates.

To ensure the legitimacy and accountability of the process, the Lilongwe Principles encourages meaningful engagement and participation from all relevant stakeholders during all applicable stages of the process.[55] It calls for vetting, stakeholder engagement, and comment after shortlisting but before interviewing. If the selection and appointment authority does not undertake the vetting process, it must not relinquish its function and must have the final say on the weight to be attached to findings of the suitability of candidates.

Guidelines for interview and selection provide that[56] interview processes should be equal, fair, rigorous, respectful and permit candidates the opportunity to choose to respond to

[52] The Lilongwe Principles 8.
[53] Principle (ix) of the Lilongwe Principles.
[54] Principle (x) of the Lilongwe Principles.
[55] Principle (vi) and (xi) of the Lilongwe Principles.
[56] Principle (xii) of the Lilongwe Principles.

adverse comments made against the candidate. Records of interviews shall be made, kept, and available.

After shortlisting and interviews, the decision-making process must be fair, objective, and based on a weighing of the pre-set criteria. Emerging best practice calls for the use of a ranking and scoring process for assessing candidates. The selection and appointment authority are encouraged to meet before the interview process to decide mathematical weightings of the various criteria according to the needs of the position for appointment, and the needs of the Judiciary. This creates practical reasons for their recommendations and promotes objectivity and fairness.[57]

The Lilongwe Principles and Guidelines require that the appointment of judicial officers be made according to constitutional and national legislative provisions in a timeous fashion.[58]

The Lilongwe Principles and Guidelines further deal with the implementation and follow-through of the appointments by calling for the appointing authority and the Judiciary to coordinate and ensure that the appointee assumes office within a reasonable time. It proposes and a maximum period of six months for the appointee to finalise existing commitments and to take appropriate steps to resign from conflicting interests. Finally, it places a duty on the Judiciary to ensure that appointees are appropriately inducted which includes a compulsory period of training immediately after appointment as a best practice and encourages ongoing legal and skills development.[59]

In addition to the Lilongwe Principles and the Cape Town Principles[60] provide guidance on the selection and appointment of judges and note that the main aim of any system of judicial appointments must be to identify and secure the appointment of persons who are independent, impartial, has integrity, possess professional competence, and may own any

[57] Principle (xiii) of the Lilongwe Principles.
[58] Principle (xiv) of the Lilongwe Principles.
[59] Principle (xv) of the Lilongwe Principles.
[60] Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges of 2016 (hereafter the Cape Town Principles) available at https://www.icj.org/wp-content/uploads/2014/10/Cape-Town-Principles-February-2016.pdf (accessed 16 February 2021). These are a set of principles that aim to provide practical guidance to constitution-makers, legislators and existing judicial service commissions or equivalent bodies. It classifies ways in which processes for the selection and appointment of judges can strengthen the independence of the Judiciary and the rule of law and attempts to adapt to suit national legal systems and is in line with the Bangalore Principles and Guidelines.

additional attributes that may be stipulated for positions that require specific expertise or leadership.[61]

The process of selection and appointment should be fair and inspire the best candidates from any background to seek a judicial career, and that overall uplifts public confidence in the Judiciary.[62]

Appointment to judicial office must be open to all suitably qualified candidates without discrimination on the prohibited grounds recognised in international human rights law and applicable domestic law. Under certain circumstances, measures may be required to remedied past or present patterns of unfair disadvantage or exclusion affecting actual or potential candidates based on race, gender, or other personal characteristics.[63]

5.3.5. Promotion of judges

Requirements for the promotion of judges must also speak to objective factors and particularly take into account a prospective Judge's ability, integrity and experience.[64] Similarly, disciplinary, suspension or removal proceedings should be subject to an independent review to promote impartiality, integrity, and fairness.[65] This review must be conducted by a permanent institution composed mainly of members of the Judiciary should the power to discipline be vested in an institution other than the Legislature.[66]

International standards prescribe some standards in terms of promotions, suspensions, and transfers of Judges. Judges should not, for example, be assigned to another post or promoted without their express agreement and unless it is duly provided for by law.[67] To further give effect to this provision the decision to transfer Judges between courts should ultimately vest

[61] Principle 1 of the Cape Town Principle.
[62] Principle 2 of the Cape Town Principles.
[63] Principle 3 of the Cape Town Principles.
[64] Article 13 of the UN Basic Principles on the Independence of the Judiciary. The Preamble of the Bangalore Principles also speak to the competence of judges.
[65] Article 20 of the UN Basic Principles on the Independence of the Judiciary. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.
[66] Section 31 of the IBA Standards.
[67] Article 2-2 of the Universal Charter of Judges provides that even if this is prescribed by law, it may only be brought about by disciplinary proceedings, "under the respect of the rights of defence and of the principle of contradiction."

in a judicial authority and be subject to the judge's consent.[68] If part-time Judges must be considered their appointment process must also be transparent, with proper safeguards.[69]

5.3.6. Judicial disciplinary procedures

Disciplining Judges is a serious matter with far-reaching effects on the independence of the Judiciary and the overall integrity of the institution. Therefore, disciplinary proceedings against judges must be based on relevant, objective reasons and be carried out according to the due process of law.[70] It must be conducted in a way that does not compromise a Judge's independence and should therefore be carried out by independent bodies that consist of mainly other Judges.[71]

Unless it can be proven that there was malice or gross negligence on the part of the Judge in handing down judgment, disciplinary action cannot be instituted based on a Judge's interpretation of the law, his assessment of facts, or weighing of evidence. The Judge also has the right to challenge the disciplinary judgment before an independent body. Disciplinary action against a judge can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure.[72]

The Executive should have limited participatory rights in the discipline of judges which should be confined to the referral of complaints against judges and the initiation of disciplinary proceedings. The Executive should not be allowed to adjudicate disciplinary matters because the power to discipline or remove a judge must be vested in an institution, which is independent of the Executive.[73]

The UN Principles allow for the removal or suspension of judges only in the case of incapacity or behaviour that renders them unfit to discharge their duties.[74] It further requires that complaints against the judicial and professional capacity of a judge be processed expeditiously and fairly under an appropriate procedure, which allows the judge the right to

[68] Section 12 of the IBA Standards. Such consent shall not be unreasonably withheld by the Judge.
[69] Section 25 of the IBA Standards.
[70] Which affords the Judge the right to have access to the proceedings and to have legal representation.
[71] Disciplinary action against a judge can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure. Article 7-1 of the Universal Charter of Judges also provides that disciplinary sanctions should be proportionate.
[72] Article 7-1 of the Universal Charter of Judges.
[73] Section 4 (a) of the IBA Standards.
[74] Principle 18 of the UN Basic Principles on the Independence of the Judiciary.

a fair hearing. The initial examination of the matter should be kept confidential unless otherwise requested by the judge. [75]

Disciplinary, suspension or removal procedures should be measured against established standards of judicial conduct and the process should be subject to an independent review. The latter does not apply where it is a decision of the highest court and those of the legislature in impeachment or similar proceedings.[76]

5.3.7. Finances and administration of the Judiciary

The State must provide the Judiciary with the means necessary to equip itself properly to perform its functions.[77] To do so, the Judiciary must be able to advocate for and motivate its needs in terms of budget, material, and human resource needs.[78] The funds allocated to the Judiciary must be properly utilised and safeguarded from alienation or misuse. The availability of funding to the Judiciary should not become a weapon used as a means of exercising improper control over the institution.[79] Therefore States have a duty to endow judicial bodies with adequate resources for the performance of their functions.[80]

Representatives of the Judiciary must be consulted before any decision is made which may affect the performance of their judicial duties.[81] Since internal administrative processes have an important impact on the latter the adjudication of these processes must be primarily entrusted to judges.[82]

An independent Judiciary is also built upon ethical principles and guidelines that form part of the internal administrative rules and procedures. Such principles deal with the judge's professional duties and ethical behaviour. It should guide judges in their actions and be captured in writing to formalise it and increase public confidence in the Judiciary. It is only natural that Judges should play a leading role in the development of these ethical principles.[83]

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[75] Principle 17 of the UN Basic Principles on the Independence of the Judiciary.
[76] Principle 19 read with Principle 20 of the UN Basic Principles on the Independence of the Judiciary.
[77] Section 10 and 13 of the IBA Standards. Article 7 of the UN Basic Principles on the Independence of the Judiciary. Principle II (2) of the Latimer House Guidelines.
[78] Article 2-4 of the Universal Charter of Judges.
[79] Principle II (2) of the Latimer House Guidelines.
[80] Section 4 (v) of the Principles on the Right to a Fair Trial in Africa.
[81] Section 4 (v) of the Principles on the Right to a Fair Trial in Africa.
[82] Article 3-3 of the Universal Charter of Judges.
[83] Article 6-1 of the Universal Charter of Judges.

Therefore, once again, it is integral that responsibility for judicial administration must vest in the Judiciary, or at least jointly in the Judiciary and the Executive.[84]

5.3.8. Judicial training and education

Quality judicial training and education should be both a right and duty of any judge. These training systems should be led and organised under the supervision of the Judiciary.[85] The States also must ensure that judicial officials have appropriate opportunity and access to education and training. To this effect, States are required to establish specialised institutions for the education and training of judicial officials and to encourage comparative collaboration amongst judicial institutions across Africa. The duty of the State goes further than initial education and expands to continuous professional development throughout a judge's judicial career.[86]

Judicial training should be organised, systematic, and ongoing. It should be administered under the control of an adequately funded independent judicial body and offer training on topics such as the teaching of the law, judicial skills, and various social contexts. Judicial officers, with the assistance of specialists in the field, should develop and maintain the curriculum. These courses should not only be aimed at the Judiciary but also at lawyers as part of their ongoing professional development. This will ultimately aid in building a pool of suitably qualified future candidates for the Judiciary.[87]

Each judicial system should also develop and adhere to a Code of Ethics and Conduct as a means of ensuring the accountability of judges. Training on this Code will also be essential to ensure that Judges are well versed in its context and what is expected of them.[88]

5.3.9. Judicial Independence Council or similar entity

Protecting the independence of the Judiciary becomes difficult when there is a constant intermingling between different spheres of government and the Judiciary. To avoid the serious traps that are created by the latter each Judiciary should have a Judicial Council or

[84] Section 9 of the IBA Standards.
[85] Article 4-2 of the Universal Charter of Judges.
[86] Part B of the Principles on the Right to a Fair Trial in Africa.
[87] Principle II (3) of the Latimer House Guidelines.
[88] Principle V (1) of the Latimer House Guidelines. The Guidelines also refer to a draft Model Code of Judicial Conduct which was in development. It notes that the Commonwealth should be encouraged to complete this Model and that the Commonwealth Association should serve as a repository of codes of judicial conduct developed by Commonwealth judiciaries. This, in turn, can be as a resource for other jurisdictions.

similar independent body. This body must be completely independent of other State powers and be comprised of mostly judges who were duly elected to this body by their peers. To accurately represent civil society the body created can include members that are not Judges but to curb suspicion these members should not have any political ties. All members serving on the body must have the requisite qualifications, integrity, independence, impartiality, and skills.[89]

The power to recruit, train, appoint, promote, and discipline judges must largely vest in this independent body. The setting of appropriate salaries and benefits, implementing support structures for staff, and allocating resources and equipment must also be an essential function of this independent body. There can be no proper functioning of the Judiciary if the latter is not properly seen.[90] The criteria for judicial office and the process of selection should be in written form and published in a manner that makes them readily accessible to candidates for selection and the public at large. Such transparency provides a foundation for public confidence in the selection process.[91] It should be open to all qualified candidates to apply and should be widely advertised with sufficient time allowed for applications to be submitted.[92]

The commission must make its decisions about applications based on evidence and to the extent a candidate satisfies the criteria prescribed. The application process should include some form of self-assessment by the candidate against the prescribed criteria, and the submission of written work (such as judgments, legal opinions, or articles). External evidence, such as referees nominated by the candidate or from third parties, and interviews of each shortlisted candidate should be conducted. The commission should keep full records of the information obtained from all sources.[93]

Candidate interviews must be conducted in a manner that is respectful to and fair between candidates. Public interviews should be considered if they will promote the legitimacy of the

[89] Article 2-3 of the Universal Charter of Judges provides that no active member of Government or Parliament can serve on this independent judicial body.
[90] Principle II (2) of the Latimer House Guidelines.
[91] Principle 9 of the Cape Town Principles.
[92] Principle 10 of the Cape Town Principles.
[93] Principle 11 of the Cape Town Principles.

selection process. The interview should be supplementary evidence to a candidate's suitability and not as replacing evidence received during the selection process.[94]

The commission's deliberation procedures should enable it to come to a reasoned decision in matters of selection. Deliberations should be private, but sufficient record must be kept. The successful candidates should be communicated to the final appointing authority, if any, without undue delay.[95]

The commission should make the decision on which candidates are appointed to judicial office, even when the formal power of appointment is vested in another branch of government. It should be the norm that a commission recommends a single selected candidate for a judicial vacancy, who must then be appointed to that position by the appointing authority.[96]

The independent body can be consulted by the Executive or legislature on all possible questions concerning judicial status, ethics, the annual budget of the Judiciary, the allocation of resources to the courts, the operation of the organisation, and the functioning and public image of judicial institutions.[97]

Commissions committed to judicial affairs functioning independently from other institutions of government are entrusted with the selection of judges. To support the independence of the Judiciary, these commissions must themselves be manifestly independent, and suitably composed and resourced. A commission will be most effective if it has a wide mandate, encompassing all levels of the superior court hierarchy and including temporary, acting, or part-time judges, where such positions exist.[98]

The commission's independence and recognition of the inherently constitutional nature of its functions must be protected and entrenched in a legal system as far as possible.[99] The commission should consist of a variety of members drawn from the Judiciary and a range of other institutional, professional, and lay backgrounds. The members should be appointed in

[94] Principle 12 of the Cape Town Principles.
[95] Principle 13 of the Cape Town Principles.
[96] Principle 14 of the Cape Town Principles.
[97] Article 2-3 of the Universal Charter of Judges.
[98] Principle 4 of the Cape Town Principles.
[99] Principle 5 of the Cape Town Principles.

proportion to safeguard against unjustified dominance of the commission by the Executive or by members of parliament or representatives of political parties. It is further required that the membership of the commission should be appropriately diverse in terms of race, gender, professional and life experience, and other relevant considerations in the context of a particular society.[100]

Members of the commission should be independent in all matters of judicial selection, to avoid conflicts of interest and to follow the highest standard of ethics. To preserve individual independence, members should enjoy security of tenure, subject to appropriate limits, and should not be vulnerable to arbitrary termination of their membership. The ethical obligations of members may be reinforced by an oath or affirmation of office, a code of conduct, and provisions that temporarily disqualify members or former members from applying for judicial office.[101]

The commission, as an independent institution, should be provided with a secretariat and a sufficient complement of staff with appropriate skills and experience to enable the commission to perform all its functions efficiently and independently.[102]

In exceptional cases, if express provision is made to that effect in the legal framework, depending on the judicial office in question and the context of a particular society, it may be justifiable to provide that the appointing authority has the right to choose from a list of selected candidates recommended by the commission, or that the appointing authority may reject or require reconsideration of a candidate or list of candidates recommended by the commission. The appointing authority should be required to provide reasons when exercising any power to reject, require reconsideration and the exercise of such powers may be confined to specified grounds. The total number of selected candidates in respect of any vacancy must be limited and no unsuccessful candidate should be eligible for appointment.[103]

[100] Principle 6 of the Cape Town Principles.
[101] Principle 7 of the Cape Town Principles.
[102] Principle 8 of the Cape Town Principles.
[103] Principle 15 of the Cape Town Principles.

The commission should be accountable for its decisions on individual applications for judicial office, by providing feedback and reasons on request, and the general performance of its institutional functions, through annual reports and other public interventions.[104]

The commission's decisions may be subject to examination by an independent ombudsman dedicated to judicial affairs with the power to make findings and non-binding recommendations in the case of maladministration. Decisions of the commission should also be reviewable by the courts on established grounds of legality and constitutionality.[105]

6. A comparative study of best practices in judicial independence: The Netherlands

6.1. Background

The Netherlands is a democratic state based on the rule of law in which there is a separation of powers between the three branches of government being the legislative, Executive, and judicial branches.[106] The civil and criminal legal systems are inspired by the French legal system while administrative law reflects a combination of French, English, and German administrative law. The judicial organization, operated by the ministry of justice and court presidents' for over 150 years has gone through considerable institutional and organizational change during the last 15 years.[107]

The legislative branch, Parliament, comprises of two Houses: The House of Representatives and the Senate. The House of Representatives decides on legislation, ratifies treaties, has the power to approve the budget, and scrutinises the work of government. The Senate reviews bills that have been approved by the House of Representatives, ensuring that it complies with international treaties, the Constitution, the relationship with other legislation and the bill's

[104] Principle 16 of the Cape Town Principles.
[105] Principle 17 of the Cape Town Principles.
[106] Factsheet on the Judiciary in the Netherlands available at file:///C:/Users/User/Downloads/Factsheet+on+the+Judiciary+in+the+Netherlands.pdf (hereafter the Netherlands Factsheet) accessed on 16 April 2021.
[107] Langbroek P M "Organization Development of the Dutch Judiciary, between Accountability and Judicial Independence" 2010 *International Journal for Court Administration* 1 -4 available at file:///C:/Users/User/Downloads/Organization_Development_of_the_Dutch_Judiciary_be.pdf (accessed on 18 April 2021).

practical feasibility. In the Netherlands, the Senate's role is less political than the House of Representatives.

The monarch and the cabinet ministers form the government which also acts as the Executive branch. The Cabinet considers and decides on overall government policy and promotes the coherence of that policy. The monarch is protected, which means that the prime minister is accountable for what the monarch says and does. Ministers are accountable to Parliament for all the monarch's actions. The government pursues policy, introduces bills and represents the Netherlands abroad. The full spectrum of its actions, or lack thereof, is scrutinised by Parliament.[108]

Courts do not have jurisdiction to decide on the constitutionality of legislation, this is for the Parliament to determine.[109] However, the courts can determine if legislation complies with international treaties which speak to citizens' fundamental rights. This means that the courts can consider whether all legislation is compatible with, for instance, the European Convention on Human Rights and all EU legislation that has direct effect.[110]

The judicial branch administers the justice system and is independent of the other two branches. Courts give their judgments based on international treaties and legislation. Judges are appointed for life, by Royal Decree. A judge's appointment may only be terminated at the judge's request or when the judge reaches 70, the retirement age and in special cases by the Supreme Court.[111]

During 1998 the Leemhuis[112] Committee proposed the improvement of the judicial organization concerning judicial independence, quality, and efficiency. The main issues identified were the contentious relationship between the Justice Department and judges; a lack of organization among judges; the shortage of personnel to develop and implement necessary changes; a lack of leadership; and the absence of decision-making structures for judges. To address these issues the Committee proposed that a Council for the Judiciary be created and appointed as a body governing the judicial organization, and would oversee

[108] The Netherlands Factsheet 2.
[109] The Netherlands Factsheet 2.
[110] The Netherlands Factsheet 2.
[111] The Netherlands Factsheet 2.
[112] The Queen's governor of the Province of South-Holland at the time.

budgeting, judicial cooperation, personnel policy, quality management, public services, the appointment of judges, and of course the management of housing, security, IT, and information. The council would also have the main task of annually negotiating funds for the Judiciary with the justice department and dividing funds amongst the courts. The council was proposed to consist out of five members (three judges and two experts one in finance and one in organization).[113]

Another recommendation by the Leemhuis Committee's was to introduce a new management model for the courts which would allow each court to have a board consisting of two judges, the president, the director for quality management (a judge) and the director for organizational management (a professional manager). The board would preside over the judges of each court focusing on the organizational functioning such as planning and case management. The board would be accountable to the Council for its financial and organizational management.[114]

The recommendations by the Leemhuis Committee formed the basis for changes in the Act on the Judicial Organization. Investments in the courts were done through the Judicial Organization Reinforcement Project and was a result of a political compromise. Politicians were only willing to invest in the Judiciary if the Judiciary would be willing to take responsibility and to be accountable for its functioning. The PVRO project commenced in the spring of 1999. The assignment of the project group was to implement the ideas developed by the Leemhuis Committee following the Cabinet decision.[115]

The Netherlands Judiciary was declared independent in both 2020 and 2021 in the Freedom House country reports.[116] The methodology used to determine judicial independence included various considerations such as:

(a) Is the Judiciary subject to interference from the Executive or other political, economic, or religious influences?

(b) Are judges appointed and dismissed in a fair and unbiased manner?

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[113] Langbroek (2010) 5.
[114] Langbroek (2010) 5.
[115] Langbroek (2010) 6.
[116] Freedom in the World 2020 and 2021, Netherlands available at https://freedomhouse.org/country/netherlands/freedom-world/2020 and https://freedomhouse.org/country/netherlands/freedom-world/2021 (accessed 16 April 2021).

(c) Do judges rule fairly and impartially, or do they commonly render verdicts that favour the government or interests? The latter could be in return for bribes or for other reasons.

(d) Doe the Executive, Legislative, and other governmental authorities comply with judicial decisions?

(e) Are decisions effectively enforced?

(f) Do powerful private entities comply with judicial decisions, and are decisions that run counter to the interests of powerful actors effectively enforced?[117]

6.2. Administration of Courts

In early 2020 the Council for the Judiciary (in consultation with the Judiciary), the prosecution service, and the bar association adopted a new code for case allocation. The code aims to promote transparency in the allocation of cases within courts. In principle, cases are allocated randomly between judges, and any exception to this rule is made public in the administrative regulations drafted by the court administrators. The code also requires that parties be notified of a transfer of a case to another judge together with the reasons for the transfer. [118]

Neither the legislative branch nor the Executive branch has any influence on the courts' findings and judgments. Each court independently reaches its own judgments and therefore courts can never be called to account for the substance of their judgments by the Executive branch, Legislative branch, or by the Council for the Judiciary.[119]

6.2.1. Appointment and training of Judges and Supreme Court Judges

The European Commission confirmed that the perceived level of independence of the Judiciary in the Netherlands is high, and efforts to further strengthen judicial independence continue. The latter is supported by the role of independent advisory bodies and cooperation with the Judiciary.[120]

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[117] Freedom in the World Research Methodology available at https://freedomhouse.org/reports/freedom-world/freedom-world-research-methodology (accessed on 16 April 2021).

[118] "2020 Rule of Law Report Country Chapter on the rule of law situation in Netherlands" 2020 *European Commission* 2 - 3 (hereafter European Commission Report) available at https://ec.europa.eu/info/sites/info/files/nl_rol_country_chapter.pdf (accessed on 17 April 2021).

[119] The Netherlands Factsheet 2.

[120] European Commission Report (2020) 2.

Recruitment, selection, training, and recommendation for appointment of members of the Judiciary is done by the Judiciary in conjunction with the Council for the Judiciary. The minimum requirements for appointment as a judge are laid down by law.[121]

After a candidate has successfully completed their training, the Council for the Judiciary recommends them for appointment as a judge. The candidate is vetted by the Minister of Security and Justice to determine if the candidate meets the statutory and other formal requirements. If successful, a nomination for the appointment is submitted to the monarch. The monarch signs the Royal Decree, appointing the judge. Judges are appointed for life and nominations for appointment are never rejected.[122]

Currently, the process for appointing a Supreme Court judge is that a Committee of Supreme Court judges draws up a list of six candidates and submits it to the House of Representatives. The House of Representatives then selects and ranks three candidates.[123] The top-ranked candidate is invited to an interview with the Permanent Parliamentary Committee on Security and Justice. There is an understanding between the Supreme Court and the House of Representatives that no questions are asked about the candidate's political views, religion, or beliefs. In practice, the House of Representatives always follows the recommendation of the Supreme Court. The Supreme Court and the House of Representatives both agree that the appointment of Supreme Court judges must not be politicised.[124]

The recommendation for the appointment of the new Supreme Court judge then goes to the Minister of Security and Justice, as with the appointment of judges, determines whether the formal requirements have been met. If successful, a nomination for the appointment is submitted to the monarch. The monarch signs the Royal Decree, appointing the judge. As with other judicial appointments, the nomination always leads to the signing of the Royal Decree.[125]

[121] The Netherlands Factsheet 3.
[122] The Netherlands Factsheet 3.
[123] European Commission Report (2020) 3.
[124] The Netherlands Factsheet 4.
[125] The Netherlands Factsheet 4.

This process is however under review and a State Commission[126] has recommended establishing an independent committee. The committee is to be composed of a member of Parliament assigned by the House of Representatives, a member of the Supreme Court assigned by its President, and an expert appointed jointly by the House of Representatives and the Supreme Court. This committee would oversee nominating new Supreme Court judges, which is currently the prerogative of the House of Representatives. The nomination would be submitted for appointment by the monarch, which would be bound by the nomination.[127]

Most of a judge's training is done by the court itself, but part of it is conducted by a central training institute, the Training and Study Centre for the Judiciary (SSR). The SSR partly falls under the responsibility of the Council for the Judiciary. After a candidate has successfully completed their training, the Council for the Judiciary recommends them for appointment as a judge.[128]

6.2.2. Council for the Judiciary

The Council for the Judiciary forms an important link in the cooperation between the three branches. Not only does it provide advice to the government and the States-General on legislation and policy concerning the Judiciary on request, but it also does so on its cognisance and its advice is deemed to be important to the legislative branch (Parliament) as well as the Executive branch (the government) in the legislative process.[129]

By law, the Council for the Judiciary must have three to five members. In the event of a tied vote in the Council, the president has the deciding vote. The president is always from the Judiciary, which guarantees that the opinion of the courts is decisive.[130]

Vacancies on the Council for the Judiciary are published nationally through the media, after which an advisory committee assesses the candidates' suitability and makes a recommendation to the Minister of Security and Justice. The advisory committee consists of:
(a) a president of a court (committee chair),

[126] The State Commission on the Parliamentary System in the Netherlands.
[127] European Commission Report (2020) 3.
[128] The Netherlands Factsheet 3.
[129] The Netherlands Factsheet 2.
[130] The Netherlands Factsheet 4.

(b) a representative of the Netherlands Association for the Judiciary,

(c) a member of a court management board who is not a judge, and

(d) one person appointed by the Minister of Security and Justice. [131]

According to the Law on Judicial Organization, the Minister and the existing Council for the Judiciary creates a joint list of no more than six persons to fill a vacancy. This list is submitted to a Recommendation Committee, which extracts a list of no more than three persons and submits it to the Minister. The Minister then nominates the new member of the Council to be appointed for six years by the monarch by way of Royal Decree.[132] The role of the Council for the Judiciary is clearly defined in legislation[133] and is responsible for:

i) preparing its budget and the overall budget of the courts.

ii) allocating budgets to the individual courts.

iii) supporting the operational management of the courts.

iv) monitoring the implementation of the budget by the courts.

v) nationwide activities relating to the recruitment, selection, hiring, appointment, and training of court staff.

6.2.3. Financial Independence

An objective legislative criterion is used to determine the budget for the administration of justice. The Minister of Security and Justice provides the necessary funds from the central government budget, which is set by the government and Parliament.[134] The Council is accountable to the ministry for reporting on the provision and quality of services as well as for money received and spent. The Minister of Justice has the power to oversee and enforce the functioning of the Council for the Judiciary through the budgeting process using financial and production reports.

Again, the budgeting system is arranged by Royal Decree (order in council). It is cabinets' strategy that the courts would receive annual funds according to the number of cases decided in the previous year. The idea was that this system would stimulate and motivate courts and prevent backlogs. This quantitative budgeting system was coupled with a parallel system

[131] The Netherlands Factsheet 4.
[132] European Commission Report (2020) 4.
[133] Sections 84 to 109 of the Judiciary (Organisation) Act.
[134] The Netherlands Factsheet 5.

focusing on quality management. It is reported that both the out-put based budgeting system and the related quality management system is effective.[135]

6.2.4. Continued Judicial Independence

The Dutch Government has drafted a concept proposal for a revision of the Constitution to implement the recommendation by the State Commission.[136] The proposed revision was published for an online stakeholder consultation from December 2019 to March 2020. The purpose of the proposed reform is to further limit the role of the Executive and legislative branch in the appointment of Supreme Court judges and is in line with the recommendations by the Council of Europe.[137]

Further reform is being contemplated on the procedures for the appointment of members of the Council for the Judiciary and court management boards.

The Council for the Judiciary plays a key role in safeguarding judicial independence and thus deliberations are continuing whether judges should have a greater influence on the appointment process of the members of court management boards and members of the Council for the Judiciary.[138]

A working group, including the Council and the association of judges, was set up to deliberate the involvement of judges in the process of nominations of court management boards. Additionally, the Minister for Legal Protection has announced legislation to amend the appointment procedure for members of the Council. The proposed amendment intends to limit the role of the Minister in the appointment procedure by no longer allowing the Minister to appoint a member of the Committee nor be entitled to participate in the creation of the 6-candidate list to be presented to the Recommendation Committee.[139]

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[135] Langbroek (2010) 6.
[136] The State Commission on the Parliamentary System in the Netherlands.
[137] Judges Independence, Efficiency and Responsibilities: Recommendation CM/Rec(2010)12 and Explanatory Memorandum 2010 *Council of Europe* at 47 available at https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d (accessed 19 April 2021). Further reform is being contemplated on the procedures for the appointment of members of the Council for the Judiciary and court management boards.
[138] European Commission Report (2020) 3.
[139] European Commission Report (2020) 3.

Parliament further requested for a Council of State opinion on potential weaknesses in the legal framework regarding the appointment of members of the Council for the Judiciary and members of court boards. The objective of this request is to further limit the influence of the Executive or legislative powers on the appointment of the members of the Council for the Judiciary, which is consistent with Council of Europe recommendations.[140]

The prosecution service falls under the political responsibility of the Minister of Justice, although it is not itself part of the Ministry. The Minister of Justice has the power to issue specific instructions to the prosecution service, but this is accompanied by safeguards and not used in practice. The Minister is kept up to date by the prosecution service of important cases, and in practice refrains from using the power to give instructions to prosecute a specific case or to withhold from doing so. The legal safeguard in place to limit the possibility of arbitrary intervention is that the Minister must inform the Board of Prosecutors-General and the written instruction, together with the views of the Board, would be added to the case file. The instruction to withhold prosecution must also be sent to the House of Representatives and the Senate together with the views of the Board, in so far as it would not be against the interests of the State. The Dutch authorities have not reported any cases of specific instructions for decades. The safeguards along with the fact that the practise has fallen into disuse mitigate potential risk for the autonomy of the prosecution.[141]

7. SADC advocacy platforms and processes for protection of judicial independence

The SADC Declaration and the Treaty[142] describe the SADC Vision as that of a shared future in an environment of peace, security and stability, regional cooperation and integration based on equity, mutual benefit, and solidarity. SADC has also committed itself to the principles of the Charter of the United Nations, the Constitutive Act of the African Union, and the Protocol Establishing the Peace and Security Council of the African Union.

Thus, and in an effort to achieve its commitments, the SADC Heads of State and Government established the SADC Organ on Politics, Defence and Security Cooperation,[143] signed the

[140] European Commission Report (2020) 4.
[141] European Commission Report (2020) 4 - 5.
[142] Consolidated Text of the Treaty of the Southern African Development Community of 2015 available at https://www.sadc.int/documents-publications/show/4171
[143] During June 1996.

Protocol on Politics, Defence and Security Cooperation,[144] and established the Strategic Indicative Plan for the Organ (SIPO)[145] as an enabling instrument for the implementation of the goals and objectives outlined in the Regional Indicative Strategic Development Plan (RISDP) and the Protocol on Politics, Defence and Security Cooperation.

The first version of the SIPO covered 2004-2009 while the updated revision covers the period 2010-2015. The most recent SIPO[146] indicated objective 4 as the promotion of the development of democratic institution and practices by state parties and encouraging the observance of universal human rights. One of the strategies implemented was to promote the principles of democracy, good governance and rule of law and activities identified were to:

(a) Identify, encourage, and strengthen the capacity of institutions that promote democracy and good governance within member states,
(b) Encourage member state production of periodic reports on human rights issues to relevant bodies and SADC structures, and
(c) Support of member states' judicial systems.

The 2020-2030 SADC Regional Indicative Strategic Development Plan[147] (RISDP) again enforces SADC's intention of strengthening and enhancing democracy, good governance, the rule of law, human rights, and human security. Although not a direct enforcement of judicial independence the strengthening of democracy, good governance, and the rule of law will all aid the independence of the Judiciary.

The African Peer Review Mechanism (APRM) launched a 'judicial independence under the APRM'-programme. According to the APRM[148]:

[144] During 2001.
[145] During 2004.
[146] *Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation* (2010) Revised Edition available at https://www.sadc.int/files/3213/7951/6823/03514_SADC_SIPO_English.pdf (accessed 22 April 2021).
[147] *SADC Regional Indicative Strategic Development Plan 2020-2030* (2020) Revised Edition available at https://www.sadc.int/files/4716/1434/6113/RISDP_2020-2030_F.pdf (accessed on 22 April 2021).
[148] R Ellett "Judicial Independence Under the APRM: From Rhetoric to Reality" March 2015 South African Institute of International Affairs available at https://www.files.ethz.ch/isn/189964/saia_sop_212_ellett_20150402.pdf (accessed 22 April 2021).

> The greatest challenges to good governance in Africa lie at the intersection of two problems: (i) low horizontal and vertical accountability, and (ii) weak constitutionalism. While courts are a critical player at these intersecting fault lines, the role of the Judiciary has frequently been understated or marginalised in the African Peer Review Mechanism (APRM). An 'independent Judiciary ' is only explicitly listed in the APRM as a component of the separation of powers; this narrowing of the role of the Judiciary obscures the potential contributions an independent and assertive Judiciary can make across all major subcategories of 'good political governance'. Beyond conflict resolution, the Judiciary is responsible for the protection and promotion of civil, political and socioeconomic rights, and should be at the forefront of combatting corruption. There are also important roles for the Judiciary to play in relation to policy problems such as land rights and provision of basic services.

In this program the APRM allows a country to make a self-assessment and then also provides its independent assessment which includes an assessment on the independence of the Judiciary. It also makes recommendations on how the member country can improve the independence of the Judiciary.

These efforts along with others assist SADC countries to improve and strengthen the independence of their Judiciary's, the rule of law and democracy.

8. Individual country reports

It is against this background and introduction that the individual country assessments follow. The Working Group was tasked at analysing the state of judicial independence in Zambia, Zimbabwe, and the Kingdom of Eswatini. The analysis follow in this same order.

PART B:

JUDICIAL INDEPENDENCE IN ZAMBIA

9. Background: Zambia

As is the norm, the Zambian Judiciary is one of the three branches of the government created by the Constitution. As such, the Judiciary is subject only to the Constitution and the law from

which it derives its authority, powers, and functions. This is in line with the principles of constitutionalism and the doctrine of separation of powers.[149]

Zambia gained its independence from Britain in 1964 at which time it adopted the British legal and governance system. The Constitution adopted by Zambia provided for three branches of government. The Executive headed by the president, the Legislature headed by the Speaker and the Judiciary headed by the Chief Justice. The Executive and, by virtue of his office, the President remain the most powerful branch of government. The Executive has historically had an influence over both the Legislature and Judiciary by exercising a degree of control over who is appointed as Speaker and Chief Justice. After independence, Zambia went through three different constitutional phases, all of which had an impact on the independence of the Judiciary which still informs its functional independence.[150]

The 'First Republic' was the first phase and came into existence immediately post-independence and lasted until 1973. This period was characterised by relative peace, prosperity, and a mostly independent Judiciary. Substantial and robust jurisprudence on political, social, economic, and private law issues were developed during this time. Unfortunately, this period also saw tribal and political unrest across the country with the apex being reached when members from the United National Independence Party (UNIP) split and formed a new party called the United Progressive Party (UPP), headed by Simone Mwansa. The UPP made its mark by winning the Chinsala Parliamentary By-elections. This caused the UNIP government to believe that the conflicts and opposition were speared by the British with the intention to return the country under colonial rule. Consequently, the UNIP moved the country into the next phase of a One-Party State.[151]

A One-Party State was created in 1973 by amending section 4 (1) of the Constitution to read, '…there shall be one and only one Political Party or organisation in Zambia, namely the United National Independence Party' and was done on recommendation Chona Constitutional Review Commission (the Chona Commission) who stated that its investigation showed that

[149] "Zambia Country profile" 2020 *SADC Lawyers Association* (hereinafter SADCLA Report on Zambia) 1.
[150] SADC LA Report on Zambia (2020) 2 - 3.
[151] SADC LA Report on Zambia (2020) 3.

there was country wide support for a One-Party State. This marked the first real test to see whether the Judiciary was independent.[152]

Harry Mwanga Nkumbula who was the leader of the opposition African National Congress (ANC), challenged the appointment of the Chona Commission and the intended one-party state.[153] He argued that the intended establishment of the One-Party state was unconstitutional as it would violate his fundamental human rights and particularly freedom of association and assembly. He further argued that the Chona Commission acted *ultra vires* the Constitution as its terms of reference did not allow for the interviewing of people to determine if they desired or wanted the One-Party State. The High Court rejected all claims made by the petitioner and held that they were premature. The new constitution had not been enacted yet and therefore his rights were not violated. The court further held that it did not have jurisdictions to deal with violations that had not yet occurred. The Court concluded that that once the constitution was enacted, the petitioner would have the option to make a claim in Court again. The judgment was appealed but the appeal was dismissed by the Court of Appeal.[154]

During this time, the doctrine of 'Executive supremacy' was consistently applied by the courts to justify its judgments in favour of the Executive. The court's practice of hiding behind the notion of *salus populist suprema lex* (the safety of the nation is the supreme law) demonstrated courts eagerness to find in favour of the state on human rights questions which in present times would be decided with completely different considerations in mind.[155] The decision in *Re Buitendag,*[156] for example, illustrated the judicial sympathy towards the Executive at the expense of individual liberties. The Court held that:

> …the President has been given powers by Parliament to detain persons who are not even thought to have committed any offence or to have engaged in activities prejudicial to security or public order but who, perhaps because of their association or for some other reason, the President believes it would be dangerous not to detain…

[152] SADC LA Report on Zambia (2020) 3.
[153] *Harry Nkumbula vs The Attorney General* 1972 ZR 204.
[154] *Court of Appeal Judgement No. 6 of 1972*
[155] *Feliya Kachasu vs Attorney General* (1968) ZR 145, *Patel vs Attorney General* (1968) ZR 99, *Nkumbula v. Attorney General* (1972) ZR 204, *Nkumbula & Kapwepwe vs UNIP* (1978) ZR 388.
[156] (1974) ZR 156.

The UNIP was in control of the appointment of judges which resulted in human rights violations, diminished democracy, and a general lack of constitutionalism. Any form of dissent or opposition to the government was met with arrests or suppression.[157] The collective voices of workers in the form of trade unions, specifically the Zambia Congress of Trade Unions (ZCTU), could however not be silenced and became the only true form of opposition to UNIP. Subsequently, the trade unions led the fight to the return of multi-party politics under the direction of Frederic Chiluba who later became Zambia's first elected president.[158]

In December 1990, at the end of a restless year filled with riots in the capital and a *coup* attempt, President Kenneth Kaunda signed legislation ending UNIP's monopoly on power. A new constitution was enacted in August 1991, which increased the National Assembly from 136 members to a maximum of 158 members, established an electoral commission, and allowed for more than one presidential candidate who no longer had to be a member of UNIP. The first multi-party elections in November 1991 resulted in the victory of the Movement for Multi-Party Democracy (MMD) and the election of President Frederick Chiluba. The present Constitution dates from June 1996.[159]

In 1993, the Mwanakatwe Commission[160] was mandated to effectively draft a Constitution that would stand the test of time and the drafted Constitution did result in substantive and progressive recommendations. Unfortunately, the final 1996 amendment to the Constitution was considered to lack popular legitimacy, as it did not consider most of the submissions made by the people. The government rejected most of the recommendations to the Constitution. Its most noteworthy rejection related to the recommend broadening of the Bill of Rights to include women's rights, children's rights, economic, social, and cultural rights. Recommendations for the introduction of a Constitutional Court and the adoption of the Constitution through a Constituent Assembly, as insisted to by civil society groups, was also

[157] SADC LA Report on Zambia (2020) 4 - 5.
[158] SADC LA Report on Zambia (2020) 5.
[159] Magagula AS "Update: The Law and Legal research in Zambia" 2014 *GlobaLex Online* available at https://www.nyulawglobal.org/globalex/Zambia1.html#theconstitutionandtheJudiciary (accessed 20 April 2021).
[160] Constitution Review Commission, chaired by Mr. John Mwanakatwe, State Counsel (SC), a former Minister in the First and Second Republics.

rejected. These rejections intensified the deep constitutional crisis and[161] the issue around Constitutional reform became the go-to strategy for contending political parties.

During 2003 and 2006 there were renewed attempts at a Constitutional review process, but both these attempts were derailed and never came to being.[162] During this time Zambia also held regular elections in five-year intervals but these were reported to have been plagued by and election rigging. Therefore, it became common to challenge the election outcomes in curt. A shift came in 2011 when the elections were widely believed to have been free and fair. This view was also endorsed by the Electoral Commission of Zambia and external observers[163].

Finally in January 2016, the new President, Edgar Chagwa Lungu, assented to a new Constitution. The amended constitution is considered very progressive as many, if not all, of the submissions by the previous Mung'omba Constitutional Review Commission, were included. Some of the most noteworthy amendments, for the purpose of this report, were the establishment of the Constitutional and Appeal Court.[164]

However, in 2019 another constitutional amendment attempt was which was opposed by the International Commission of Jurists (ICJ) and several other international bodies.[165] The reasons for opposing these amendments seemed to centre on the proposed new constitution's negative impact on the independence of the Judiciary. According to the ICJ and its supporters, the amendments to the provisions regulating disciplinary measures and processes against judges are concerning. Concern was also raised regarding the proposed provisions regulating the composition of the Supreme and Constitutional Courts. The amendment allows for the replacement or removal of a judges if the judicial officer is 'legally disqualified from performing judicial functions.' Unfortunately, no definition of 'legal disqualification' is given which opens this clause up to possible abusive interpretations.

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[161] See in general Magagula (2014).
[162] Maniatis A "Zambian Constitutional History" 2019 *Center for Open Access in Science* 145 - 147 available at http://centerprode.com/conferences/4IeCSHSS.html#012 (accessed 20 April 2021).
[163] EU-Elections Observer Mission to Zambia (2011) Elections Report, Southern Africa Development Community-PF Report on Zambia's 2011 September Elections and the Electoral Institute of Southern Africa (EISA).
[164] Maniatis (2019) 147.
[165] Commonwealth Lawyers Association (CLA), Commonwealth Magistrates' and Judges' Association (CMJA), International Bar Association's Human Rights Institute (IBAHRI), International Commission of Jurists (ICJ), Judges for Judges (J4J), Lawyers' Rights Watch Canada (LRWC) and the Southern Africa Litigation Centre (SALC).

The ICJ further opined that the amendments introduced unnecessary obscurity and vagueness which could increase the risk of judges being removed on politically motivated grounds. Should the latter come to pass it would have a grave impact on the rule of law.

Finally, the amendments also transfer the authority to recommend the removal of judicial officers from the independent Judicial Complaints Commission to a Tribunal appointed by the President. [166] The Amendment Bill was challenged in court as being unconstitutional however it mustered the test and the application failed. In December 2020, the government failed to obtain the two-thirds majority required to pass the 2019 Amendment Bill. Despite being titled a victory some view it as a narrow escape for Zambia becoming yet another statistic in the global democratic decline.[167]

10. Judicial independence in Zambia and the impact on the rule of law

Judicial independence is guaranteed by law, but in reality, the Judiciary is subject to political pressure. President Lungu warned that chaos would ensue should the Constitutional Court attempted to block his bid to run for a third term in 2021. In December 2018, the court, composed entirely of Lungu appointees, issued a unanimous ruling that appeared to support Lungu's eligibility for another term.[168]

In a 2013 APRM Report,[169] Zambia conceded in its Country Self-Assessment Report (CSAR) that it did not formally employ the doctrine of the separation of powers as it is not specifically recognised in the 1991 Constitution. Zambia held that the separation of power is realised by the existence of the Executive, legislature, and Judiciary. However, in practice, little to no financial independence exists for these various branches of government. This severely influences perceptions toward a proper separation of powers. Despite acknowledging the

[166] "Zambia: 'Constitutional Amendment Bill' threatens judicial independence" 2019 *Commonwealth Lawyers Association and others* available at https://www.icj.org/zambia-constitutional-amendment-bill-threatens-judicial-independence/ (accessed 20 April 2021).
[167] Kalala J "The Constitutional Amendment Bill No. 10 of 2019: A Test of Democracy and Constitutionalism in Zambia" (2 March 2021) *Commonwealth Lawyers Association Online* available at https://www.commonwealthlawyers.com/africa/the-constitutional-amendment-bill-no-10-of-2019-a-test-of-democracy-and-constitutionalism-in-zambia/ (accessed 22 April 2021).
[168] Freedom in the World 2020 and 2021, Zambia available at https://freedomhouse.org/country/zambia/freedom-world/2021 (accessed 14 April 2021).
[169] African Peer Review Report No.16, Republic of Zambia, January 2013.

importance of separation of powers in guaranteeing an equitable distribution of power and effective checks and balances in the exercise of power to enhance good governance and accountability, both the National Assembly and the Judiciary have indicated their lack of financial independence.[170]

The Constitution entrenches the independence of the Judiciary comprised of judges appointed by the president subject to ratification by the National Assembly. Public confidence in the Judiciary was high in 2008 with 68 per cent of the population regarding it as an impartial upholder of the rule of law. A subsequent study conducted in 2009 found that 68 per cent regard judges as subject to interference. The Judiciary has requested to be regarded as a separate arm of government and to have its budget allocated accordingly.[171]

Subsequently, the Country Review Mission (CRM) recommended proper constitutional recognition of the doctrine of separation of powers to prevent overlaps between the three branches of government. Presidential sovereignty caused by the excessive concentration of power in the presidency aggravates the blurring of the line between the Executive and legislature. It is inappropriate that Zambia would still follow the Westminster system which assumes that Parliament is sovereign when the Constitution reigns supreme in a proper constitutional democracy.[172]

As is the case with the legislature, the CRM found the Judiciary to be weak in comparison to the Executive. The Judiciary was seen to be under-resourced in terms of budget allocations and human resources. The autonomy of the President was further strengthened by his power to appoint judges and his power to appoint judges on contract rather than securing tenure. This undermines the independence of judges and the Judiciary and creates Executive-mindedness in judges hoping for contract renewal. There is also no financial independence as the Upper Bench (Supreme Court, High Court, and Industrial Relations Court) is appointed by the President. He also approves their conditions of services, salary scales and budgets. The Lower Bench (magistrates of the magistrate's courts and local courts), despite being under

[170] African Peer Review Report No.16 (2013) 108.
[171] African Peer Review Report No.16 (2013) 108.
[172] African Peer Review Report No.16 (2013) 109.

the management of the Judicial Service Commission, is controlled from a budgetary perspective by the Budget Office and Treasury.[173]

From the above, the Judiciary lacked both administrative and financial autonomy. It was open to external influence, which undermines and threatens judges' independence and the overall independence of the Judiciary. This leads to the undermining of the principle of the separation of powers as the Executive can and does interfere with the operations of the Judiciary. One would have to go a long way to say that the rule of law is protected and enforced by an independent Judiciary. This was however improved with the 2016 amendment of the Constitution rendering the current legal framework more robust and in favour of judicial independence.

11. The current legal framework in Zambia and the independence of the Judiciary

Zambia is a constitutional democracy and as such its institutions and systems of democracy as well as governance are created by the constitution. In establishing these institutions, the constitution states that "all persons, state organs and state institutions are bound by the constitution."[174] It also makes provision for constitutional supremacy by stating that:

> This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.[175]

By subjecting all officers and state organs to the constitution ensures that power remains in the people and further that constitutionalism, the rule of law, and democracy thrive in Zambia. The spirit of the constitution is further protected by articles 2 and 3 which places a duty on citizens to defend the constitution. These articles also strengthen the constitution by renouncing any unlawful act to overthrow, suspend, or illegally abrogate its provisions. In essence the Supremacy of the constitution is the cornerstone of governance in Zambia and as such the ground upon which the Judiciary is created and should function.

[173] African Peer Review Report No.16 (2013) 110.
[174] Article 1(3) of the Constitution of Zambia Act 2015 (hereinafter the Zambian Constitution).
[175] Article 1(1) and (2) Zambian Constitution.

11.1. The Judiciary

The Judiciary is established by Part VIII of the constitution which sets out the authority, system of Courts, and its independence.[176] As an institution, the Judiciary consists of the Supreme Court, Constitutional Court, Court of Appeal, High Court, Magistrate Courts and Local Courts. Each of these Courts are established by the Constitution which sets out their general powers and functions with the detailed procedures, powers, and functions set out in respective legislation.

Article 118 of the Constitution sets out the principles of judicial authority in Zambia. The primary principle is that the Judiciary as an organ of government is a creature of the Constitution which is a document of 'the People' and as such Article 118(1) states that "the judicial authority of the Republic derives from the people of Zambia and shall be exercised in a just manner and such exercise shall promote accountability." In essence, this provision lends itself to the principle of democracy set out in the preamble that all power is vested in and derives from the people, who through the Constitution have expressed how they wish to be governed. Consequently, during the exercise of judicial authority, the fundamental rights and freedoms of the people are primary and prevail over all rules and regulations.

While this provision was only included in 2016, it was always part of the debate during the constitution-review process and was the basis of a test of the independence of the Judiciary in a landmark case during 1996. In *Christin Mulundika and 7 others v the Attorney General*[177] the accused persons, who belonged to an opposition political party, were charged with unlawful gathering under section 5 of the Public Order Act. They challenged the constitutionality of this provision which required them to obtain permission from the police before they could hold a public gathering. They argued that in a democratic state, freedom of assembly was fundamental, and that section 5 violated that right. The case tested the independence of the Judiciary as the Executive desperately wanted the *status quo* to be preserved to its political advantage. In a decision that highlighted the independence of the Judiciary, the Supreme Court held that section 5 violated the Constitution and was not justifiable in a democratic society. In defining a democratic society, the Court stated that one of the features is that in such a society power resides in the people and all organs of

[176] Articles 118 – 120 of the Zambian Constitution.
[177] *Mulundika and 7 Others v People* 1996 ZMSC 26.

government, including the Courts, should be subject to such power through constitutional expression.[178] Article 118(1) is therefore fundamental in establishing the independence of the Judiciary and preventing its capture.

While Article 118 states that judicial authority is derived from the people, article 119 vests that authority and power in the Judiciary subject to the Constitution. Article 119 further states that the functions of the Judiciary are to hear and determine civil and criminal matters in Zambia. To ensure transparency in the adjudication of matters, article 119(3) makes it mandatory for matters to be heard in open court where members of the public are free to attend. Through this provision, judicial officers are kept accountable to the people and the law in line with article 118 of the Constitution. The courts are also indirectly protected from external pressure in the execution of their judicial functions.[179]

Article 122 was included in the 2016 amendment of the Constitution and strengthens the rule of law and judicial independence by stating that:

> (1) In the exercise of the judicial authority, the Judiciary shall be subject only to this Constitution and the law and not be subject to the control or direction of a person or an authority. (2) A person and a person holding a public office shall not interfere with the performance of a judicial function by a judge or judicial officer. (3) The Judiciary shall not, in the performance of its administrative functions and management of its financial affairs, be subject to the control or direction of a person or an authority. (4) A person and a person holding a public office shall protect the independence, dignity, and effectiveness of the Judiciary. (5) The office of a judge or judicial officer shall not be abolished while there is a substantive holder of the office.

This article not only confirms the independence of the Judiciary but also solidifies the administrative and financial independence of the Judiciary. The independence of the Judiciary is fictitious if there is no real financial independence from the Executive. Traditionally, judicial organs do not have the financial generating capacity to cover all their activities and thus they tend to rely on the Executive arm for funding. This, however, should not provide an opportunity for Executive control of the Judiciary. As such, the Constitution provides safeguards to ensure that the financial relationship between the Judiciary and the Executive

[178] *Mulundika and 7 Others v People* (1996) 7.
[179] SADC LA Report on Zambia (2020) 10.

does not undermine its independence.[180] To this effect Article 123 provides that the Judiciary is a self-accounting institution that should receive adequate funding to properly carry out its duties. This shows that the independence of the Judiciary has come a long from where it was in 2013.

12. The court system in Zambia

12.1. The Supreme Court

The Supreme Court is created by article 124 as the final Court of appeal in Zambia. The Supreme Court is headed by the Chief Justice, the Deputy Chief justice and eleven other judges. The Supreme Court is supplemented by the Supreme Court Act[181] which spells out the detailed functions of the judges and their overall power.

The Supreme Court hears and determines appeals in civil and criminal matters and any other matters provided for by law.[182] Article 121 of the Zambian Constitution ranks the Supreme Court equal to the Constitutional Court with the difference being that the Constitutional Court only has jurisdiction to hear matters pertaining to the Constitution and does not act as the court of final instance.[183]

The Supreme Court is the final court of appeal and is bound by its decisions, except in the interest of justice and development of jurisprudence.[184] The Court is established when an uneven number of no less than three judges are sitting, except in the case of an interlocutory matter when only one judge is required, and the full bench will be constituted by an uneven number that is not less than five judges.[185]

12.2. The Constitutional Court

As stated, the Constitutional Court ranks 'equivalently with the Supreme Court' and is established by article 127 of the Zambian Constitution. The Constitutional Court is headed by the Judge President and the vice Judge president assisted by eleven other judges.[186] The court

[180] SADC LA Report on Zambia (2020) 10 - 11.
[181] Supreme Court of Zambia Act (Zambian Supreme Court Act). Section 124 of the Zambian Constitution.
[182] Section 7 of the Zambian Supreme Court Act.
[183] Section 167 of the Constitution of the Republic of South Africa, 1996.
[184] Section 125(1) read with 125(3) of the Zambian Constitution.
[185] Article 126 of the Zambian Constitution.
[186] Article 127 of the Zambian Constitution.

is constituted in the same manner as the Supreme Court in relation to the number of judges required to sit.[187]

The Constitutional Court is the Court of first instance and final adjudication on matters relating to the interpretation of the Constitution, a violation or contravention of the Constitution, the President, Vice-President, or an election of a President. It also hears appeals relating to the election of Members of Parliament and councillors and can consider whether or not a matter falls within the jurisdiction of the Constitutional Court.[188] The power to hear matters relating to the violation of the Bill of Rights as contained in the Constitution vests in the High Court and not the Constitutional Court.[189] The Constitutional Court, further, does not have binding power over the Supreme Court and does not act as an appellate court to the Supreme Court.[190]

Since its inception in 2016 it has heard approximately 256 cases but has lost the confidence of jurists in recent years.[191] The 2016 constitution and the subsequent creation of a new Constitutional Court, potentially provided the ruling party with an opportunity to control the appointment of all judges without effective accountability mechanisms.[192]
It should also be noted that although the Constitution provides for a 13-member Constitutional Court, only 9 judges have been appointed.[193] The President decides how many judges to appoint but considering the caseload since inception, the appointment of less than the allowed number of judges could potentially make it easy to predetermine the judges who will sit on a case, or even manipulate the system in one's favour.[194] Considering the weak framework and the potential control it grants the Executive it is possible that the

[187] Article 129 of the Zambian Constitution.
[188] Article 128 (1) of the Zambian Constitution.
[189] Article 28 of the Zambian Constitution.
[190] Article 128(4) of the Zambian Constitution read with section 8 of the Constitutional Court Act, 2016.
[191] Kaaba B "'South Africa Look What You Have Done to Us': Exploring the Reasons for the Likely Failure of the South African Constitutional Court Model in Zambia" *Constitutional Court Review Conference IX Programme* (2018) available at https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/constitutional-court-review-program/OBRIEN%20KAABA%20FIRST%20DRAFT%20PAPER.docx (accessed 14 April 2021).
[192] Kaaba (2018) 2.
[193] Constitutional Court Judges as indicated on the Judiciary of Zambia website available at https://www.Judiciaryzambia.com/category/adjudicators/constitutional-court-judges/ (accessed 20 April 2021).
[194] Kaaba (2018) 31.

Constitutional Court was constituted merely to provide the regime with an appearance of legitimacy.[195]

12.3. The Court of Appeal

The Court of Appeal is created by Article 130 of the Constitution. Neither the Constitution nor the Court of Appeal Act[196] provides for the number of judges the court should consist of. The Court consists of the Judge President, the Deputy Judges President, and as many judges as may be prescribed. The Court is constituted by an uneven number but no less than three judges unless, in the case of an interlocutory matter, in which case only one judge is required.[197]

The Court of Appeal has jurisdiction to hear appeals from the High Court and other courts, except for matters under the exclusive jurisdiction of the Constitutional Court. It can also hear appeals from quasi-judicial bodies with the exclusion of a local government elections tribunal.[198] Parties to proceedings may appeal the Court's decision to the Supreme Court with leave from the former.[199]

12.4. The High Court

The High Court is established and consists out of the Chief Justice, as an ex-officio judge, and such number of judges as prescribed.[200] Only one judge is required to constitute the Court, but this number may be increased by the Chief Justice.[201] The High Court is divided into different divisions namely: The Industrial Relations Court, Commercial Court, Family Court, Children's Court, and other specialised courts as created by the Chief Justice.[202]

The Court has unlimited and original jurisdiction in civil and criminal matters. It also boasts appellate and supervisory jurisdiction, jurisdiction to review decisions, and jurisdiction to hear matters relating to the violation of rights enshrined in the Bill of Rights.[203]

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[195] Kaaba (2018) 32.
[196] Court of Appeal Act 2016.
[197] Article 132 of the Zambian Constitution read with section 5(1) of the Court of Appeal Act.
[198] Article 131(1) of the Zambian Constitution read with section 4 of the Court of Appeal Act.
[199] Article 131(2) of the Zambian Constitution.
[200] Article 133(1) of the Zambian Constitution.
[201] Article 135 of the Zambian Constitution.
[202] Article 133(2) and (3) of the Zambian Constitution.
[203] Article 134 read with article 28 of the Zambian Constitution.

Considering that the High Court is essentially the only Court which holds the power to determine whether a right in the Bill of Rights has been infringed, and further considering that such cases usually involve the State against an individual or group of individuals, it is quite surprising that only one judge is required to constitute the Court.

There are 41 judges[204] currently appointed to the High Court with no limit set on the amount that may be appointed. Despite having far more appointed judges than the number of judges appointed in the Supreme and Appeal Courts, the High Courts have been reported as releasing limited judgements and being riddled with delays. In addition, many judgements remain unpublished and hidden from the public. This is worrying because it makes the Judiciary vulnerable to speculative attacks and allegations of bias and political manoeuvring.[205]

12.5. The Lower Courts

The lower Courts, the Subordinate Court, Small Claims Court and Local Court are created by Article 120 and are all under the direction of the Chief Justice. Their powers, function and procedures are set out in the respective substantive legislation of the Courts.

12.6. The hierarchy of judges

The Chief Justice is the overall head of the Judiciary and the head of the Supreme Court. He is responsible for the efficient administration of the Judiciary, ensures that judges and judicial officers perform their judicial function properly, and establishes procedures to ensure that judges and judicial officers independently exercise judicial authority. The Chief Justice must further ensure that judicial officers can perform their functions without fear, favour, or bias.[206]

The Deputy Chief Justice must perform the functions of the Chief Justice when the Chief Justice is absent or there is a vacancy in the office of Chief Justice. He also assists the Chief Justice in the administration of the Judiciary and performs other functions assigned by the

[204] High Court Judges as indicated on the Judiciary of Zambia website available at https://www.Judiciaryzambia.com/category/adjudicators/high-court-judges/ (accessed 20 April 2021).
[205] Banda T "Project Report Access to Justice: Court Efficiency in Zambia" 2019 *Institute for African Development Cornell University* available at https://ecommons.cornell.edu/bitstream/handle/1813/69970/Access%20to%20Justice%20Zambia%20Report%20-%202018%20-%20Court%20Efficiency%20%28Accessible%29.pdf?sequence=5&isAllowed=y (accessed 20 April 2021).
[206] Article 136 of the Zambian Constitution.

Chief Justice.[207] If the Deputy Chief Justice cannot fulfil his duties the President, in consultation with the Judicial Service Commission, may designate a judge from the Supreme Court to act as the Deputy.[208]

The Constitutional Court, despite being equal to the Supreme Court, is headed by the President of the Constitutional Court who is responsible for the administration of the Constitutional Court under the direction of the Chief Justice.[209] Given the earlier discussion on the Constitutional Court and the fact that the President of the Constitutional Court ranks below the Chief Justice, there may well be merit to the argument that the Constitutional Court is a mere illusion of constitutional democracy. As is the case in the Supreme Court, the Deputy President of the Constitutional Court serves in a supporting role to the President and may be appointed by the President in consultation with the Judicial Service Commission should the position become vacant.[210]

All judicial officers are subject to the supervision of the Chief Justice, but they retain overall control in the adjudication of their matters within the law. Judicial officers are subject to the control of the Chief Justice in terms of how long they take to pass judgement and, to a certain extent, the quality of their judgements.[211]

12.7. Appointment of judges

The President, in consultation with the Judicial Service Commission and after ratification by the National Assembly, appoints the Chief Justice and his Deputy, the President of the Constitutional Court and his Deputy as well as all other judges.[212] The qualifications for appointment as a judge are that the candidate must have been a legal practitioner for not less than 15 years in the case of a Supreme Court and the Constitutional Court judge, not less than 12 years in the case of a Court of Appeal judge and not less than 10 years for the appointment of a High Court judge.[213]

[207] Article 137(1) of the Zambian Constitution.
[208] Article 137(2) of the Zambian Constitution.
[209] Article 138 of the Zambian Constitution.
[210] Article 139 of the Zambian Constitution.
[211] SADCLA Report on Zambia (2020) 12.
[212] Article 140 of the Zambian Constitution.
[213] Article 141 of the Zambian Constitution.

Kaaba[214] submits that the process of appointment of judges leaves a lot of room for the appointment of Executive-minded judges. This is because the President has a free hand at the appointment of judges. The President appoints judges "on the recommendation" of the Judicial Service Commission. The use of the word "recommendation" has been narrowly defined by the Supreme Court.[215] According to the court, to recommend "*implies discretion in the person to whom it is made to accept or reject the recommendation*."[216]

Further, the appointment process lacks transparency. In the past vacancies were not advertised and the whole recruitment and appointment process was shrouded in secrecy. This result in the public not being able to determine what qualified one candidate above another for office of a judge. The reported response of one judge to a parliamentary committee question about his suitability for office is telling. Africa Confidential[217] reported that when Judge Martin Musaluke was asked about his suitability for office he answered: "I did not apply for the position I am being considered for…The fact that I have been recognized by the Appointing Authority [President Edgar Lungu] is evidence of my competence and suitability."

12.8. Tenure of judges

The tenure of judges is guaranteed until the age of seventy-five, but they are allowed to retire, with full benefits, at the age of sixty-five.[218] The Chief justice and the President of the Constitutional Court may only hold office for ten years after which they may hold office as a judge of the Supreme or Constitutional Court on the condition that they have not reached the age of retirement.[219] Once a judge has retired he may not be re-appointed as a judge.[220] This may very well prevent the bench from ageing and becoming outdated, but could also lead to a hole in the bench should the Judiciary not be able to train and appoint judges fast enough.

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[214] Kaaba (2018) 27.
[215] *Minister of Information and Broadcasting v. Chembo and others* 2007 ZMSC 11.
[216] Kaaba (2018) 28.
[217] "Opposition MPs accuse the President of putting an unqualified Judge on the Constitutional Court" 2018 3 *Africa Confidential* 59 available at https://www.africa-confidential.com/article-preview/id/12231/Judges_to_rule_on_Lungu%27s_future (accessed 20 April 2021).
[218] Article 142(1) and (2) of the Zambian Constitution.
[219] Article 142(3) of the Zambian Constitution.
[220] Article 142(4) of the Zambian Constitution.

Security of tenure is related to the remuneration of judges. In Zambia, the judges' salaries and conditions of service are recommended by the Judicial Service Commission and published annually by the President.[221] This again strengthens the Executive's stronghold over the Judiciary. During 2009 the Institute for Security Studies reported that poor remuneration within the Judiciary is one of the major problems it faces.[222]

12.9. Removal of judges

Judges may vacate from office either by way of retirement, resignation or may be removed from office. A resignation must be done on notice and in writing, addressed to the President.[223]

The Constitution allows for four grounds of removal:[224]

(a) mental or physical disability rendering the judge unable to perform his duties,

(b) incompetence,

(c) gross misconduct or

(d) bankruptcy.

The removal of a judge is initiated by a complaint to or by the Judicial Complaints Commission based on one or more of the grounds stated above. Should the Judicial Complaints Commission find that there is a prima facie case, it will report same to the President. The President must then within seven days suspend the judge and inform the Judicial Complaints Commission of the suspension. The Judicial Complaints Commission must then within thirty days, hear the matter against the judge or constitute a medical board in the case of mental or physical disability. Should it be found that the complaint was unsubstantiated, the Judicial Complaints Commission will inform the President who then must revoke the suspension alternatively remove the judge from office in the event the complaint is confirmed.[225]

[221] Sections 3 and 12 of the Judges (Conditions of Service) Act of 1996.
[222] Alemika EEO "Policy Brief Judicial systems in Sierra Leone, Tanzania and Zambia"2009 *Institute for Security Studies* 4 available at https://www.files.ethz.ch/isn/112457/NO15OCT09.pdf (accessed 19 April 2021).
[223] Article 142(5) of the Zambian Constitution.
[224] Article 143 of the Zambian Constitution.
[225] Article 144 (1)-(5) and (9) of the Zambian Constitution.

The Constitution calls for removal proceedings to be held in camera and for the judge to be represented.[226]

Although on the face of it, it appears the President only plays a peripheral role, it is actually the President who has a free hand in constituting the Judicial Complaints Commission. Its members are not appointed by the Judicial Service Commission but are directly appointed by the President.[227] As Hatchard et al argued, leaving such power in the hands of the President "provides a potential weapon through which to intimidate judges and thus help create or maintain a pliant Judiciary."[228] By simply wielding that power, even when not invoked, it sends a clear message to judges that the President has the levers of power over them. In essence, the constitution creates a process for both the appointment and the removal of judges. These procedures are meant to ensure that the Judiciary is independent and thereby prevent judicial capture.

13. The Judicial Services Commission

The Judicial Service Commission consists of eight members:[229]

(a) the chairperson who is appointed by the President and who is currently or has previously held a high judicial office,
(b) a judge nominated by the Chief Justice,
(c) the Attorney General with the Solicitor-General as an alternate,
(d) the Permanent Secretary responsible for public service management,
(e) a magistrate nominated by the Chief Justice,
(f) a representative of the Law Association nominated by the Association,
(g) the Dean of a Public law school nominated by the minister, and
(h) one member appointed by the President.

Six of the eight members are either directly appointed by the President or has a close affiliation to the President. This means that the Judicial Service Commission is mostly

[226] Article 144 (8) of the Zambian Constitution.
[227] Section 20(2) Judicial (Code of conduct) (Amendment) Act No. 13 of 2006
[228] Hartchard J Ndulo M and Slinn P *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (2009) Cambridge: Cambridge University Press 155.
[229] Section 5 of the Service Commissions Act of 2016.

comprised of Executive-minded members and, therefore, does not give the impression of a truly independent commission. This can be contrasted with the South African JSC[230] which seems to have wider representation.[231] It is noteworthy to mention that the Service Commission Act expressly states that the Commissions, which include the Judicial Service Commission, exercised the "…powers of the President in relation to other offices in the public service…on the President's behalf…"[232]

The Judicial Service Commission is responsible for making recommendations to the President on the appointment of judges, the appointment, confirmation, promotion, and hearing of appeals from judicial officers; and for carrying out a function provided for in this Constitution[233], it must also:

(i) make recommendations to the President regarding the appointment and terms and conditions of service of the Chief Administrator.
(ii) appoint, confirm, promote, second, re-grade, transfer, discipline and separate the employees of the Judicial Service.
(iii) authorise the withholding, reduction, deferment, or suspension of salary of employees in the Judicial Service.
(iv) hear and determine complaints and appeals from employees in the Judicial Service; and
(v) perform such other functions as are necessary or incidental to the regulation of human resource management in the Judicial Service.[234]

Article 220(2)(b) indicates that the Judicial Service Commission must "make recommendations to the president on the appointment of judges." As already noted above, the use of the word "recommend" provides discretion to whom the recommendation is made. Further, the provisions leave the composition and structure of the Judicial Service Commission to be prescribed in subordinate legislation. This is dangerous as it allows for circumventing the constitution through subordinate legislation.[235]

[230] Section 178(1) Constitution of South Africa of 1996
[231] B Kaaba (2018) 28.
[232] Section 31(3) of the Service Commissions Act of 2016.
[233] Article 220(2) of the Zambian Constitution.
[234] Section 6 of the Service Commissions Act of 2016.
[235] B Kaaba (2018) 28 – 29.

The independence of the Judicial Service Commission can be questioned as the composition, as well as its recommendations, may be moot due to Executive interference.

14. The Judicial Complaints Commission

The Judicial Complaints Commission is established by the Constitution[236] and is responsible for the enforcement of the Code of Conduct for judges and judicial officers; ensuring that judges and judicial officers are accountable to the people for the performance of their functions; for receiving complaints lodged against a judge or judicial officer; hearing a complaint against a judge or judicial officer; for making recommendations to the appropriate institution or authority for action; and performing other functions as prescribed.[237]

If the appointment of judges ensures a full and competent bench the removal of judges directly affects the life span of the bench. Choudhry argues that the power of removal is directly related to the power of appointment for at least two reasons.[238] First, the power of removal allows the appointing regime to remove individuals who may have been appointed on a non-partisan basis or have behaved independently to pave way for a partisan appointment. Second, the power to remove judges may serve as a tool to enforce "*the principal-agent relationship*" between the appointing regime and the appointed judge.

Kaaba holds that although on the face of it, it appears the President only plays a peripheral role, it is actually the President who has a free hand in constituting the Judicial Complaints Commission. Its members are not appointed by the Judicial Service Commission but are directly appointed by the President.[239] As Hatchard et al argued, leaving such power in the hands of the President "*provides a potential weapon through which to intimidate judges and thus help create or maintain a pliant Judiciary*."[240] By simply wielding that power, even when

[236] Article 236(1) of the Zambian Constitution.
[237] Article 236(2) of the Zambian Constitution.
[238] Choudhry S 'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy" 2009 2 *Constitutional Court Review* 57 available at https://www.researchgate.net/publication/228126301_'He_Had_a_Mandate'_The_South_African_Constitutional_Court_and_the_African_National_Congress_in_a_Dominant_Party_Democracy (accessed 19 April 2021).
[239] Section 20(2) Judicial (Code of Conduct) (Amendment) Act No. 13 of 2006
[240] Hartchard *et al* (2009) 155.

not invoked, it sends a clear message to judges that the President has the levers of power over them.[241]

It would seem as if the independence of the Judiciary is and the court's ability to develop progressive jurisprudence that ensures constitutional values are upheld, especially against narrow political interests of ruling politicians, are at risk as the mechanisms for constituting the court and removal of judges does not necessarily ensure that only the best and most committed judges are appointed and retained.[242]

15. Chief Administrator

Section 5 (1) of the Judiciary Administration Act[243], states that the Chief Administrator of the Judiciary is the Chief Executive Officer of the Judiciary and is responsible to the Chief Justice for the day-to-day administration of the Judiciary and the implementation of resolutions of the Judicial Service Commission. The Chief Administrator is appointed by the Judicial Service Commission.[244] The overlap between the Chief Administrators responsibility towards the Chief Justice and the Judicial Service Commission, two independent bodies, may cause conflict in the execution of duties or orders.

16. Financial Independence of the judiciary

Financial independence is created by the constitution which states that "[t]*he Judiciary shall not, in the performance of its administrative functions and management of its financial affairs, be subject to the control or direction of a person or an authority*".[245] This does however not make express provision for sufficient funding.

Additionally, the Judiciary Administration Act[246] states that the Judiciary will be funded by monies as apportioned by Parliament. This means that the Judiciary is at the mercy of Parliament, being the legislative branch, for annual funding. The Act does make provision for

[241] Kaaba (2018) 30.
[242] Kaaba (2018) 29 – 30.
[243] Judiciary Administration Act of 2016.
[244] Article 146(1) of the Zambian Constitution.
[245] Article 122(3) of the Zambian Constitution.
[246] Section 17 of the Judiciary Administration Act.

income generation by the Judiciary through court fees, grants, gifts, donations, or bequests; or investments, fees or levies administered by the Judiciary.[247] As stated previously, however, the Judiciary by its nature does not have the capacity for significant income generation and by doing so may go against the principle of access to justice as it may become unaffordable to access courts should income generation become a focal point of the Judiciary. Thus, the latter provisions do not give much hope to the Judiciary.

The Chief Justice reported in her 2019 Annual Report[248] that: "[a]lthough the Judiciary only received 97.2 per cent funding of its budgetary allocation, the institution managed to sustain court operations and all the court sessions and circuits across the entire court system. About the budgetary allocation for capital projects, it is worth noting that only 5 per cent funding was released, and this severely compromised the Judiciary's ability to renovate and refurbish the many dilapidated court buildings, especially the Local Courts across the country."

The maintaining of court buildings and resources are crucial for the execution of judicial duties and could lead to the downfall of the Judiciary should it not be maintained as judges and judicial officers are directly affected in their execution of the law and their functions. The Judiciary Administration Act[249] states that the provision equipping and maintaining of courthouses, offices and other building may be necessary. This meant that the Judiciary at the mercy of the government to act which again creates an opportunity for interference by the Executive in the Judiciary. Poor funding of the Judiciary and inadequate personnel facilities has been a long time coming and was already identified in 2009 by the Institute for Security Studies as a major problem.[250]

No funding strategy could be found that speaks to the approval and apportionment of funding to the Judiciary, which renders one to believe that approval and apportionment of funding are done arbitrarily.

[247] Section 17(b) and (c) of the Judiciary Administration Act.
[248] *The Judiciary Annual Report* (2019) 22 available at https://www.Judiciaryzambia.com/wp-content/uploads/2020/10/The-Judiciary-of-Zambia-Annual-Report-2019-Approved.pdf (accessed 19 April 2021).
[249] Section 22 of the Judiciary Administration Act.
[250] Alemika (2009) 4 .

17. Training and Continued Training of Judges

The experience and expertise requirements set out in article 141[251] are the only mandatory requirement pertaining to the training of newly appointed and other judges. Save for the Service Commission Act[252] and the Judiciary Administration Act[253] no other provisions or legislation deals with mandatory training and continued training of judges.

The Service Commission Act merely states in general terms that affording adequate and equal opportunities for appointment, training, and advancement at all levels of the public service is part of the values and principles of public service as well as those of human resource management in the public service. The Judiciary Administration Act on the other hand allows for the publishing of regulations, by the Judicial Service Commission, on training courses as may be considered necessary for promoting or maintaining efficiency in the Judicial Service. No such regulations could be found to have been published.

The Zambia Institute of Advanced Legal Education (ZIALE) was established to provide post-graduate judicial training for Magistrates and Judges.[254] A cursory overview of the ZIALE website shows that most of its training focuses on general legal training for the legal profession and qualifying examinations for legal practitioners and does not cater for specific training for judges.[255] Further, the Annual Report[256] presented by the Chief Justice lists limited training of members of staff due to budgetary constraints as a challenge experienced and indicated that she appointed an Advisory Committee on Training and Continuing Education to advise. 356 judicial officers were reported as receiving training during 2019 and comprised of judges, magistrates, registrars, and Judiciary management.[257]

18. Analysis, trend development and cross-cutting issues

Having discussed the legal and political framework under which the Judiciary operates in Zambia, this section discusses whether judicial capture exists in Zambia using the eight trace

[251] The Zambian Constitution.
[252] Sections 3 and 4 of the Service Commissions Act of 2016.
[253] Section 23 of the Judiciary Administration Act.
[254] Section 4(h) of the Zambia Institute of Advanced Legal Education Act.
[255] ZAILE website available at https://www.ziale.org.zm/ accessed on 19 April 2021.
[256] The Judiciary Annual Report (2019) 23.
[257] The Judiciary Annual Report (2019) 18.

indicators developed by SADC Lawyers Association. It sights specific examples that impact the independence of the Judiciary bearing in mind the definition of judicial capture.

18.1. Issuance or attempts to issue retrogressive practise directives by judicial officers

An audit of the practice directives that have been issued in the past 7 years all point to the improvement in the administration of justice in Zambia.[258] For instance, the latest practice directives issued under the High Court (Amendment) Rules[259] were meant to ensure speedy delivery of decisions after years of complaints that matters take very long to resolve. While the Rules seeks to control the performance of judicial officers, the directive is positive in the sense that it ensures speedy and transparent administration of justice. An example of the rules introduced to that effect is that judges 'shall deliver judgement with 180 days final submissions were filed following trial'.[260] To ensure accountability Rule 16(3) of the new rules states:

> Where the Court fails to deliver its judgement or ruling within the period specified [180 days] in subrule (2), the Court shall— (a) Record the reasons for the failure (b) Forward to the chief justice a copy of the reasons recorded in accordance with paragraph (a); and (c) Immediately give the parties, or the advocates of the parties, notice of the new date on which the Court shall deliver the judgement or ruling.

The above rules give credence to the principle that the Judiciary is an institution accountable to the people from whom it derives its power. The new Rules, like other directives, was made following a consultative process between the bar and bench in Zambia. The speedy administration of justice was also a major talking point throughout the constitution-making process and as such, it becomes a necessary subject to be dealt with by the Judiciary. With the general welcome of the practice directives that have been issued, it can be argued that there is no evidence under this trace indicator, which seeks to establish undue control over the Judiciary.

18.2. Arbitrary case allocation

The allocation of cases is to a large extent systemized such that cases are generally allocated to judicial officers indiscriminately. However, there have been complaints that certain

[258] SADC LA Report on Zambia (2020) 16.
[259] High Court (Amendment) Rules of 2020.
[260] Rule 16 of the High Court (Amendment) Rules of 2020.

criminal cases against opposition political leaders have been allocated to a particular judicial officer of the subordinate Court. Records from the Subordinate Court and the Judicial Complaints Commission show that indeed some criminal matters involving political opponents were allocated to a particular Magistrate. Several complaints were filed against him by opposition political leaders regarding his conduct against them in Court and the alleged unfair adjudication of matters.[261]

After several of these complaints, the Judicial Complaints Commission upon due consideration of the matter recommended that the said magistrate be removed as a judicial officer from the Judicial service.[262] This decision was made in September 2020. However, as at the time of the SADC LA investigation, the decision has not been acted upon and the officer was still an active member of the Judicial Service.

To an extent, the issue surrounding this particular officer and the fact that several opposition leaders who have faced criminal charges were brought to his court, and during proceedings complained that he was being used for political purposes suggests a degree of capture. This is more telling because the Judicial Complaints Commission has recommended his removal, but the decision has not been acted upon. On the other hand, the court records also show that despite these complaints, in more instances than not, the judicial officer has made decisions in favour of the opposition leaders that have complained. He has also acquitted several leaders stating lack of evidence by the Court. As such, while the complaints relate to how the officer has treated them and while the recommendation is based on his treatment of accused persons, the actual judicial decisions made have been relatively fair.

Bearing in mind the definition of judicial capture, while the situation with this judicial officer is undesirable, it does not signify institutional capture of the Judiciary. There are several other politically sensitive cases that have been allocated to other judicial officers at different levels and these have been decided on the metrist against the state and sometimes in its favour. This notwithstanding, the overall point to be noted here is that even when one judicial officer is compromised to whatever extent, in a manner that favors the Executive, the institutional

[261] SADC LA Report on Zambia (2020) 16 -17.
[262] Funga M "Magistrate Simusamba to go, as JCC recommends his removal from Judiciary" 2020 *News Diggers* available at https://diggers.news/courts/2020/09/14/magistrate-simusamba-to-go-as-jcc-recommends-his-removal-from-Judiciary/ (accessed 21 April 2021).

balance between the three arms of government is severely impaired and that can have serious implications for democracy and the future well-being of the country.[263]

18.3. Retrogressive Court decisions in sensitive matters

Zambia has had several politically sensitive cases since 1991 and most recently since the 2016 amendment to the Constitution and the creation of the Constitutional Court. In many of these cases, the Court has made decisions against the state and in favour of civil society organisations and other stakeholders. An example of such a sensitive and important case is where the Law Association of Zambia commenced an action against the state and Cabinet Ministers who had continued holding office after Parliament was dissolved and received salaries during that period.[264] The Law Association argued that the Ministers had illegally continued to hold office and claimed that they should refund the money they received as salaries.[265] In a decision that gave public confidence in the Judiciary's independence, the Constitutional Court decided in favour of Law Association and the other petitioners and stating that:

> The invitation to us by the Solicitor General to take judicial notice that they have been rendering services for which they are entitled to remuneration cannot stand in the circumstances as the matter is being decided on its own peculiar circumstances to which Section 48 of the Employment Act or any other employer and employee relationship cannot apply. To put it in its proper context, the Ministers cannot be said to be discharging the functions of their offices to entitle them to any payments, as appointments to the said offices ceased upon the dissolution of Parliament on 11'h May, 2016.We would have agreed with the Solicitor General's argument if the Cabinet Ministers and Provincial Ministers were appointed from outside Parliament as was initially proposed in the Bill that was tabled and considered by the National Assembly. This is what was envisaged by Articles 116 and 117 prior to the amendment to Articles 116 (1) and 117 (1). Remaining in office after the dissolution of Parliament was tied to the Ministers and Provincial Ministers being appointed outside Parliament so that the dissolution of Parliament would not have influenced their continued stay in office until the President- elect is sworn into office. The emoluments paid to the 2'd to the 64'h Respondents from 12 May 2016 to date are to be agreed by the Petitioners and the

[263] Malila M "The Zambian Judiciary on trial : politicisation of the Judiciary or judicialisation of politics?" 2011 42 *Zambia Law Journal* 71.
[264] *Katuka and Law Association of Zambia v The Attorney General and 64 others* 2016 ZMCC 1.
[265] *Katuka and Law Association of Zambia v The Attorney General and 64 others* (2016) 961.

Respondents. In default of such agreement, the matter shall be referred by party for assessment by the Registrar of the Constitutional Court. [266]

This and other decisions recently made against the state from the different Courts have created a public perception that the Judiciary in Zambia is relatively independent,[267] however, the research has shown that the Judiciary is susceptible to influence decision and capture.

18.4. Bribery of the Judiciary

A marker of judicial capture under this indicator is 'evidence of bribery of the entire Judiciary or a critical, sizeable section of the Judiciary by members of the Executive, cartels/commercial forces'.

It needs to be appreciated that while evidence of this nature is very difficult to find or unearth, generally, due to their role, the existence of bribery among judicial officers is possible. A 2020 corruption report[268] describe the Zambian judicial system as being of high risk. It stated that bribes and irregular payments in return for fabled additional decisions or common and that a third of Zimbabwean Nationals believe but most judges are corrupt.

However, as there is no concrete evidence that that the *entire Judiciary* or *sizeable section* of it has received bribes or is under the undue influence of business players.[269] The important rider here is that evidence of this nature is very difficult, if not impossible to unearth, something which currently goes outside the scope of this study.

18.5. Improper relationships involving the Judiciary

The markers under this indicator are inappropriate relationships with business or political parties. For example, where judicial officers attend political events as members or representatives of the party.

[266] *Katuka and Law Association of Zambia v The Attorney General and 64 others* (2016) 1038 - 1039.
[267] SADC LA Report on Zambia (2020) 18.
[268] "Zambia Corruption Report" 2020 *GAN Integrity* available at https://www.ganintegrity.com/portal/country-profiles/zambia/ accessed on 22 April 2020.
[269] SADC LA Report on Zambia (2020) 19.

It is worth noting that even judicial officers retain their right to vote and as such will have political preferences. However, they are expected to remain uncompromised and be unbiased towards political will.[270]

Due to the politically charged nature of Zambia, judges are under such public scrutiny that appearing at a public social event could cause controversy. As such, their relationships with the business world or with political parties and their leaders may turn into a double-edged sword for a judge relying on his integrity.

There have been allegations of specific judicial officers being associated with political parties but in all cases, these allegations have never been substantiated nor has there been any indication of how such allegations manifest in the execution of judicial functions. Further, there are no records at the Judicial Complaints Commission pointing to judicial officers having inappropriate relationships with the business world or with political parties that suggest capture.[271]

18.6. Legislative and Constitutional rules which subordinate the Judiciary to the Executive

Although the Zambian Judiciary has come a long way in its independence from the Executive, there are still hints of subservience to the Executive. This can be seen from the appointment of judges as well as the allocating of funding and resources to the Judiciary. The constitution may not expressly allow for the separation of powers, but it does lend itself towards a theoretical separation of powers.

It may not be as drastic as in other jurisdictions, but the Judiciary still has a long way to go before it reaches complete independence from the Executive.

18.7. Threats against the Judiciary or judicial officers

There have been several comments against the Judiciary in Zambia, especially from the ruling party. Most of these comments have come because of the Judiciary making decisions that are unpopular to the ruling party. On 2 November 2017, President Edgar Lungu issued a statement stating:

> Right now, there is a matter in court which is subjudice but they are saying I have already done two terms and I shouldn't contest in 2021 but how many people have done five terms in their

[270] Principle 7 of the Cape Town Principles.
[271] SADC LA Report on Zambia (2020) 19.

> political parties and still continue? …To my colleagues in the Judiciary, my message is just do your work, interpret the law without fear or favour and look at the best interest of this country. Don't be copycat and think that you are a hero if you plunge the country in chaos. I want to conclude by saying that those people who don't love peace and freedom will say President Lungu is intimidating the courts of law, *I am not intimidating you my colleagues in the Judiciary, I am just warning you…we don't want to plunge this country this country into chaos because we are trying to imitate what is happening elsewhere*.[272]*(Own emphasis added)*

During early March 2021, Paul Moonga, a ruling party member, made another statement perceived by many as an intimidation tactic aimed at the Judiciary.[273] Moonga, based on the belief that the opposition party was attempting to bribe judges, stated:

> So, [instead of putting] on money to grow the party, they're busy putting on money to see whom they can corrupt; a judge to nullify our president. *We are very much alive, we're aware and we are watching all the judges in Zambia*. *(Own emphasis added)*…Don't fall prey to these monsters who have no agenda for Zambia, whose agenda is simply to become president of Zambia at any cost. This, members of the press, my office, has this message…

Although these comments seem sincere and without malice they were received in the context of the political climate and perceived as threats by many.

The Judiciary in Zambia has maintained a culture of not responding to public attacks and as such does not make any pronouncements of matters. Instead, it relies on the goodwill of civil society to come to its aid. The Law Association of Zambia has thus been a consistent ally of the Judiciary in the event of an attack and in keeping with this approach it responded to the attack on the Judiciary through a statement which in part read:[274]

> The Law Association of Zambia (LAZ) is deeply concerned with the attacks on the Judiciary attributed to Mr. Paul Moonga who is the Patriotic Front (PF) Lusaka Province Chairperson, during a press briefing at the PF Secretariat on Friday, 5th March 2021. Mr. Moonga's sentiments have since gone viral, a situation we feel needs redress […] The Judiciary, being a

[272] "The Perspective, by Edward Bwalya Phiri: Political intimidation, a threat to democracy in Zambia" 2021 *The Mast* accessible at https://www.themastonline.com/2021/03/20/the-perspective-by-edward-bwalya-phiri-political-intimidation-a-threat-to-democracy-in-zambia/ (accessed 22 April 2021).
[273] The Mast (2021) available at https://www.themastonline.com/2021/03/12/moonga-meant-to-intimidate-concourt-judges-says-kazabu/ (accessed on 22 April 2020).
[274] "LAZ deeply concerned with attacks on the Judiciary" (2021) *Lusaka Times* available at https://www.lusakatimes.com/2021/03/11/laz-deeply-concerned-with-attacks-on-the-Judiciary/ (accessed on 22 April 2021).

> creation of the Constitution, is subject only to this Constitution and the law and not be subject to the control or direction of a person or an authority. […] LAZ strongly condemns unwarranted attacks on public institutions which are established to work independently, in furtherance of national order and governance. *If such public utterances are left unchecked or requisite reprimand not effected, the country may face a quagmire where institutions risk being cowed into taking extraneous considerations in the discharge of their statutory mandates* […] We therefore, call upon the PF leadership to prevail over its members to refrain from issuing unwarranted attacks against the Judiciary or indeed any other public institutions as these institutions should not be politicised in the name of serving personal interests. LAZ will engage the ruling party to register its disquiet. *We also urge the Judiciary to continue discharging its mandate without fear or favour in tandem with its constitutional mandate. (Own emphasis added)*

The statement was received well by members of the public and typical of LAZs statements in defence of the Judiciary. While threats and attacks on the Judiciary are not common and are quickly condemned when made, their occurrence sends the signal that the Judiciary can be undermined by the Executive at will. It also creates fear and unwarranted pressure in judicial officers and thus creates an inconducive environment for judicial independence.[275]

In this regard, it can be argued that there is a worrying potential for capture. In the main, political statements against the Judiciary such as those discussed above are also indicative, to a worrying degree, of a government that may not have the best interest of the people at heart.

18.8. Improper public pronouncement

As stated above the Judiciary in Zambia has maintained a culture of silence even when attacked. As such, there are no recorded public pronouncements that signify or indicate capture under this indicator.[276]

[275] SADC LA Report on Zambia (2020) 20.
[276] SADC LA Report on Zambia (2020) 21.

19. Recommendations for Zambia

Non-interference with the functioning of the judicial system is, as discussed in this report, integral to the independence of the Judiciary. The principle of separation of powers is a cardinal rule and essential to the proper functioning of the Judiciary. It is imperative that the Judiciary functions independently from the Executive and Legislature. To ensure this independence and integrity it is vital that the Constitution and other laws of a country explicitly speak to and enforce due separation of powers. The Executive and the Legislature simply cannot interfere in the way Judiciary carries out its functions.[277]

We now make the following recommendations for purposes of strengthening, promoting, protecting, and practically respecting the independence of the Judiciary in Zambia.

19.1. Proper separation of powers

Throughout this report reference has been made to the importance of the separation of powers when attempting to constitute an independent Judiciary. From the discussions in this report, many issues with the Zambia Judiciary either stem from or contribute to a poor or complete lack of separation of powers.

Therefore, the Constitution should provide for clearer and stronger separation of powers. Although the article 119 of 2016 Zambian Constitution attempts to vests exclusive judicial authority in the Judiciary, it still lacks a clear or explicit separation of powers clause. Articles 122 and 123 directly speak to the functional and financial independence of the Judiciary.

It is recommended that section 119 of the Zambian Constitution be amended to allow for more real separation of powers and judicial independence by adding the following illustrated in italics:

> 119(1). Judicial authority vests exclusively in the courts and shall be exercised by the courts in accordance with this Constitution and other laws. The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour, or prejudice.[278]

The inclusion of a section promoting institutional independence and separation of powers, will also be integral, such as:

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[277] Nkhata C M "Comparative analysis on judicial independence between Zambia and Lesotho" 2020 *SADC LA Resource* 6-7.

[278] Sections 165(2) – (6) of the Republic of South Africa, 1996.

The Constitutional Court, the Supreme Court of Appeal, and the High Court of Lesotho each has the inherent power to protect and regulate their own process, and to develop the common law, considering the interests of justice.

19.2. Strengthen the Judicial Services Commission

There is a clear lack of practical independence in terms of the Judicial Services Commission. Strengthening the composition, roles, functions, and powers of this Commission is crucial. Although the Judicial Services Commission is protected from outside interference in the performance of its duties, it still presents a glaring threat to the independence of the Judicial Services Commission if the composition process is biased or potentially biased. Selecting the members who serve on the Judicial Services Commission through potentially biased practices impacts the overall, practical independence of the Judiciary. It is important that the Judiciary be truly independent in practice, and not just seemingly independent on paper.[279]

In Zambia the judicial complaints Commission is in charge of disciplining and removing judges. As explained Above this may very well pose a risk or even be a threat to the Judiciary as it may provide a way for the Executive to interfere by having two independent bodies one of which is appointed solely by the president.

Based on the experiences, resistance and challenges and opportunities discussed above the following recommendations are made:

(a) The Judicial Services Commission should be an independent and widely representative commission that is tasked with the appointment and removal processes for judges. The commission through its composition and members must inspire confidence that due process will be followed and that all decisions will be made based on law, procedure, and fact and not out of political considerations.

(b) The aim of the Judicial Services Commission must be to identify and secure the appointment of persons who are independent, impartial, have integrity, possess professional competence, and have any additional attributes that may be stipulated for positions that require specific expertise or leadership.

[279] Nkhata (2020) 6-7.

(c) The Judicial Services Commission's process of selection and appointment should be fair and inspire the best candidates to apply and should be without discrimination unless fair discrimination is required to justify past wrongs and is in line with international standards.

(d) The Judicial Services Commission should be clearly independent, suitably composed, and resourced, and its protection should be entrenched not only in the Constitution of Zambia, but also subservient legislation.

(e) The Judicial Services Commission should be composed of a greater number of members and that are drawn from the Judiciary and from a range of other institutional, professional, and lay backgrounds. The members should be appointed in proportion to safeguard against unjustified dominance of the commission by the Executive or by members of parliament or representatives of political parties.

(f) The Judicial Services Commission should employ a process of candidate interviews that is respectful and fair and will promote the legitimacy of the selection process.

(g) The Judicial Services Commission's deliberations should be private to avoid interference but should be sufficiently recorded.

(h) One of the most crucial recommendations are that the Judicial Services Commission should be the decision-making authority in the selection and appointment of candidates and should the appointing authority, the President in Zambia's case, refuse or refer a candidate back for reconsideration it should not be lightly or without proper reason. Only in exceptional circumstances should the appointing authority be allowed to choose from a list of selected candidates recommended by the commission, and

(i) The Judicial Services Commission should be accountable for its decisions and same may be subject to examination by an independent ombudsman.

19.3. Process for the appointment and removal of judges

There is also a genuine need to carefully review and revise the procedure for the removal of judges as contained in sections 143 and 144 of the Zambian Constitution. There seems to be a lot of opportunity for potential Legislative and Executive interference in the functioning of the Judiciary, which should be addressed. Specific instances identified include security of tenure which can be guaranteed by drafting and implementing grounds, conditions, and process for the dismissal of a Judge. It will once again be pivotal that these procedures be free of political manipulation.

The President's extensive influence in appointing and removing judges should be addressed. This is a clear violation of the doctrine of separation of powers and creates the impression that the ultimate authority on the appointment or removal of judges vests solely in the President. The Judicial Services Commission, once properly constituted, should be the body that recommends the proper candidates for appointment, and possible reasons for removal, to the President.

It is also crucial that there be an objective and transparent method of appointing members of the Judiciary. Rules of procedures for appointment, tenure and removal of Judges must be drafted and implemented. This will aid in ensuring that the right people hold judicial office and that appointments are done in accordance with due process under the law. The appointment of Judges by politicians is simply not good practice and undermines the independence of the Judiciary. Judges appointed in such a manner are often required to pledge their allegiance to the political party that appoints them, further damaging the public perception of judicial independence.

The best way to ensure the fair and transparent appointment of Judges remains the practice of appointment through an independent judicial body like the Judicial Services Commission. However, this will serve no purpose if the Judicial Services Commission remains improperly constituted, as is the current case in Zambia. Ideally, these processes should be codified, and the Judicial Services Commission should consider the high-quality criterion based on a candidate's qualifications, experience, skill, integrity, and impartiality.

The Constitutional appointment process in Zambia relies heavily on the Executive who ultimately has the power to appoint. A weak separation of powers and the lack of subservient and complimentary legislation jeopardise the independence of the Judiciary. Due to this, and in line with the above, the following recommendations are made.

The Constitution of Lesotho must be amended, and subservient legislation should be passed in Zambia which:

(a) Sets out a qualifying criterion for judges which, amongst others, considers a candidate's criminal record and political compliance.
(b) Sets out a minimum base criterion which the Judicial Services Commission can add to base on the relevant opening on the bench. This criterion can set a standard qualification,

minimum years' experience required, level of writing skills, and command of the official court language.

(c) Increased transparency in the application process by including stakeholder engagement.

(d) A judicial Code of Ethics to set the criterion for assessing the 'fit and proper'-standard of candidates.

(e) Set minimum conditions of service and tenure along with guaranteed remuneration for judges and continuous education.

(f) Manages and exposes conflicts of interest of candidate judges, especially political conflicts.

The Constitution can be amended to allow for less Executive interference by adding a clear separation of powers and by placing as much power in the President regarding the hiring or termination of a judge. The system of appointment of judges must be reviewed.

19.4. Remuneration and promotion of Judges

Judicial independence can be further secured by considering competitive salaries and favourable conditions of service for judges. It will at least contribute to the impartiality and independence of judges since they may be less likely to bow to financial influence and manipulation.

The professional progression of judges must also be prescribed by law to ensure that promotions are not based on corrupt actions. A judge's integrity and good performance must determine their professional progression. Their connections to powerful individuals or institutions should not play a role and corrupt practices should not be rewarded.

It is recommended that the Zambian Constitution be amended to include security of remuneration for judges by including sections such as:

Conditions of service and tenure of members of the Judiciary

(1) Judges are entitled to the salaries, allowances and other benefits fixed from time to time by the Judicial Service Commission with the approval of the President given after consultation with the Minister responsible for justice and on the recommendation of the Minister responsible for finance.

(2) An Act of Parliament must provide for the conditions of service of judicial officers other than judges and must ensure that their promotion, transfer and dismissal, and any disciplinary steps taken against them, take place--

(a) with the approval of the Judicial Service Commission; and

(b) in a fair and transparent manner and without fear, favour, or prejudice.

(3) The salaries, allowances, and other benefits of members of the Judiciary arc a charge on the Consolidated Revenue Fund.

(4) The salaries, allowances, and other benefits of members of the Judiciary must not he reduced while they hold or act in the office concerned.[280]

19.5. Funding of the Judiciary

Section 123 of the constitution highlights the importance of financial and other support that is needed to preserve judicial independence and operational efficacy. It is apparent that the government is currently failing to meet its constitutional obligations towards the Zambian Judiciary as it pertains to Section 123.

It is recommended that the Judicial Services Commission be properly constituted and that it should draft a financial plan for the Judiciary for the next three years. Financial specialists should be brought in to assist the Judiciary with this so it may present a comprehensive plan for its resource needs to government.

19.6. Conflicts of interest

Judges must be safeguarded against possible conflicts of interest. Therefore, code of ethics or conduct should be drafted which outlines potential conflicts of interest opiate professional political or business orientated. Continuous training on conflict of interest and declarations of conflict of interest should also be considered, this will reinforce the public's confidence in the independence of judges and boast their impartiality.

19.7. Training and continuous education of judges

Quality judicial training and education should be both a right and duty of any judge. These training systems should be led and organised under the supervision of the Judiciary. The State also has to ensure that judicial officials have appropriate opportunity and access to education and training. To this effect, States are required to establish specialised institutions for the education and training of judicial officials and to encourage comparative collaboration

[280] Section 123 of the Constitution of Zimbabwe Amendment (No. 20) Act 2011.

amongst judicial institutions across Africa. The duty of the State goes further than initial education and expands to continuous professional development throughout a judge's judicial career.

It is recommended that a training Institute that is organized, systematic and ongoing be established. It should be administered under the control of an adequately funded independent judicial body and offer training on topics such as the teaching of the law, judicial skills, and various social contexts. Judicial officers, with the assistance of specialists in the field, should develop and maintain the curriculum. These courses should not only be aimed at the Judiciary but also at lawyers as part of their ongoing professional development. This will ultimately aid in building a pool of suitably qualified future candidates for the Judiciary.

PART C:

JUDICIAL INDEPENDENCE IN ZIMBABWE

20. Zimbabwe Background

During a *coup d'état* in November 2017 President Mugabe was overthrown, and President Mnangagwa took office. Zimbabweans hoped for a new chapter for the country after 38 years of control under the Mugabe regime. However, it seems that cases of human rights violations, arrests and detainment of civic rights activists, corruption, economic demise, crumbling infrastructure, and high unemployment rates remain unresolved.[281] Many have indicated that the situation in the country has worsened since President Mnangagwa took over.[282]

It seemed that the country's new leadership was also not appropriately concerned with respecting and promoting the independence of the Judiciary. In 2019 President Mnangagwa appointed war veterans and inexperienced lawyers to key judicial positions.[283] There seemed to be many discrepancies regarding the chosen appointees and therefore a lot of questions arose. The President appointed eight judges, among them a member of the ruling political party, from a questionable pool of lawyers. Some of the candidates openly admitted to never serving within a court of law during their career, and to not knowing the difference between court applications and actions.[284] Supreme Court candidates who scored highest in the public interviews were overseen in favour of candidates that had dismal scores.[285] Even though the Constitution of 2013 required the Judicial Services Commission (JSC) to hold public interviews of candidates for all senior judicial appointments, President Mnangagwa seemed to ensure the appointment of the candidates that performed poorly.

In reaction to this hundreds of lawyers marched to the Constitutional Court to call for the immediate restoration of the rule of law and order in Zimbabwe.[286] The march was organised by the Law Society of Zimbabwe who also stated that members of the protest group noticed

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[281] Chifamba M "Zimbabwe: Mnangagwa's capture of Judiciary a red flag for state failure" (23 November 2020) *The Africa Report Online* available at https://www.theafricareport.com/51602/zimbabwe-mnangagwas-capture-of-Judiciary-a-red-flag-for-state-failure/.

[282] Chifamba (2020).

[283] Zenda C "Is Zimbabwe's new leader stifling judicial freedom?" (27 June 2019) *TRT World News Online* available at https://www.trtworld.com/magazine/is-zimbabwe-s-new-leader-stifling-judicial-freedom-27854.

[284] Zenda (2019).

[285] Zenda (2019). For example, Justice Francis Bere who was appointed to the Supreme Court, had a record 43% of his judgments set aside after they were found to be unsound in Supreme Court appeal hearings. In contrast to this, Justice Nicholas Mathonsi who was overlooked for the appointment, handed down a record 333 judgments in three years, of which only 22 were appealed. Of these appeals 21 were upheld by the Supreme Court as correct.

[286] Ndlovu R "Zimbabwean lawyers march to demand a return to the rule of law" (29 January 2019) *TimesLive Online* available at https://www.timeslive.co.za/news/africa/2019-01-29-zimbabwean-lawyers-march-to-demand-a-return-to-the-rule-of-law/.

worrying trends in the Judiciary. This involved the fast-tracking of cases, routine denial of bail, routine dismissal of applications, and blatant disregard for constitutional provisions.[287]

In October 2020 Zimbabwe judges sent a formal letter to the President and Zimbabwe Anti-Corruption Commission, outlining instances of judicial capture and noting that this is a major challenge affecting the Judiciary. The letter alleged that the Judiciary was under siege and judges were unable to independently execute their duties without interference from the Executive and other state agencies.[288]

Although the Zimbabwe Constitution calls for judicial independence[289] judges have accused the Chief Justice, Luke Malaba, of influencing the decisional independence of judges and creating situations where judges operate out of fear and not objectivity. To this, Justice Minister Ziyambi responded and stated that the courts were not captured and confirmed that he was not able to interfere in the work of the Judiciary.[290]

There have also been reports of whistle-blowers being prosecuted and Magistrates acting out of fear of crossing the government agenda. Reports suggest that only persons aligned with the President and ruling party are granted bail in the Magistrate's Court.[291] Anti-government activists have been arrested and charged with various crimes. Some were even sent to the Chikurubi maximum prison.[292]

It is against this background that the following report addresses the current state of judicial independence in Zimbabwe. It is also important to understand that Zimbabwe has undergone various attempted changes to its Constitution in the past few years, which can create some confusion to a non-citizen assessing the state of judicial independence. For this purpose, the current Constitution of Zimbabwe, still in force at the time of writing, will be referred to as the 2013 Constitution.[293]

[287] Ndlovu (2019).
[288] Chifamba (2020).
[289] Section 164 of the Constitution.
[290] Chifamba (2020).
[291] Chifamba (2020).
[292] Chifamba (2020).
[293] 2013 Constitution.

21. Current legislative and other frameworks that promote judicial independence

Transparency and accountability are central themes in the 2013 Constitution.[294] There seems to be a clear move to break away from past arbitrary use of power to a more equal use of power. The preamble of the Constitution speaks to democracy, good governance, transparent governance, accountable governance, and the rule of law.[295]

The 2013 Constitution also provides that the Chief Justice is the head of the Judiciary and oversees the Constitutional Court and the Supreme Court. He also has extensive powers to ensure that judges who may be suspected of misconduct are subjected to the proper disciplinary procedures.[296] The Constitution also expressly guarantees the independence and impartiality of the courts.[297]

Section 164 of the Constitution clearly provides for an independent Judiciary which is subject only to the constitution and the law. Courts are expected to apply the constitution and the law impartially and without fear or favour.[298] It further underscores the principal that the independence of the Judiciary is crucial to the rule of law and a democratic society. Therefore, neither the state nor any other institution of government can interfere with the proper functioning of the courts and it has a duty to protect judicial independence.

Section 165 as an extension of section 164 goes further to set extremely stringent measures for appropriate conduct by judicial officers in executing their duties, acting ethically, and administering justice. It speaks strongly against undue influence, corruption or solicitation of judicial officers and makes it clear that this behaviour is unconstitutional. It also ensures that members of the Judiciary take all the necessary steps to ensure their continued development, training, and education to ensure they can perform their duties to the highest standard possible.

These measures provided for in the Constitution speak to various international and regional human rights instruments and best practices regarding judicial independence. It underpins

[294] "Judicial Accountability: An adaptation of Practitioners Guide No.13 for Zimbabwe" 2020 *International Commission of Jurists* at 5 available (hereafter ICH Report) available at https://www.icj.org/wp-content/uploads/2020/11/Zimbabwe-PG-No-13-Accountability-adaptation-Publications-Reports-Thematic-report-2020-ENG.pdf accessed 14 April 2021).
[295] Preamble of the 2013 Constitution of Zimbabwe.
[296] ICJ Report (2020) 9.
[297] Section 164 of the Constitution.
[298] Section 164(1) of the Constitution.

the values of a democratic society with a strong respect for the rule of law and the promotion thereof.

21.1. Judicial Code of Ethics and the Judicial Service Act

Section 17 and 18 of the Judicial Service Act[299] provides for the creation of a judicial code of ethics and conduct. The Judicial Service Code of Ethics Regulations[300] were developed by members of the Zimbabwean Judiciary. The Code mostly mirrors the Bangalore Principles of Judicial Conduct and was officially launched in April 2012.[301] It uses the phrase "judicial officers" but in practice it only applies to the judges of the Supreme Court, Constitutional Court, the High Court, Labour and Administrative Court. Therefore, it does not apply to Magistrates.[302]

Section 25 of the Code provides that an individual judge is accountable to his own conscience first and that every judicial officer will do his or her best to uphold the values and standards enshrined in it. Importantly, section 25(2) provides for the impartiality of judges and confirms that they are not accountable to any State or non-State organ, entity, or authority.

It mostly a well drafted Code that displays good intentions toward the governing of judicial conduct and ethics. It covers a wide range of important aspects such as integrity, equality, the creation of an ethics enforcement committee, and the propriety of judges.

21.2. Judicial Services Commission

Prior to 2013 the President handpicked judges but now section 191 of the 2013 Constitution provides for a JSC that conducts its business in a transparent and fair manner.[303] The JSC is required to advertise vacancies for judicial positions and to hold public interviews. After the interviews have been concluded the JSC should prepare a shortlist of three candidates and

[299] Judicial Services Act 10 of 2006, as amended.
[300] Judicial Service (Code of Ethics) Regulations of 2012, hereafter "the Judicial Code."
[301] ICJ Report (2020) 7.
[302] ICJ Report (2020) 7. However, the Judicial Service (Magistrate's Code of Ethics) Regulations of 2019 speak to mostly the same elements for Magistrates as is provided for in the Judicial Code.
[303] Shivamba A "An analysis of Zimbabwe's proposed constitutional amendments relating to the Judiciary" 3 2020 *Southern Africa Litigation Centre Policy Brief* 3-4 available at https://www.southernafricalitigationcentre.org/wp-content/uploads/2020/06/Policy-Brief-No.-3-of-2020-June.pdf (accessed 22 April 2021).

submit it to the President. The President can then only appoint judges from the JSC shortlist.[304]

The Judicial Services Commission is formally created by section 189 of the Constitution. It is mandated to oversee the employment, discipline, and conditions of service of judicial officers.[305] However, its overall duty is to hold the Judiciary accountable. This is evidenced in section 190 that further mandates the JSC to promote and facilitate judicial accountability:

> The Judicial Service Commission must promote and facilitate the independence and accountability of the Judiciary and the efficient, effective, and transparent administration of justice in Zimbabwe, and has all the powers needed for this purpose.

The composition of the JSC is allows for a broad representation on the Commission.[306] Its members are appointed for one non-renewable term of six years[307] and the composition is provided for in section 189:

> (a) the Chief Justice; (b) the Deputy Chief Justice; (c) the Judge President of the High Court; (d) one judge nominated by the judges of the Constitutional Court, the Supreme Court, the High Court, the Labour Court and the Administrative Court; (e)the Attorney-General; (f) the chief magistrate; (g) the chairperson of the Civil Service Commission; (h) three practising legal practitioners of at least seven years' experience designated by the association that represents the legal practitioners in Zimbabwe; (i) one professor or senior lecturer of law designated by an association representing the majority of the teachers of law at Zimbabwean universities or, in the absence of such an association, appointed by the President; (j) one person who for at least seven years has practised in Zimbabwe as a public accountant or auditor, and who is designated by an association, constituted under an Act of Parliament, which represents such persons; and (k) one person with at least seven years' experience in human resources management, appointed by the President.

It is important to note that although the composition of the JSC can be celebrated as comprehensive, the fact that the body consists of many Presidential appointees is worrying. This can render it susceptible to Presidential and political influence, even if only perceived.

[304] Shivamba (2020) SALC Policy Brief 3-4. The President may accept this first shortlist or request a second shortlist should he not be satisfied with the initial list provided.
[305] ICJ Report (2020) 5.
[306] ICJ Report (2020) 183.
[307] Section 189(3) of the 2013 Constitution.

The current composition also does not meet the international and regional standard of being composed of a majority or substantial number of judges.[308]

22. The court system in Zimbabwe

Section 162 of the Constitution[309] provides for the Zimbabwe court system which consists of the Constitutional Court, Supreme Court, High Court, Labour Court, the Administrative Court, Magistrates courts, customary courts, and other courts established by law.

Section 163 of the Constitution speaks to the composition of the Judiciary which is composed of the Chief Justice, the Deputy Chief Justice and the other judges of the Constitutional Court, the judges of the Supreme Court, the Judge President and other judges of the High Court, the Judge President, and other judges of the Labour and Administrative Courts, magistrates, and judges of customary law or other courts established by law.

The Chief Justice is head of the Judiciary and oversees the Constitutional and Supreme Courts.[310] The Judge President of the High Court serves as the head of this court while the Judge Presidents of the Labour and Administrative courts serve as the heads of these courts, respectively.[311]

22.1. The Constitutional Court

Section 166 creates the Constitutional Court which is the superior court of record and consists of the Chief Justice, Deputy Chief Justice, and five other judges of the Constitutional Court. The Chief Justice is also mandated to appoint an acting judge to the Constitutional bench if needed for a limited period to time only.[312]

The Constitutional Court hears cases concerning alleged infringements of a fundamental human right or freedom. It also hears cases concerning the election of a President or Vice-President.[313] It has further jurisdiction over all constitutional matters and issues connected with decisions of constitutional matters.[314] Its decisions on the latter are binding on all lower

[308] ICJ Report (2020) 183.
[309] Constitution of Zimbabwe Amended 20 of 2013.
[310] Section 163 (3) of the Constitution.
[311] Section 163(4) and (5) of the Constitution.
[312] Section 166(2) of the Constitution.
[313] Section 166(3) of the Constitution.
[314] Section 167 of the Constitution.

courts. The Constitutional Court also makes the final decision as to whether a matter is a constitutional matter, or a particular issue relates to a decision on a constitutional matter.[315]

Only the Constitutional Court can advise on the constitutionality of proposed legislation. However, it can only do this if the concerned legislation has been referred to it in terms of the Constitution. The Court can also hear and determine disputes relating to whether a person is qualified to hold the office of Vice-President or determine if Parliament or the President has failed to fulfil a constitutional obligation.[316]

The Constitutional Court's decision on the constitutionality of an act of parliament, or constitutional conduct of the President or parliament is final. Should a lower court declare any of the latter to be constitutionally invalid this decision must be confirmed by the Constitution Court.[317]

Section 167(5) further provides that people must be allowed to bring constitutional matters directly to the Constitutional Court, to appeal directly to the Court, or appear as a friend of the Court if it is in the interests of justice to do so.

22.2. The Supreme Court

Section 168 provides that the Supreme Court is a superior court of record and consists of the Chief Justice, Deputy Chief Justice, and a minimum of two other judges.[318] Section 3 of the Supreme Court Act[319] serves to further confirm this composition and bestows additional powers upon the Chief Justice of the Supreme Court in appointing acting judges if necessary. The court has a permanent seat in Harare and sits on circuit for one week at the end of each legal term in Bulawayo. The Supreme Court currently has a compliment of 10 Judges.[320]

Unlike High Court provisions, the 2013 Constitution does not expressly grant the Supreme Court jurisdiction over constitutional matters and provides that the Supreme Court "is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has

[315] Section 167(1)(c) of the Constitution.
[316] Section 167(2) of the Constitution. Also see ICJ Report (2020) 15.
[317] Section 167(3) of the Constitution.
[318] Section 168(2) provides for certain instances where additional judges can be appointed for a limited period.
[319] The Supreme Court Act of Zimbabwe 28 of 1981 as amended 1997.
[320] Supreme Court of Zimbabwe Official Webpage available at http://www.jsc.org.zw/supreme.

jurisdiction."[321] However, it may be granted additional jurisdiction by an Act of Parliament as per section 169(2).[322]

22.3. The High Court

Section 170 deals with the High Court which has original jurisdiction over all civil and criminal matters. It also has the jurisdiction to supervise Magistrates courts and other subordinate courts and to review their decisions. The High Court can decide constitutional matters except those specifically excluded from its jurisdiction and has limited appellate jurisdiction as well.

The High Court may be divided into different divisions and the Registrar may be provided with certain powers in civil matters to make orders in uncontested cases[323] and to decide preliminary or interlocutory matters.[324] However, the rules of court must give a person affected by the Registrar's order or decision a right to have it reviewed by a judge of the High Court.

Section 3 of the High Court Act[325] speaks to the composition of the court for different matters. In the case of a civil matter the composition will be one or more judges of the High Court. Criminal trials require a composition of one judge of the High Court and two assessors while review proceedings require one or more judges of the High Court. When exercising its appellate jurisdiction, the court must consist of a minimum of two judges of the High Court.

Section 47 notes that the court The High Court shall sit at such places and at such times as may be prescribed in rules of court or directed by the Chief Justice.

22.4. Magistrate Courts

The 2013 Constitution gives Parliament the authority to establish and mandate the composition of the Magistrate's Courts. It also has the authority to decide and mandate the jurisdiction of these courts.[326] Section 182 of the Constitution provides that all appointments must be made by the JSC through a free and transparent process.

[321] Section 169(1) if the 2013 Constitution.
[322] 2013 Constitution. Also see ICJ Report (2020) 13-14.
[323] This does not include orders that affect status, custody, or guardianship of children.
[324] This does not affect matters that affect the liberty of the person.
[325] The High Court Act of Zimbabwe 29 of 1981 as amended.
[326] ICJ Report (2020) 10-11.

Section 7 of the Magistrate's Court Act[327] provides for the details of Magistrate appointments. It provides that the Public Service Commission is responsible for appointing Magistrates and senior Magistrates. In the case of senior Magistrates, the following conditions must be met:[328]

(a) The candidate has held magisterial office for a minimum of four years; or

(b) The candidate has held magisterial office for a minimum of two years ***and*** held another official office which the Minister or Chief Justice approves for a minimum of two years; or

(c) The candidate has held magisterial office for a minimum of two years ***and*** has for a minimum aggregated period of four years been practicing as:

   i) a legal practitioner in Zimbabwe, or other country where the common law is Roman-Dutch, and English is an official language.

   ii) a legal practitioner, if he is a citizen of Zimbabwe, in a country in which the common law is English and English is an official language.

Regional magistrates are the highest-ranking magistrates in criminal courts immediately followed by provincial magistrates, senior magistrates, and finally ordinary magistrates. The ranks of the magistrates determine their jurisdiction to hear certain cases, and to impose certain sentences.[329]

It is important to note that neither the Constitution nor the Magistrates Court Act guarantee the security of tenure for magistrates.[330]

23. Current challenges with judicial independence and the impact on the rule of law

The reality is that many elements of the Zimbabwe legal and policy framework for judicial accountability are in line with regional and international frameworks. The 2013 Constitution provides for separation of powers, non-interference with the Judiciary, structural protection of judges, and judicial accountability measures.[331] However, several concerning attempts have been made to reverse this position.

[327] The Magistrate's Court Act 7:10 as amended 86 of 1995.
[328] Section 7(2) of the Magistrate's Court Act.
[329] ICJ Report (2020) 10-11.
[330] ICJ Report (2020) 10-11.
[331] ICJ Report (2020) 178.

23.1. Gonese and Anor v Parliament of Zimbabwe[332]

In 2017 President Mnangagwa signed into law a Constitutional Amendment Bill that was intended to amend section 180 of the Constitution which speaks to the appointment of senior judicial officers such as the Chief Justice, the Deputy Chief Justice, and the Judge President of the High Court. The proposed amendment would also add measures to the appointment of Senior Judges of the Labour Court and the Administrative Court.[333] It eliminated judicial interviews by doing away with public scrutiny in the appointment processes of the Chief Justice, Deputy Chief Justice and Judge President of the High Court.[334] This has a significant impact on the great strides made toward transparency, accountability and public participation in the judicial appointment process introduced by the 2013 Constitution.[335] A court application was brought to oppose this amendment on 6 September 2017 but before the application could be heard the President signed the Constitutional Amendment Bill.[336] The applicants filed an additional application seeking to set aside the amendment on the grounds that Parliament did not follow constitutional processes in the adopting of the Bill.[337]

The proposed amendment to the section 180 would essentially give the President full and final authority to appoint senior members of the Judiciary. The proposed amendment provides in section 180(2) and (3):

> The Chief Justice, the Deputy Chief Justice, and the Judge President of the High Court shall be appointed by the President after consultation with the Judicial Service Commission…If the appointment of a Chief Justice, Deputy Chief Justice or Judge President of the High Court is not consistent with any recommendation made by the Judicial Service Commission in terms of subsection (2), the President shall cause the Senate to be informed as soon as is practicable: Provided that, for the avoidance of

[332] *Gonese & Anor v Parliament of Zimbabwe & 4 Others* [2020] ZWCC 04 (31 March 2020) available at https://zimlii.org/zw/judgment/files/constitutional-court-zimbabwe/2020/4/2020-zwcc-04.pdf.
[333] *Gonese & Anor v Parliament of Zimbabwe (2020)* 3.
[334] ICJ Report (2020) 179. Section 180(2) of the 2013 Constitution which provided for public interviews, advertising for the position etc. was removed in the 2017 Constitution.
[335] "Zimbabwe: Constitutional amendment undermines judicial independence" (25 July 2017) *International Commission of Jurists Online News* available at https://www.icj.org/zimbabwe-constitutional-amendment-undermines-judicial-independence/.
[336] Constitutional Amendment Bill (No.1) of 2017.
[337] *Gonese & Anor v Parliament of Zimbabwe (2020)* 3.

doubt, it is declared that the decision of the President as to such appointment shall be final.[338]

The court held that the constitution is a supreme law intended to guarantee stability to a nation, therefore, the amendment of the Constitution must be a limited power and the exercise of this power must be strictly controlled.[339] It is binding on every person and every institution of Government. The purpose of the requirements to be met before a constitutional amendment can take effect are therefore meant to enforce the supremacy of the Constitution and the principle of the rule of law.[340] Therefore, the Parliament had a constitutional obligation to deny the passing of the Bill in Senate when the votes in favour of the proposed amendment did not amount to the mandated two-thirds of House membership.

The court held that the passing of the Bill, under these circumstances, was a violation of the Constitution[341] and inconsistent with the constitutional requirements. The Bill was declared invalid to the extent of the majority vote inconsistency. The Senate was ordered to conduct a new vote in accordance with constitutional provisions within 180 days, failing which the current judgment will stand.[342]

In reaction to this judgment the government published Constitution Bill 2019[343] in January 2020 which included even further amendments to section 180 of the 2013 Constitution. This process seems to have been vigorously pursued under the rouse of COVID-19 when public participation was greatly limited due to pandemic restrictions.[344]

The 2019 Bill proposes that the power to promote superior court judges from one court to another would vest solely in the President. There would be no need for public interviews or recommendations from the JSC.[345] Should these provisions be passed judicial appointments would once again be made under obscure processes and procedures. It will be inconsistent

[338] *Gonese & Anor v Parliament of Zimbabwe (2020)* 6.
[339] *Gonese & Anor v Parliament of Zimbabwe (2020)* 31-32.
[340] *Gonese & Anor v Parliament of Zimbabwe (2020)* 68.
[341] *Gonese & Anor v Parliament of Zimbabwe (2020)* 68-69.
[342] *Gonese & Anor v Parliament of Zimbabwe (2020)* 72.
[343] The Constitution of Zimbabwe Amendment (No.2) Act of 2019.
[344] Chikohomero R "Zimbabwe to change its constitution under cover of COVID-19" (9 July 2020) *Institute for Security Studies Online* available at https://issafrica.org/iss-today/zimbabwe-to-change-its-constitution-under-cover-of-covid-19. Although there seem to be many worrisome amendments, there are also proposed amendments that seem to move toward positive change. These include the creation of a the Office of the Public Protector and better youth participation in Parliament.
[345] ICJ Report (2020) 179.

with international and regional standards and will certainly diminish public confidence in the Judiciary.[346]

The judicial appointment process contained in the 2013 Constitution has been heralded as an international best practice because it efficiently provides for a broad range of professional to be part of the consultation process.[347] This process allows for a high-level of scrutiny in the interview and consultation processes which assists in ensuring the best candidates are appointed.

The Amendment Bill seeks to include an additional sub-section to section 180 of the 2013 Constitution. The proposed amendment will provide as follows:

> (4a) Notwithstanding subsection (4) the President, acting on the recommendation of the Judicial Service Commission, may appoint a sitting judge of the Supreme Court or High Court to be a judge of a higher court whenever a vacancy arises in such court.[348]

The effect of this insertion is threefold: It drastically reduces the opportunity for outside and independent candidates to apply for judicial vacancies; it removes the elements of public accountability and transparency that should be present in the appointment procedure of judges; and it creates a risk of judicial appointments made for political gain or purpose. However, the Bill does not provide the President the power to unilaterally promote judges. He is still required to consult the JSC and act upon their recommendations. This could hopefully add a certain degree of objectivity, if the JSC carefully review candidates before making recommendations to the President.[349]

It is extremely important to note that Zimbabwe's constitutional provisions dealing with the appointment of judges is celebrated and strongly recommended by regional and international instruments.[350] Therefore, it is integral that the Amendment Bill be carefully scrutinised so as not to diminish the high standard of protection for judicial independence which already exists in the current 2013 Constitution.[351]

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[346] ICJ Report (2020) 179.
[347] Shivamba (2020) SALC Policy Brief 3-4.
[348] Section 13 of the Constitution of Zimbabwe Amendment (No. 2) Act, 2019.
[349] Shivamba (2020) SALC Policy Brief 4.
[350] Shivamba (2020) SALC Policy Brief 6. Zimbabwe received a 4/6 score from the Comparative Constitutions Project in relation to its respect for judicial independence.
[351] Shivamba (2020) SALC Policy Brief 6. Also see Solidar Report (February 20200 6.

In terms of the proposed amendments the President could possibly be the ultimate appointing authority of judges as he will be able to nominate judicial candidates. There is a risk of the JSC simply appointing judges on the predetermined choice of the President. This would be an unfortunate situation which severely impacts proper separation of powers, the independence of the Judiciary and ultimately the rule of law.[352]

The 2019 Bill also seeks to make a total of 27 further changes to the 2013 Constitution, mainly related to the three spheres of government.[353] The Bill seeks to grant the President the power to extend the tenure of judges beyond mandatory retirement. These renewals will not be based on the advice of the Judicial Service Commission but will be the president's decision. This not only removes the security of tenure for judges, but also impacts their independence because their appointment renewal is subject to the whim of the president. This may cause judges to integrate themselves with the Executive to ensure they enjoy tenure.[354]

The 2019 Bill also proposed to change the appointment and dismissal processes of the Prosecutor-General.[355] The Prosecutor-General's independence is also protected by the constitution and the current process of appointment is equal to that of judges. The process includes public advertisements, hearings, and the involvement of the JSC. A shortlist is prepared by the JSC which contains three candidates the President can choose from. Should he not be satisfied, the President may request a second list. The Amendment Bill seeks to remove all these additional processes.[356] It therefore reverts to the old position prior to the 2013 Constitution where the appointment process was shrouded in secrecy and the Attorney General who was also responsible for prosecution was appointed by the President.[357]

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[352] ICJ Report (2020) 179-180.
[353] Shivamba (2020) 3.
[354] Chikohomero R "Zimbabwe to change its constitution under cover of COVID-19" (9 July 2020) *Institute for Security Studies Online* available at https://issafrica.org/iss-today/zimbabwe-to-change-its-constitution-under-cover-of-covid-19.
[355] Shivamba (2020) 3.
[356] Clause 19 of the Amendment Bill which is equal to section 259 of the Constitution. Also see "Civil society position: Analysis of the Constitution of Zimbabwe Amendment (No.2) Bill 2019" (February 2020) *Solidar Foundation* at 9 available at https://www.solidar.org/system/downloads/attachments/000/001/144/original/Final_Zim_CSO_Position_Const_Amend_No.2_2020_April-May_Doc_%281%29.pdf?1592218973 (accessed 20 April 2021).
[357] Solidar Foundation (February 2020) 9.

Although there are other examples of neighbouring countries[358] where the equivalent of a Prosecutor-General is solely appointed by the President, these countries do not share the same political background as Zimbabwe.[359] Especially in relation to the office of the Prosecutor-General. There was great public dissatisfaction with the appointment of the current Prosecutor-General of Zimbabwe when the President appointed him above other, more qualified, candidates.[360] The situation was further soured when it was submitted that the subsequent appointed Prosecutor-General disqualified himself during the public interview when he confirmed that he would take his instructions from the Executive. Given this example and the public dissatisfaction at this appointment it does create concern over this amended in the specific case of Zimbabwe.[361]

On the other hand, the Amendment Bill can also be commended as it requires the President to appoint an independent tribunal to investigate the possible removal of the Prosecutor-General. A requirement that does not currently exist in the 2013 Constitution.[362]

The Solidar Foundation also published their official civil society position in collaboration with 126 other organisations concerning the 2019 Bill.[363] It states that the proposed amendments "seek to consolidate Executive powers" and will diminish existing checks and balances which the current Constitution duly provides for. The Foundation further opines that this could result in a centralisation of power vested in the President and strongly protests its adoption noting:

> The proposed provisions are an affront to participatory democracy. They seek to limit the power of the electorate and the public to participate in certain processes such as the election of Vice presidents and appointment of Judges.[364]

The Foundation's analysis also speaks to the proposed amendments to section 180 and more specifically to the President's right to appoint judges after consultation with the JSC. They identify the following challenges to the amendment:

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[358] In both Botswana and South Africa the Director of Public Prosecutions is appointed by the President without the additional public processes as contained in the 2013 Zimbabwe Constitution.
[359] Shivamba (2020) 5-6.
[360] Shivamba (2020) 5-6.
[361] Shivamba (2020) 5-6.
[362] Shivamba (2020) 6.
[363] Solidat Report (February 2020) 1.
[364] Solidar Report (February 2020) 2.

(a) It removes existing safeguards which ensure judges are appointed after a transparent public interview process which is open to scrutiny.

(b) It symbolises a step back to the Lancaster House Constitution in terms of which judges were appointed and promoted through an extremely opaque process.

(c) The removal of public interviews will greatly affect the public's confidence in the judicial appointment process.[365]

23.2. Practice Directive 16 July 2020

A further blow came when, on 16 July 2020, Chief Justice Malaba issued a Practice Directive to the superior and special courts to speak to certain concerns he had about the way judgments were handled after being handed down. However, the facts that led to these concerns were not disclosed and this led to a wide range of interpretations by the public.[366] Paragraph 2(iv) reads:

> Before any judgment or an order of the High Court or Labour Court is issued or handed down, it should be seen and approved by the head of court division.

Once this Directive, presented in the form of a Memorandum, was published it immediately led to all manner of concerns regarding the independence of the Judiciary.[367] The public outcry was so severe that the Chief Justice issued an additional Memorandum a day later in which he removed the word "approved" and noted that these judgments should be "seen" by the head of the court, station, or division before it is handed down.[368]

The second Memorandum did not seem to create much difference from the initial Memorandum issues. Therefore, there was still a significant threat to judges' decisional independence when deciding matters and handing down judgment.[369]

[365] Solidar Report (February 2020) 5.
[366] Okumu-Masiga (2020).
[367] Okumu-Masiga (2020).
[368] Okumu-Masiga (2020).
[369] Okumu-Masiga (2020).

24. Judicial appointment, conditions of service, and disciplinary procedures

24.1. Appointment of judges

Section 177 to 184 of the 2013 Constitution provide for the appointment of judges. Section 180(2) specifically provides for the process the JSC must follow:

> (a) advertise the position; (b) invite the President and the public to make nominations; (c) conduct public interviews of prospective candidates; (d) prepare a list of three qualified persons as nominees for the office; and (e) submit the list to the President; whereupon, subject to subsection.

The President appoints judges from the shortlist provided by the JSC and may request an additional list if he is not satisfied with the candidates on the initial list. All appointments subsequently made must be published in the Government Gazette.[370]

Section 182 deals with the appointment of Magistrates and other members of the Judiciary providing that an act of parliament must provide for the appointment of magistrates and other judicial officers other than judges. However, Magistrates must ultimately be appointed by the JSC and other judicial officer on the approval of the JSC.

Lastly, section 183 provides that a judicial officer cannot be appointed as a judicial officer of more than one court and section 184 provides that the appointments made to the Judiciary must reflect diversity and gender.

Section 181 specifically provides for the appointment of acting judges based on the same processes prescribed for the appointment of permanent judges as stipulated in section 180. Acting judges act for a maximum period of twelve months but this period can be extended if needed for the judge to finalise proceedings before him or her.

24.2. Removal of judges

Section 187 of the Constitution provides for the removal of judges from service prior to their age of retirement of for a reason not related to his or her incapacity to further perform judicial functions. It clearly provides that judges may only be removed from office for reasons of gross incompetence or misconduct.[371]

[370] Section 180(3) and (4) of the 2013 Constitution.
[371] ICJ Report (2020) 15.

Section 187(2) stipulates that the President must appoint a tribunal to investigate the merit for the removal of the Chief Justice should the President belief that such removal should be considered. Similarly, an investigative tribunal must be appointed if the JSC advises the President that the removal of any judge should be considered. Section 187(4) provides for the composition of such a tribunal:

> …A tribunal appointed under this section must consist of at least three members appointed by the President, of whom…at least one must be a person who...has served as a judge of the Supreme Court or High Court in Zimbabwe; or…holds or has held office as a judge of a court with unlimited jurisdiction in civil or criminal matters in a country whose common law is Roman-Dutch or English, and English is an officially recognised language…at least one member (own emphasis) must be chosen from a list of three or more legal practitioners of seven years' standing or more who have been nominated by the association, constituted under an Act of Parliament, which represents legal practitioners in Zimbabwe.

The President will appoint a Chairperson of the Tribunal and after inquiry, the Tribunal will report its findings to the President recommending whether the concerned judge should be removed or not.[372] The President is required to act according to the Tribunal's recommendation.[373]

24.3. Security of tenure

Judges of the Constitutional Court are appointed for a non-renewable term of 15 years,[374]but they will be required to retire if they reach the retirement age of 70[375] before the expiry of the 15-year term. After Constitutional Court judges have completed their terms and they are eligible they can be appointed as judges of the Supreme Court or the High Court.

Section 186(3) provides for fixed term appointments of judges but also stipulates that they will cease to act as judges if they reach the retirement age prior to the expiration of their set term. Judges may, however, remain in office after they are mandated to exit for the purpose of dealing with any proceedings commenced before him or her while he or she was a judge.

[372] Section 187(7) of the 2013 Constitution. Once the question of removal has been submitted to the Tribunal the concerned judge is suspended from office until the suspension it revoked or the removal confirmed.
[373] Section 187(8) of the 2013 Constitution.
[374] Section 186 of the 2013 Constitution.
[375] Section 186(2) of the 2013 Constitution.

The ICJ had concerns with the provision of fixed term appointments noting that this creates an unequal system in which judges appointed through the normal system enjoy security of tenure while judges appointed on fixed term contracts have no security of tenure. The tenure of fixed term judges depends solely on the periodic renewal of their contracts. This could also open the door to manipulation on various levels since the appointing authority could appoint certain judges, he or she dislikes for short, fixed periods, and then control their tenure through renewal possibilities.[376]

A further concern with security of tenure exists in the proposed 2019 Constitutional Amendment Bill. In terms of this Bill the President will be allowed to grant one-year contracts to retired judges for up to 5 years. This could make these judges beholden to the President and the Executive which could create a threat to judicial independence.

24.4. Disciplinary proceedings

The Code of Ethics gives the Chief Justice the power to initiate a disciplinary procedure against a judge. If the Chief Justice is of the opinion that a judicial officer has violated any provision in the Code of Ethics, he must appoint a disciplinary committee to investigate the matter.[377]

The disciplinary committee is appointed on an *ad hoc* basis and comprises of three members who are sitting or retired judicial officers from Zimbabwe.[378] After investigation, the committee reports its findings and recommendations to the Chief Justice but the final decision vests in the Chief Justice.[379] The danger here is that the is that there is not clear provision requiring the Chief Justice to provide reasons for possibly departing from the recommendation of the committee. This may weaken the internal independence of the disciplinary process as it has no check and balance system.[380]

[376] ICJ Report (2020) 184.
[377] ICJ Report (2020) 17.
[378] They may also be from any other country in which the common law is Roman-Dutch, and the official language is English.
[379] ICJ Report (2020) 16. Also see Section 15 of the Judicial Service Act
[380] ICJ Report (2020) 186.

25. Specific issues with judicial independence in Zimbabwe

25.1. Judges' rights to freedom of expression, association, or assembly

There have been attempts to unduly hinder Magistrates from expressing their thoughts about matters that objectively seem to be of concern in the administration of justice, rule of law, and judicial independence.[381] In 2018, the JSC found the Chairperson and Secretary-General of the Magistrate's Association of Zimbabwe guilty of illegally communicating with the press. These disciplinary proceedings were based upon a press statement they issued on behalf of their association, without seeking prior permission from the JSC, which dismissed allegations of corruption in the Magistrates courts. They were each disciplined in their personal capacities and by the JSC that noted their conduct was regulated by the Judicial Services Act and its regulations. This effectively means that the Magistrates Association is under the control of the JSC, which defeats the purposes of freedom of association for magistrates provided for in the UN Basic Principles on Independence of the Judiciary.[382]

25.2. Judicial corruption

In February 2020, the Prosecutor-General allegedly made the following remarks:

> What we have in Zimbabwe is the problem of cartels who affect every sector of the society. We have got sections in the Judiciary, the Zimbabwe Republic Police, the National Prosecuting Authority and even the Zimbabwe Anti-Corruption Commission (ZACC) who are controlled by cartels and manipulate investigations and this is pulling the country's economy down.[383]

Chief Justice Luke Malaba also announced the theme for 2020 would be "Judicial Transparency and Accountability" and reaffirmed the need to maintain an independent Judiciary which acts in a transparent and accountable manner. However, is should be noted that despite the widespread perceptions of corruption, no judges have been brought before a tribunal for removal from office due to corruption allegations. Also, no judges have been prosecuted on corruption-related charges.[384]

It seems that the lower courts have the highest perception of corruption. Since these are the courts that most of the population interact with, it is worrying. Due to this some citizens have opted to resort to alternative dispute resolution forums since they lack faith in the lower court

[381] ICJ Report (2020) 187-188.
[382] ICJ Report (2020) 187-188.
[383] ICJ Report (2020) 189-190.
[384] ICJ Report (2020) 189-190.

systems. Although this corruption could be perceived it still creates concerning cracks in the confidence the public has in the judicial system.[385]

25.3. Issues with the delivery of judgments

At the opening of the 2020 judicial year Chief Justice Luke Malaba made the following remarks:

> The Judiciary is alive to the public's expectation of quality and timeous judgments from the courts. This is a requirement set out in section 164 of the Constitution, which provides that the courts must apply the law impartially, expeditiously and without fear, favour, or prejudice. The Judicial Codes of Ethics for both Judges and Magistrates stipulate timelines which every judicial officer is expected to meet in relation to the delivery of judgments. In that regard, it has been impressed upon every judicial officer to comply with this obligation. I am aware of the concerns raised by some stakeholders and members of the public regarding some judgments that have taken unduly long periods to be delivered. These concerns are merited, and I give my assurance that they will be attended to without further delay. Allow me to further advise that I meet with the Judge President of the High Court, the Senior Judge of the Labour Court, and the Judge of the Administrative Court, and the Chief Magistrate at least once every month. These meetings assess the operations of the courts and discuss the challenges which militate against justice delivery. It is through such engagements with the heads of the courts that challenges, including the tardiness of judicial officers in handing down judgments, are addressed. Robust mechanisms to monitor the delivery of all reserved judgments were recently put in place to curb the practice of reserving judgments beyond the time limits provided for by the law.[386]

These comments raised a lot of questions and the Chief Justice was pressed to further address the issues concerning the delivery of judgments in an additional Memorandum he issued on 21 July 2020.[387] The JSC offered further background to this Memorandum and explained that they had received many complaints regarding the non-availability of judgments after it had been read and handed down by the judge. These complaints stemmed from litigants, legal practitioners, and the public. An investigation into the matter showed that judges would read judgments, or part thereof, in court or chambers but would fail to immediately make the

[385] ICJ Report (2020) 189-190.
[386] ICJ Report (2020) 191-194.
[387] ICJ Report (2020) 191-194.

judgment available to the concerned parties. The reasons for this delay or non-delivery were unclear although some reasons were described as "genuine."[388]

To address these issues the Chief Justice instructed judges not to hand down judgments unless it is also ready for distribution. Furthermore, judges were instructed to desist from handing down judgments with the caveat that reasons would follow, unless they are dealing with a point *in limine*.[389] All judgements handed down should be accompanied by full written reasons which is made available to all concerned parties. Therefore, the timelines for judgments should be clearly communicated and complied with.[390]

Judges were also instructed to not to hand down any judgments without full written reasons being made available and the timelines for handing down judgments should be clearly communicated and complied with.

26. International and regional frameworks applicable to Zimbabwe

Zimbabwe is a member of both the African Union and the United Nations. Therefore, it has a duty to respect and promote the international principles they are bound to by virtue of these memberships. A host of international and regional instruments speak to the protection and promotion of judicial independence. However, there are some specific elements that are specific to the Zimbabwe situation.

Article 26 of the Banjul Charter broadly speaks to the importance of the independence of the Judiciary and provides:

> States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.[391]

[388] ICJ Report (2020) 191-194.
[389] The Constitutional Court and Supreme Court were exempted from this instruction.
[390] ICJ Report (2020) 191-194.
[391] African (Banjul) Charter on Human and Peoples Rights of 1982 available at file:///C:/Users/Jeanne-Mari/Dropbox%20(Personal)/My%20PC%20(DESKTOP-4LT0OFJ)/Downloads/banjul_charter%20(1).pdf hereafter the "Banjul Charter."

Similarly, section 1 of the United Nations Basic Principles on the Independence of the Judiciary also enforce these principles of judicial independence and the duty of the state to protect and promote it.[392] The Universal Charter of the Judge which is approved by judges from all regions of the world, also provides that the independence of judges is indispensable to impartial justice and the rule of law. Lastly, the Commonwealth (Latimer House) Principles on the Accountability of and the Relationship of the Three Branches of Government speak to judicial independence and the importance of the proper separation of powers.

The independence of the Judiciary is also specifically recognised in regional instruments such as the Resolution on the Respect and Strengthening of the Independence of the Judiciary of 1999, which was adopted by the African Commission on Human and Peoples' Rights. In addition to this Resolution the Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers also encourage a transparent judicial appointment process. The Lilongwe Principles and Guidelines are of particular importance since they were developed to find African solutions for African governance challenges. The principles emphasise the need to have a standardised, transparent process that ensures public confidence in the Judiciary and that enhances the integrity of the process.

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa in Principle[393] speak to the issues concerning the delays in judgments. These Principles provide that a fair hearing includes delivery of judgment to the concerned parties, with reasons for the decision, without undue delay.[394]

Article 10 of the UN Basic Principles on the Independence of the Judiciary[395] speaks to the proper appointment processes of judges and the qualifying criteria:

> 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…

Similarly, article 4(h) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa requires a transparent appointment process which duly protects the

[392] UN Basic Principles on the Independence of the Judiciary.
[393] Principle 2 Right to a Fair Trial and Legal Assistance in Africa.
[394] ICJ Report (2020) 194.
[395] UN Basic Principles on the Independence of the Judiciary.

independence and impartiality of the Judiciary. In respecting these Principles, it is crucial that the Constitution not be amended to provide for the President to promote judges without public interviews and without abiding by the recommendations of the JSC.[396]

Various regional and international instruments reiterate the importance of security of tenure and its impact on the independence of the Judiciary.[397] The provision in the 2013 Zimbabwe Constitution dealing with the fixed term appointment of judges is in contravention of these instruments. Judges should enjoy security of tenure under unified tenure system so all may be treated equally and impartially.[398]

Speaking to the disciplinary measures for judges and the President's proposed exclusive authority to disregard a recommendation from the disciplinary committee in this regard, the Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct[399] is of particular importance:

> The power to discipline a judge should be vested in an authority or tribunal which is independent of the legislature and Executive, and which is composed of serving or retired judges, but which may include in its membership persons other than judges, provided that such other persons are not members of the legislature or the Executive.[400]

There are also various instruments that speak to a judge's right to freedom of expression and association. These rights are fully endorsed by international and regional instruments which support the notion that judges should only be removed for serious misconduct.[401]

27. Conclusion and Recommendation

Should the 2013 Constitution of Zimbabwe stand, it represents a country built on democratic principles with due separation of powers and safeguards for the independence of the Judiciary. As noted in this report, the issue in the Zimbabwean context does not seem to be the legal framework which is currently in place. This framework holds fast to international

[396] ICJ Report (2020) 180.
[397] Article 12 of the UN Basic Principles on the Independence of the Judiciary, Article 13.2 of the Bangalore Principles, Article 4(I) if Right to a Fair Trial and Legal Assistance in Africa in Principle.
[398] Article 4(h) of Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa
[399] Article 154.
[400] ICJ Report (2020) 186-187.
[401] Article 8,9 and 19 of the UN Basic Principles on the Independence of the Judiciary, article 15.1 and 15.5 of Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct. Article 15.1 of the Measures for the Effective Implementation of the Bangalore Principles of Judicial. Also see ICJ Report (2020 188-189.

principles and best practices. The true challenge for Zimbabwe is the practical application of these principles and the public promotion of these principles. Through its actions the government seems to have instilled a great deal of doubt about the true independence of the Judiciary. Confusing and ever-changing narratives from the Office of the Chief Justice, the Judiciary as a whole, and the Executive seem to further exacerbate this issue. Add to this the continuous attempts to amend the Constitution in favour of dubious principles which significantly blur the separation of powers, and the situation is even worse.

An independent Judiciary lies at the heart of a democratic and constitutional State built upon the doctrine of the separation of powers. Judges must therefore be truly independent and must be perceived as such. If this is not the case, the government could have the ability to override the rights of its citizens.

It is against this background and based upon the outcomes of the research in this report, that we supply our proposed recommendations.

27.1. Transparent appointment processes for judges

It is recommended that that Zimbabwe retain the careful safeguards that are enshrined in the 2013 Constitution for the appointment and tenure of judges. These principles can ensure that only qualified, fit, and proper people are appointed to the Bench and that judges who seek promotion submit their records for public scrutiny.[402] Although the 2013 Constitution provides details for the appointment and shortlisting process of judges it does not seem that it will be translated into the proposed Amendment.[403]

A proper judicial appointment process is necessary to transparently identify the best candidates for the role, to ensure public confidence in the judicial appointments, and to appoint judges without favour or political influence. Therefore, it is integral that these provisions are not amended.[404]

Transparency is also of great importance during the appointment of judges. Not only must they be duly qualified, fit, and proper persons but they must be perceived as such by the public. Therefore, the appointment and promotion processes of judged must be completely

[402] Constitution Watch 2/2020 - Amending the Constitution - Part 2 (26 January 2020) *Veritas Online* available at http://www.veritaszim.net/node/3906.
[403] Solidar Report (February 2020) 6. Amendment Bill of 2019.
[404] Solidar Report (February 2020) 6.

transparent so that anyone who has an interest can peruse the concerned judge's qualifications, fitness, and propriety. This is crucial if the government wishes to avoid any possible suspicions that political motivations drive the promotion and appointment of judges.

If the proposed amendments are passed by Parliament the independence of the Judiciary will be greatly compromised. The President will have vast powers to promote possibly pliant judges to higher courts and keep them in office after their age of retirement.[405] This should not be allowed to come to pass. Judicial appointment processes must be transparent and should guard against the possibility of appointments based on improper motives.[406]

27.2. Non-interference with tenure

Although the Amendment Bill[407] seems to follow common practice regarding the requirements for the extension of tenure after retirement, an indirect issue seems to arise. The President only extends the term of office after consultation with the JSC but is seems the President is in no way bound to the recommendations of the JSC herein. This could create a possibly dangerous conflict of interest which could negatively influence judicial independence and the rule of law.[408]

It is once again recommended that this amendment not be passed to ensure that the integrity of the tenure process stays intact. There should be no opportunity for the Executive to be able to keep certain judges in office past their age of retirement for the sole purpose of preventing other (perhaps more impartial) judges to take up office.

To this end the fixed term appointments as per section 181(3) and (4) of the Constitution should be reconsidered and revised. This has the potential of impacting the integrity of the judicial appointment process since judges may be more likely to be swayed by manipulation to ensure the renewal of their contracts.

27.3. Proper regulation of Executive powers in the removal of judges

Section 187 must be amended to provide for a more impartial and independent process of appointment for the Tribunal which investigates the possible removal of judges. Currently the President appoints all the members of these Tribunals which is inconsistent with international

[405] ICJ Report (2020) 194.
[406] ICJ Report (2020) 180.
[407] Clause 14 which speaks to section 186 of the 2013 Constitution.
[408] Solidar Report (February 2020) 7.

and regional standards.[409] The current prescribed process creates a risk of possible manipulation of the process or bias towards it, even if only perceived. According to international best practice the Executive should not be involved in this process at all, or only minimally involved in a formal and symbolic capacity.[410] However, it is wholly undesirable for the Executive to play such substantive and crucial roles in the discipline and removal of judges.[411]

It is also recommended that the President must not be given exclusive discretion to depart from recommendation of a disciplinary committee in deciding what action to take against a judge, particularly in the absence of any requirement to provide reasons for departing from the recommendation.[412]

27.4. Impartial and independent Judicial Services Commission

The 2013 Constitution gives the JSC a very prominent role in the judicial appointments and is a bold change from the 1979 Constitution.[413] However, the JSC consists of many Presidential appointees which may make it susceptible to improper influence, even if only perceived. The current composition also does not follow international and regional standards which dictate that the JSC should consist of mostly judges.[414]

The ICJ recommended that the composition of the JSC must be reviewed, even if it meant that the constitution should be amended to provide for a better composition. It further recommended that the number of presidential appointees serving on the JSC should be reduced in favour of more judges.[415]

27.5. Disciplinary processes should not be used to infringe upon Judges' freedom of expression

Judicial discipline processes must not serve to limit judicial independence or infringe upon speech and other constitutional rights. To this end judges and Magistrate's Association should not be subject to censorship by the JSC.[416]

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[409] ICJ Report (2020) 181.
[410] ICJ Report (2020) 181.
[411] ICJ Report (2020) 182.
[412] ICJ Report (2020) 186-187.
[413] ICJ Report (2020) 183-184.
[414] ICJ Report (2020) 183-184.
[415] ICJ Report (2020) 183-184.
[416] ICJ Report (2020) 188-189.

27.6. Proper mechanisms for prevention and elimination of judicial corruption

Judicial corruption seems to already be quite widely perceived in Zimbabwe, as discussed in this report. Action should be taken to counteract these allegations, public perception, and real cases of judicial corruption. The JSC should deal decisively with cases of corruption or alleged corruption while ensuring that the independence of the Judiciary is upheld through the process.[417]

[417] ICJ Report (2020) 190-191.

PART D:

JUDICIAL INDEPENDENCE IN THE KINGDOM OF ESWATINI

28. Historical challenges with judicial independence in Eswatini

The Kingdom of Eswatini's Constitution explains the government system to be built on a democratic and participatory *Tinkhundla* system. *Tinkhundla* are meeting places under customary law and, in the case of Eswatini, also represents constituencies for participation in parliamentary elections. According to this system there is a devolution of state power between central government and *Tinkhundla* areas. Eswatini is divided into several *tinkhundla* areas and regional councils are responsible for the co-ordination of economic development in each area. Each region is also headed by a Regional Administrator who is appointed by the King.[418]

The Kingdom of Eswatini is however, in practice, a monarchy which has been ruled by King Mswati III since 1986.[419] It functions on a dual legal system which includes courts based on Roman-Dutch law and traditional courts using customary law.[420] Although the Constitution of the Kingdom of Eswatini[421] provides that its government system is based on the principles of democracy and citizen participation[422] there seems to be a lack of democratic institutions with the King controlling all arms of government.[423] The King has extensive Executive powers and can appoint and dismiss the Prime Minister and cabinet members.[424] Furthermore, the King

[418] Dube B Magagula A "The Law and Legal Research in Swaziland" 2016 *GlobaLex Online* Updated by Magagula A and Nhlabatsi S available at https://www.nyulawglobal.org/globalex/Swaziland1.html (accessed 19 April 2021).

[419] "Eswatini Events of 2020" 2020 *Human Rights Watch Online* available at https://www.hrw.org/world-report/2021/country-chapters/eswatini-formerly-swaziland#b7c61a. See also The BTI Transformation Index Eswatini Country Report 2020 at 12 available at https://www.bti-project.org/content/en/downloads/reports/country_report_2020_SWZ.pdf.

[420] The BTI Transformation Index Eswatini Country Report 2020 at 12 available at https://www.bti-project.org/content/en/downloads/reports/country_report_2020_SWZ.pdf.

[421] Section 79 of the Constitution of the Kingdom of Eswatini.

[422] The Government of the Kingdom of Eswatini official webpage on the Tinkhundla Political System available at http://www.gov.sz/index.php/about-us-sp-15933109/governance/political-system.

[423] "United Nations Common Country Analysis of the Kingdom of Eswatini" April 2020 *United Nations Eswatini* at 22 available at https://eswatini.un.org/sites/default/files/2021-03/CCA%20Report%20-%20FINAL%20for%20printing%2022%20July.pdf (accessed 14 April 2021). Also see The BTI Transformation Index Eswatini Country Report 2020 at 10 available at https://www.bti-project.org/content/en/downloads/reports/country_report_2020_SWZ.pdf.

[424] The BTI Transformation Index Eswatini Country Report 2020 at 10 available at https://www.bti-project.org/content/en/downloads/reports/country_report_2020_SWZ.pdf.

and Queen Mother are immune to prosecution and neither the Supreme Court nor the High Court, which interpret the constitution, can impeach them.[425]

The Kingdom of Eswatini has a history of judicial crisis with the root causes often seeming to be a lack of respect for judicial independence and interference by the Executive. Post 2002 Judges also seemed to be quite voluntary to conform to directives from the Executive.[426] Especially during Chief Justice Michael Ramodebedi's tenure when the Judiciary became seemingly pliant, acted as an extension of the Executive, and Judges were either expelled or harassed if they advocated for the independence of the Judiciary.[427]

The infamous judicial crisis of 2002 is a prominent example of disrespect for judicial independence in Eswatini[428] and sets the background for the most prominent issues of judicial independence in Eswatini. During the events of 2002, the then Prime Minister, Barnabas Sibusiso Dlamini, refused to recognise a court judgment which held that King Mswati III had no constitutional mandate over Parliament for issuing decrees affecting the law.[429] Prime Minister Dlamini also refused to recognise a second judgment made against the Police Commissioner for disobeying a High Court order, and therefore being guilty of contempt of court.[430]

The failure of the Executive to accept the judgment of the courts resulted in a protest action instituted by Judges. The entire bench of judges of the Court of Appeal resigned and a work stoppage was instituted by judges of the High Court.[431] Despite an international outcry over

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[425] The BTI Transformation Index Eswatini Country Report 2020 at 12 available at https://www.bti-project.org/content/en/downloads/reports/country_report_2020_SWZ.pdf.

[426] Makonese M "Appointment processes for Judicial Services Commission (JSCs) and the role in promoting independence of the Judiciary in Southern Africa: A focus on Law Society/Bar Association Representatives on the JSCs" 2017 *SADC Lawyers' Association* at 43 available at https://www.sadcla.org/content/appointment-processes.pdf, hereafter the "SADC LA Report."

[427] The SADC LA Report (2017) 43.

[428] The SADC LA Report (2017) 43.

[429] This particular decree denied bail to rape suspects. The UN Special Rapporteur of the United Nations Commission on Human Right on the independence of judges and lawyers, Dato' Param Cumaraswamy , expressed his concern in "UN expert expresses grave concern over recent developments in Swaziland" (4 December 2002) *United Nations Online* available at https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2530&LangID=E.

[430] "UN expert expresses grave concern over recent developments in Swaziland" (4 December 2002) *United Nations Online* available at https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2530&LangID=E.

[431] "UN expert expresses grave concern over recent developments in Swaziland" (4 December 2002) *United Nations Online* available at https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2530&LangID=E.

these events the Eswatini Government pursued its onslaught on the independence of the Judiciary by allegedly forcing the then Chief Justice to resign and by dismissing or demoting other judicial officers.[432] This paved the way to the leadership of Chief Justice Ramodebedi and many years of hardship for the Judiciary.[433]

In the years of Chief Justice Ramodebedi's leadership the judicial challenges did not show any signs of improvement.[434] Challenges included the persecution of independent Judges, questionable judicial appointments, and a Chief Justice who clearly acted as though he was under the control of the Executive and the monarchy.[435] Some of his most questionable actions included the Practice Directive[436] he issued which protected the King from any form of legal action instituted against him, and presiding over cases in matters that he had an interest in.[437]

To bring attention to this severe threat to the independence of the Judiciary, the Law Society of Eswatini boycotted the courts for four months and lodged a communication with the African Commission on Human and People's Rights in which they accused the Chief Justice of undermining the independence of the Judiciary.[438]

The lowest point for judicial independence seemed to have been in 2015 with the issuing of the arrest warrant against CJ Ramodebedi.[439] The charges were conflict of interest, defeating the ends of justice, and abuse of power.[440] Further warrants for arrest were issued against

[432] SADC LA Report (2017) 43.
[433] The appointment of CJ Ramodebedi was questionable in itself since he was a Lesotho national. The Constitution of Eswatini states that "a person who is not a citizen of Swaziland shall not be appointed as justice of a superior court after seven years from the commencement of this constitution."
[434] The SADC LA Report (2017) 44.
[435] The SADC LA Report (2017) 44. CJ Ramodibedi allegedly attempted to unduly influence the set-up of the Judiciary, in 2014 he reportedly issued a warrant for the arrest of three High Court judges who were critical of him, and in May 2014 two Supreme Court judges reportedly threatened to resign if this warrant issued by Ramodibedi was served. However, the Swazi police did not make the arrests see Dube et al (2016). The SADC LA Report (2017) 44.
[436] Practice Directive 4 of 2011 which provides that "1) Summonses or applications for civil claims against His Majesty the King and iNgwenyama, either directly or indirectly, shall not be accepted in the High Court or any other Court in the country and (2) The Registrar of the High Court and/or all those entrusted with receipt of court processes in this country are hereby directed to refuse to accept any summons or application specified in 2(1) above."
[437] The SADC LA Report (2017) 44. Also see in general The ICJ Report (2016) 5.
[438] The SADC LA Report (2017) 44.
[439] ICJ Report (2016) 18-19. See also Dube et al (2016).
[440] ICJ Report (2016) 28.

the then Registrar of the High Court, Fikile Nhlabatsi and Justice Jacobus Annandale.[441] Justice Annandale was arrested for trying to rescind the warrant of arrest against Chief Justice Ramodibedi without any due application for the rescission being made.[442] This was done in cahoots with the Registrar and CJ Ramodibedi himself. Justice Annandale's actions were said to have been both procedurally wrong and corrupt.[443]

CJ Ramodebedi refused arrest and locked himself in his house. He appeared 37 days later and was impeached and subsequently dismissed as the Chief Justice of Eswatini. It is worth noting that Registrar Nhlabatsi was redeployed to the Magistrate's Court while Judge Annandale continued to serve as judge of the High Court.[444]

This unfortunate situation also proved undue judicial interference by government. A serious anomaly occurred when the Prime Minister officially announced that the warrant of arrest would be held in abeyance, during the time when the CJ refused to surrender. Such an instruction is to be made by the courts and not by the Prime Minister or Executive.[445]

29. The special instance of Practice Directive 4 of 2011

The special issue of the 2011 Practice Directive is important to discuss against the judicial history in Eswatini. During his tenure Chief Justice Ramodibedi issued a directive[446] proclaiming that courts do not have jurisdiction over cases brought against the King or *Ingwenyama.*[447] The Directive was based on section 11 of the constitution which provides:[448]

> The King and *iNgwenyama* shall be immune from –
>
> (a) suit or legal process in any cause in respect of all things done or omitted to be done by him; and
>
> (b) being summoned to appear as a witness in any civil or criminal proceeding.

[441] Dube et al (2016).
[442] ICJ Report (2016) 28.
[443] Dube et al (2016).
[444] Dube et al (2016).
[445] Joint Report on Swaziland (2016) 9.
[446] Practice Directive 4 of 2011.
[447] Dube *et al* (2016).
[448] Eswatini Practice Directive 4 of 2011 available at https://swazilii.org/practice-directive/2011/4.

This led to a situation where the Registrar of the high court refused to admit a case against the King's office when it failed to honour its debts.[449] CJ Ramodebedi also harshly punished Justice Masuku, a respected Judge of the High Court, by imposing 12 charges against him and suspending him from his duties.[450]

This Practice Directive led to the Law Society collectively moving to boycott the courts for four months and calling for the removal of the former Chief Justice in an official complaint the Law Society launched with the Judicial Service Commission.[451] The JSC did not take any action whereupon the Law Society filed Communication 406/2011 with the African Commission on Human and Peoples Rights.[452]Although the 2011 Practice Directive was subsequently withdrawn in 2017, the replacing Directive still provided for the King's immunity as secured in sections 7 and 11 of the Constitution.[453]

30. The Kingdom of Eswatini court system

Eswatini has a dual legal system that consists of traditional courts, known as Swazi National Courts, and common law courts. Common law courts include the Supreme Court, High Court and Magistrate's courts.[454] The Eswatini Judiciary has the primary mandate to administer justice, to interpret and uphold the Constitution, and it has the power to review the decisions and actions of the other spheres of government.[455]

[449] Dube *et al* (2016).
[450] Among these charges was that Justice Masuku had allegedly insulted the King in a judgment he handed down a month earlier. During his judgment he dismissed an idea that the King could have spoken with a "forked tongue." He was severely criticised by Chief Justice Ramodebedi for the use of these words in reference to the King.
[451] ICJ Report (2016) 35.
[452] ICJ Report (2016) 35.
[453] Eswatini Practice Directive 1 of 2017 available at https://swazilii.org/practice-directive/2017/1.
[454] The BTI Transformation Index Eswatini Country Report 2020 at 12 available at https://www.bti-project.org/content/en/downloads/reports/country_report_2020_SWZ.pdf also see The Kingdom of Eswatini Ministry of Justice and Constitutional Affairs Webpage available at http://www.gov.sz/index.php/ministries-departments/ministry-of-justice/Judiciary. Also see "Report of the Centre for the Independence of Judges and Lawyers: Fact-finding mission to the Kingdom of Swaziland" 2003 *International Commission of Jurists* at 13 available at https://www.icj.org/wp-content/uploads/2012/03/swaziland_fact_finding_10_06_2003.pdf, hereafter ICJ Report 2003."
[455] The Kingdom of Eswatini Ministry of Justice and Constitutional Affairs Webpage available at http://www.gov.sz/index.php/ministries-departments/ministry-of-justice/Judiciary.

The common law court system consists of the consist of the Supreme Court, which is the apex court of Eswatini.[456] The system further consists of the High Court and three levels of Magistrates Courts.[457] Eswatini also has specialty courts which are creatures of statute with limited jurisdiction.

The structure of the Eswatini courts and appeal system is as follows:

The King, on the advice of the Judicial Service Commission (JSC), appoints the Judges of the common law courts. However, it is important to note that the JSC itself consists of members appointed by the King.[458] The Judiciary consists of 17 judges and 18 magistrates. Eswatini also has a total of 22 courts, of which four are higher courts and 18 are subordinate courts.[459]

Neither the Supreme Court nor the High Court have jurisdiction in matters concerning the Offices of the King or Queen Mother, the regency, chieftaincies, the Swati National Council (the king's advisory body), or the traditional regiments system. These institutions are mostly governed by uncodified traditional laws.[460]

30.1. The Supreme Court

Section 145 of the Constitution deals with the composition of the Supreme Court and provides that it will consist of a Chief Justice and a minimum of four additional Justices. It is the final court of appeal with appellate and review jurisdiction[461] and any other jurisdiction that could be conferred upon it by the Constitution or any other law.[462]

The Chief Justice may recommend that the King make an Acting Judge or Justice appointment if the prescribed complement of the Supreme or High Court cannot be realised.[463] These

[456] Section 145(1)
[457] Magistrates' Court Act as amended in 2011 section 16.
[458] The BTI Transformation Index Eswatini Country Report 2020 at 12 available at https://www.bti-project.org/content/en/downloads/reports/country_report_2020_SWZ.pdf
[459] Swaziland United National Development Assistance Framework (UNDAF) 2016-2020 at 11 available at https://eswatini.un.org/sites/default/files/2019-09/SWZ%202016%20UNDAF%20%281%29.pdf, hereafter the UNDAF.
[460] US Country Report on Eswatini (2020) 5. See also section 7 and 11 of the Constitution.
[461] Section 148 of the Constitution.
[462] Section 146 of the Constitution.
[463] Section 153(3) of the Constitution.

Acting appointments cannot exceed a single renewable period of three months,[464] unless there is reason to extend the term to enable the Acting judicial officer to deliver judgment.[465]

Justices of the Supreme Court must persons of high moral character and integrity. To be eligible for appointment as a Supreme Court Justice the person must also have been:

(a) A practicing attorney, barrister, or advocate in Eswatini for a minimum of 15 years;[466] or
(b) An Eswatini High Court Judge for a minimum of seven years;[467]or
(c) Serving as a Judge and practicing law as attorney, barrister, or advocate for a combined period of 15 years.[468]

30.2. The High Court

Section 150 of the Constitution establishes the High Court, which consists of the Chief Justice as an *ex officio* member, and a minimum of four judges of the High Court. Judges of the High Court must also be persons of high moral character and integrity. To be eligible for appointment as a Judge the person must have been:

(a) A practicing attorney, barrister, or advocate in Eswatini for a minimum of ten years;[469] or
(b) Serving as a Judge of a superior court of unlimited jurisdiction in civil and criminal matters in any part of the Commonwealth or Ireland for a minimum of five years; or
(c) Serving as a Judge (as noted above) and practicing law as attorney, barrister, or advocate for a combined period ten years.[470]

The High Court has unlimited original jurisdiction in civil and criminal matters, and appellate jurisdiction as prescribed by the Constitution or any other law. Therefore, the High Court accepts matters on appeal from the Magistrates' Courts and has revisional jurisdiction.[471] It

[464] Section 153(4) of the Constitution.
[465] Section 153(6) of the Constitution. In terms of section 153(5) it is also possible for the Chief Justice, after consultation with the JSC, to appointment and Acting judicial officer for a one-month unrenewable term.
[466] Section 154 of the Constitution. A person will also qualify if he or she has been practicing for the minimum period in another commonwealth country or Ireland.
[467] A person will also qualify if he or she has been a High Court Judge in another commonwealth country or Ireland.
[468] Section 154 (1).
[469] A person will also qualify if he or she has been practicing for the minimum period in another commonwealth country or Ireland.
[470] Section 154(1)(b)
[471] Section 152 of the Constitution. Also see Dube et al (2016).

also has jurisdiction over constitutional matters but is limited in other areas of jurisdiction.[472] For example, it has no original or appellate jurisdiction in matters where the Industrial Court has exclusive jurisdiction. It also has no original jurisdiction in matters of Swazi law and custom. It does however have review and appeal jurisdictions over these matters.[473]

The Constitution further provides that the High Court has limited jurisdiction over the Crown:

> …the High Court has no original or appellate jurisdiction in matters relating to the office of *iNgwenyama*; the office of *iNdlovukazi* (the Queen Mother); the authorisation of a person to perform the functions of Regent in terms of section 8; the appointment, revocation and suspension of a Chief; the composition of the Swazi National Council, the appointment and revocation of appointment of the Council and the procedure of the Council; and the *Libutfo* (regimental) system, which matters shall continue to be governed by Swazi law and Custom.[474]

31. The current legal framework that speaks to judicial independence

Section 62 of the Constitution provides for the independence of the Judiciary which must be guaranteed by the state. A duty is placed upon government and other institutions to respect and promote judicial independence.[475] Section 62(2) further provides for the impartiality of the Judiciary and acting without fear or favour when handing down judgments. It specifically prohibits direct or indirect improper influences, inducements, pressures, threats, or interferences.

Section 62(3) seems rather discouraging when read with section 11 of the Constitution. Although section 62(3) provides that the Judiciary has jurisdiction over all issues of a judicial nature and has exclusive authority to decide whether an issue falls within its jurisdiction, section 11 directly contradicts this by providing that that the Crown is exempt from this jurisdiction.[476]

Furthermore, the Constitution provides that the King does not have final judicial power and that this should be vested in the Judiciary.[477] It further provides for the independence of the

[472] Section 151(2) of the Constitution.
[473] Dube et al (2016).
[474] Section 151(8) of the Constitution.
[475] Section 62 of the Constitution.
[476] The Constitution of the Kingdom of Eswatini of 2005 (hereafter "the Eswatini Constitution").
[477] Section 140(1) of the Constitution.

Judiciary and the exercise of judicial powers and execution of judicial duties free from the control of any person or authority, including the King.[478]

> Neither the Crown nor Parliament nor any person acting under the authority of the Crown or Parliament nor any person whatsoever shall interfere with Judges or judicial officers, or other persons exercising judicial power, in the exercise of their judicial functions…All organs or agencies of the Crown shall give to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts under this Constitution.[479]

Section 141(5)-(7) of the Constitution includes safeguards for the Judiciary's financial and administrative independence, by providing that expenses shall be funded directly from the Consolidated Fund and that the Judiciary shall determine its own administrative affairs.

32. The current state of judicial independence in the Kingdom of Eswatini

Although CJ Ramodebedi was replaced by CJ Bheki Maphalala in 2015, the structural challenges that infringed upon the independence of the Judiciary and the proper separation of powers remained.[480] The constitutional and legal changes needed to ensure proper promotion and respect for the independence of the Judiciary remained elusive and in 2016 the African Commission on Human and People's Rights confirmed the ongoing lack of adequate separation of powers which had a damaging effect on judicial independence.[481]

The post of CJ was never advertised after the removal of CJ Ramodebedi and therefore CJ Maphalala's appointment was made according to royal decree.[482] Further anomalies also existed in his appointment and the appointment of other Judges:

(a) The Constitution of Eswatini[483] provides that the CJ is the Chairman of the JSC. The Constitution then goes further to provide that the CJ is appointed by the King, on the advice of the Judicial Service Commission. Given that CJ Maphalala was Chairman of JSC

[478] Section141(2) of the Constitution.
[479] Section 141(2) and (3) of the Constitution.
[480] The SADC LA Report (2017) 44.
[481] The SADC LA Report (2017) 44.
[482] Dube et al (2016).
[483] Section 159(2)(a)

when he was acting, he essentially himself to the for appointment, as the process was not open and transparent.[484]

(b) After CJ Maphalala's appointment an unprecedented call was made when the JSC, for the first time, advertised vacant posts for judges. This advertisement was also followed by public interviews. Another unprecedented move. Although this initially gave hope to the restoration of a respected and independent Judiciary, the situation soon changed. After the public interviews were held and candidates shortlisted the JSC received instructions to re-open the application process. This led to the appointment of two Judges who had initially not applied and were merely accommodated through the re-opening of applications.[485]

(c) Section 154 (1) of the Constitution also provides that only persons of high moral character and integrity can be appointed as Justices of Superior Courts. This led to some speculation about Justice Mlangeni's appointment who in 2002, as the then Minister of Public Works and Transport, was removed from cabinet. A public report also indicated that he was not fit to hold public office after parliamentarians successfully passed a vote of no confidence against him arguing that he could not be trusted with State assets or property.[486]

In November 2015 Chief Justice Maphalala was given the mandate to resolve the judicial challenges brought about by events leading up to the removal of CJ Ramodebedi.[487] He was also tasked with restoring public confidence in the Judiciary, investor confidence in the credibility of the Eswatini Judiciary, and strengthening international community ties by the promotion of respect for judicial independence.[488]

In 2016 the International Court of Justice reported that the independence and accountability of the Judiciary in Eswatini was still lacking. It further held that Eswatini's constitutional and legislative framework does not respect the separation of powers or provide the necessary legal and institutional framework and safeguards to ensure the independence of the Judiciary.[489]

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[484] Dube et al (2016).
[485] Dube et al (2016).
[486] Dube et al (2016).
[487] Dube et al (2016).
[488] Dube et al (2016).
[489] The BTI Transformation Index Eswatini Country Report 2020 at 12 available at https://www.bti-project.org/content/en/downloads/reports/country_report_2020_SWZ.pdf.

As of 2020 it seemed that corruption at the higher levels of government still seemed to go unprosecuted and perhaps indicated the government's political will to deal with corruption.[490] A report by the Office of the Auditor General exposed widespread fraud and financial irregularities across numerous government ministries yet many of these cases were pending indefinitely because of the strategic connections of the accused.[491]

32.1. Separation of Powers in Eswatini

Although the Constitution provides for three separate organs of government (the Executive, legislature, and Judiciary), Eswatini law and custom dictate that all powers are vested in the King.[492] The King appoints 20 members of the senate,[493] 10 members of the house of assembly, and he approves all legislation that the parliament passes.[494] The King also appoints the Prime Minister and political powers mostly remain vested in him.[495]

Parliament operates on a bicameral system and consists of both the House of Assembly and Senate. All legislation must be scrutinised by both the Senate and the House of Assembly before being sent to the King for his assent.[496] However, parliamentary legislative powers are curbed by section 115(7) of the Constitution which provides that the following bills can only be regulated by Swazi law and custom. Bills that alter or affect:

> (a) the status, powers or privileges, designation or recognition of the *Ngwenyama*, *Ndlovukazi* or *Umntfwanenkhosi Lomkhulu*; (b) the designation, recognition, removal, or powers of the chief or other traditional authority; (c)the organisation, powers or administration of Swazi (customary) courts or chiefs' courts; (d) Swazi law and custom, or the ascertainment or recording of Swazi law and custom; (e) Swazi nation land; or (f)

[490] The BTI Transformation Index Eswatini Country Report 2020 at 12 available at https://www.bti-project.org/content/en/downloads/reports/country_report_2020_SWZ.pdf.
[491] The BTI Transformation Index Eswatini Country Report 2020 at 12 available at https://www.bti-project.org/content/en/downloads/reports/country_report_2020_SWZ.pdf.
[492]"Submission to the Universal Periodic Review of Eswatini" March 2021 *Human Rights Watch* available at https://www.hrw.org/news/2021/03/26/submission-universal-periodic-review-eswatini (accessed 14 April 2021) hereafter "HRW Periodic Review."
[493] Senate consists of 30 members.
[494] "Submission to the Universal Periodic Review of Eswatini" March 2021 *Human Rights Watch* available at https://www.hrw.org/news/2021/03/26/submission-universal-periodic-review-eswatini (accessed 14 April 2021) hereafter "HRW Periodic Review."
[495] "2020 Country Reports on Human Rights Practices: Eswatini" 30 March 2021 *US Department of State* at 1 available at https://www.state.gov/wp-content/uploads/2021/03/ESWATINI-2020-HUMAN-RIGHTS-REPORT.pdf hereafter the "US Country Report on Eswatini."
[496] Section 197 of the Constitution.

Incwala, *Umhlanga* (Reed Dance), *Libutfo* (Regimental system) or similar cultural activity or organisation.

Parliament's powers are even further limited by section 106 of the Constitution which provides that supreme legislative authority vests in the King, and that the King can also make laws for peace and good order.[497] These situations are worrying and undermine the foundation of constitutional law in terms of which parliament should be autonomous with the liberty to debate legislative issues.[498] It is crucial that every sphere of government exercises only its constitutional powers and nothing more. This ensure a good separation of powers and avoids conflicts that inevitable arise when one organ is empowered to exercise more than it is rightly constitutionally given power. If these precautions are not put in place the system of fairness and impartiality is compromised and prejudiced.[499]

32.2. The Judicial Service Commission

Section 159 of the Constitution provides for the JSC which consists of the following members:

(a) The Chief Justice, who is also the Chairman.

(b) Two legal practitioners appointed by the King.

(c) The Chairman of the Civil Service Commission; and

(d) Two additional persons appointed by the King.[500]

The JSC is tasked with advising the King when exercising his power to appoint persons who hold or act in any office specified in the Constitution. This includes advising the King on his powers to exercises disciplinary control over these appointed persons and to remove them from office. The JSC also advises the King on the appointment, discipline and removal of the Director of Public Prosecutions and other public officers as provided for in this Constitution. The JSC further reviews and recommends the terms and conditions of service of Judges and holding certain judicial offices prescribed by the Constitution.[501]

[497] Dube *et al* (2016).
[498] Dube *et al* (2016).
[499] Dube *et al* (2016).
[500] Section 159(2) of the Constitution.
[501] Section 160 of the Constitution.

It deals with all recommendations and complaints regarding the Judiciary and advises Government on the improvement of general conditions for the improvement of the administration of justice.[502]

Given the appointment process of the Chief Justice and the Chairman of the Civil Service Commission, together with the four additional persons appointed to the JSC by the King, it is clear that the King effectively appoints the entire JSC.[503] During the ICJ's fact-finding mission several interviewees confirmed that the advisory function of the JSC is practically interpreted to mean that the King may freely reject the advice received from the JSC and that he has exercised this power on occasion.[504] This poses a threat to the independence of the Commission and ultimately the independence of the Judiciary. The King is remarkably also not required to consult the President of the Law Society when deciding on the two Legal Practitioners to be appointed to the JSC.[505]

Another issue is the fact that the Principal Secretary to the Ministry of Justice also serves as the Secretary to the JSC. Therefore, the Secretary runs a key function within an Executive arm of government while simultaneously performing key functions within the Judiciary. This is a clear threat to the separation of powers and ultimately the independence of the Judiciary made even more prominent by the fact that this is not common practice in other Southern Africa jurisdictions. It is usually seen to that the JSC runs its own independent administration without interference from other spheres of government.[506]

Also of concern is the wide-ranging powers of the CJ as the Chairman of the JSC. His administrative and decision-making powers are extensive. The latter powers combined with the fact that the JSC can hardly be said to be independently constituted, severely affects the integrity of the Judiciary.[507]

The JSC's credibility is further diminished by section 5(2) of the Judicial Service Commission Act of 1982. The section provides that only Magistrates, the Office of the Registrar and Deputy Registrar are deemed to be judicial officers. Therefore, the JSC has no power to advise on the

[502] SADC LA Report (2017) 46.
[503] ICJ Report (2016) 22-23.
[504] ICJ Report (2016) 22-23.
[505] Dube *et al* (2016).
[506] SADC LA Report (2017) 47.
[507] Dube *et al* (2016).

appointment, discipline, or removal of Judges of the High Court or Justices of the Supreme Court.

Although it is good practice to have a body like the Judicial Service Commission responsible for the appointment of judges and oversight of other judicial matters, the composition of the JSC is in desperate need of reform. It is vital that Members of the commission, excluding the Chief Justice, should not belong to any organ of the state.

32.3. Concerns in terms of case allocation

The United Nations Special Rapporteur on the independence of judges and lawyers has expressed concern for the manner in which cases are allocated in Eswatini. The assignment of cases is exclusively an internal matter of judicial administration.[508] Referring to the Implementation Measures for the Bangalore Principles of Judicial Conduct, it is crucial that case allocation is an internal matter of judicial administration and there must be no interference from the outside.[509]

In Eswatini, the ICJ fact-finding mission found that the method of case allocation and management greatly contributed to judicial independence issues. This situation seemed to exist because there was a lack of proper court rules on case allocation.[510] The existing rules were also not readily accessible and the ICJ's attempts to find it were unsuccessful. However, the ICJ mission found that the general practice seemed to be that the former Chief Justice Ramodebedi personally allocated cases, usurping the Registrar's functions in this regard.[511] This also meant that the former Chief Justice side-stepped established practice in which the "duty judge" was tasked with hearing new matters. Former Chief Justice Ramodibedi also acknowledged to the ICJ that he indeed personally assigned cases, but he noted that this was done to ensure each judge was assigned cases according to his or her individual competencies.[512] Many of the ICJ's interviewees believed that this personalised allocation method allowed the former Chief Justice to collude with certain judges and the Executive to

[508] Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 46 available at https://www.refworld.org/publisher,ICJURISTS,,SWZ,57ee89474,0.html. ICJ Report (2016) 30.
[509] Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 46 available at https://www.refworld.org/publisher,ICJURISTS,,SWZ,57ee89474,0.html.
[510] ICJ Report (2016) 30.
[511] ICJ Report (2016) 30.
[512] ICJ Report (2016) 30.

manipulate the justice and influence the outcome of proceedings. Some cases were assigned to certain judges whom the Chief Justice knew are in favour of the Crown's, Executive and other power officials' interests[513]. This interference also cast doubt over the impartiality and independence of the Judiciary. Tensions were also created between the Judiciary and the legal profession and tears in the independence of the Judiciary, which can still be seen today, appeared.[514]

32.4. Public trust in the Judiciary

Tensions between the Judiciary and the Law Society of Eswatini have been present for some time. The Law Society expressed frustration to the ICJ and noted that the Judiciary did not hear or address their concerns. Lawyers were also subject to undue influence through intimidation meted out against them by certain judges. Members of the Law Society also reported to the ICJ that there were instances where judges advised parties to proceedings that they would not get judgement in their favour because they were presented by lawyers viewed as "agents of regime change".[515]

This alleged conduct is in direct contravention of the section 21(1) of the Constitution which specifically provides that all are equal before the law.[516] It also goes against regional and international law standards on a fair hearing and the right to be represented by a legal practitioner of your choice.[517]

It is also unclear what level of trust and faith the public has in the impartiality and independence of the Judiciary.[518] There seems to be a general understanding that the Judiciary serves to protect the interests of the Crown and certain members of the Executive. The views on the lack of impartiality if the Judiciary seems to stem from the former Chief Justice's association with the Executive, the failure of the JSC to address concerns raised by civil society, and the opaque nature of judicial appointments and perceived corruption of some judges.[519]

[513] ICJ Report (2016) 30.
[514] ICJ Report (2016) 30.
[515] ICJ Report (2016) 32.
[516] ICJ Report (2016) 32.
[517] ICJ Report (2016) 32.
[518] ICJ Report (2016) 35.
[519] ICJ Report (2016) 35.

33. Appointment, tenure, discipline, and removal of judges from office

33.1. Appointment of Justices of the Superior Courts

The process of judicial appointments is a key factor in determining the independence of the Judiciary. The Judicial Service Commission reviews and recommends the terms of appointment and the conditions of service for judges and judicial office holders.[520] However, in practice it seems that the Crown comprehensively controls judicial appointments.[521]

The appointment process also seems to be opaque since vacancies are not advertised, public interviews are not a common practice, and the shortlist of candidates provided to the King is not publicly disclosed.[522] This lack of transparency in the judicial appointment process seems to create a conducive environment for favouritism and corruption.[523] During the ICJ facto-finding mission to Eswatini, several stakeholders opined that the lack of safeguards in the appointment process and the Crown's control over it as an important contributing factor to the lack of judicial independence.[524]

There have also been several instances where judges have been appointed in direct contravention of the Constitution, severely undermining the rule of law.[525] One such example is the appointment of Chief Maphalala and his additional judges after the removal of former Chief Justice Ramodibedi. Apart from the anomalies in the appointment of Chief Justice Maphalala discussed in paragraph 3 above, he was also not the most senior of the Supreme Court Justices at the time of his appointment.[526]

Appointment of acting and temporary judges have also had a negative impact on the rule of law and judicial independence. Although the Constitution gives the Chief Justice the mandate to advise the King on making such appointments, the ICJ mission found that this is mostly a secretive process without oversight or consultative participation of relevant stakeholders.[527]

[520] Section 160(1)(c) of the Constitution.
[521] ICJ Report (2016) 22-23.
[522] ICJ Report (2016) 22-23.
[523] ICJ Report (2016) 22-23.
[524] ICJ Report (2016) 22-23.
[525] ICJ Report (2016) 22-23.
[526] Section 158(7) of the Constitution.
[527] ICJ Report (2016) 22-23.

Interviewees of the ICJ mission also repeatedly pointed out that it appears as if acting judges are appointed to prevent certain sitting judges from hearing matters. This is likely to influence proceedings to guarantee a favourable outcome for the Crown and its interests.[528]

33.1.1. Appointment of foreign judges

The Constitution provides for the appointment of judges from other commonwealth countries or Ireland. The Judiciary Act[529] provides for the appointment of judges from commonwealth countries and South Africa to the non-traditional courts. Despite this legislated power to appoint foreign judges, the Executive seems to have engaged in campaigns against these foreign judges. This has come about by misinterpretation or misrepresentation of judgments by these foreign judges that do not meet the Executive's political agendas.

33.2. Security of tenure

Section 156 of the Constitution provides for the retirement and resignation of Justices of the Superior Courts. According to this section Justices can retire at any time after reaching this age of sixty-five. However, they need to have at least completed a ten-year term of service. Mandatory retirement is prescribed if a Justice of the Supreme Court or a Judge of the High Court reaches the age of seventy-five years.[530] A Justice can also resign at any time by giving written notice to the Chair of the JSC.[531] In addition to this Justices may also be removed for misbehaviour or inability to further perform their functions, as stipulated in section 158 of the Constitution.

One points of contention however is the safety of tenure based on Eswatini's practice of appointing judges on short-term contracts. This creates uncertainty of the continuity of their roles as its unclear if they would still be employed when the contract comes to an end.[532]

[528] An example would be Chief Justice Ramodebedi's referral of his tax case to Judge Simelane. ICJ Report (2016) 22-23.
[529] The Judiciary Act of 1982.
[530] In terms of section 156 (3) this may be extended for a period of six months to allow the Justice to finalise ongoing cases serving before him or her.
[531] Section 156(2) of the Constitution.
[532] Dube *et al* (2016).

33.3. Removal of judges

The Constitution provides that a judge can only be removed from office for serious misbehaviour or an inability to perform the functions of office.[533] The Constitution uses the phrase "stated serious misbehaviour." However, upon further perusal of the Constitution there is no guidance as to which acts may qualify as "stated serious misbehaviour." This is extremely worrying given the power the King wields especially over the appointment and removal of judges. Also, even though the King must act upon the recommendations of the JSC[534] this rule can easily be circumvented by the appointment of judges on short-term contracts and a later refusal to renew those contracts upon expiry.[535]

The example of Judge Masuku's dismissal is once again of importance here. His disciplinary hearing did not follow due process and observers were refused access to the hearing.[536] The then Chief Justice Ramodibedi, also refused to recuse himself even though he was the accuser and the judge. He also denied an application for hearing to be held in public and cross-examination of some of the evidence against Judge Masuku was also denied.[537]

The ICJ fact-finding mission found that attempts to obtain warrant of arrests against judges who we are serving at the time were made. These warrants were issued even though the Constitution clearly prevents this. Section 141(4) provides:

> A judge of a superior court or any person exercising judicial power, is not liable to any action or suit for any act or omission by that judge or person in the exercise of the judicial power.

Although a distinction must be made between conduct which is purely in the exercise of a judicial power by the judge and conduct that does not involve the legitimate exercise of a judicial power, justice must always be administered in a way that ensures accountability while also respecting judicial independence.[538] This use of arrest warrants against serving judges in Eswatini caused significant damage to the independence, impartiality, and personal security of serving judges. Especially because, in this context, there may have been undue interference in judicial functions by the Executive. The perception that these warrants are used merely as

[533] Section 158 of the Constitution.
[534] Section 158(5) of the Constitution.
[535] For examples of such circumstances see Dube et al (2016).
[536] ICJ Report (2016) 26.
[537] ICJ Report (2016) 26.
[538] ICJ Report (2016) 29.

a measure of harassment is further evidenced by the fact that most warrants for arrest are eventually withdrawn and hardly ever lead to a criminal trial.[539]

33.4. Conditions of service for judges

The only provision speaking to the determination of the conditions of service for judges can be found in section 160(1)(c) of the Constitution. The sub-section is extremely broad and does not speak to any specifics.

> Subject to any other powers or general functions conferred on a service commission in terms of this Constitution, the Judicial Service Commission shall, among other things, perform the following functions…review and make recommendations, subject to the provisions of this Constitution, on the terms and conditions of service of Judges and persons holding the judicial offices enumerated in subsection (3)…

The vagueness of this section is further complicated by the fact that the JSC, in terms of the definition of judicial officers,[540] do not seem to have any power over judges of the Supreme Courts. There is seems to be no codified mandate given to the JSC to play any formal role in negotiating or recommending terms and conditions of service for the judges of the High Court or Supreme Court.[541] Unfortunately, this lack of uniform approach in the determination of the conditions of service of the judges, without a defined, meaningful and precise role for the JSC, makes this a matter of largely unregulated Executive discretion.[542] Although there have been notices stipulating the salaries of judges over the years it did not disclose all the benefits accruing to all judges.[543]

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[539] ICJ Report (2016) 29.

[540] Discussed under the Judicial Services Commission in paragraph 6.

[541] "Swaziland law, custom and politics: Constitutional crisis and the breakdown in the rule of law" (March 2003) *International Bar Association Human Rights Institute Report* at 42 available at file:///C:/Users/Jeanne-Mari/Dropbox%20(Personal)/My%20PC%20(DESKTOP-4LT0OFJ)/Downloads/Swaziland_law_custom%20(1).pdf hereafter the "IBA Report". Section 160(2) and (3) the JSC has limited to no power over the discipline, removal and conditions of service of judges. Since these sections read as follows: "Without derogating from the provisions of subsection (1), the Commission has power to appoint persons to hold or act in any of the offices mentioned under subsection (3) including the power to exercise disciplinary control over those persons and the power to remove those persons from office." Sub-section (3) then goes further to define these persons providing: "The offices referred to in subsection (2) are...the office of Registrar of the Supreme Court; Registrar of the High Court.
(iii) Deputy Registrar of the Supreme Court; Deputy Registrar of the High Court; Master of the High Court; Deputy Master of the High Court; Magistrates.

[542] IBA Report (2003) 42. In 2003 a short notice prescribing salaries was published, available here https://gazettes.africa/archive/sz/2002/sz-government-gazette-dated-2002-11-21-no-882.pdf

[543] Kindly see the following for notices published in 2004 and 2007 respectively. Unfortunately more recent notices could not be traced by the researchers. https://gazettes.africa/archive/sz/2004/sz-government-

34. Judicial pronouncements and trend developments in Eswatini

34.1. Case law

Various international organisations have expressed concern about the apparent lack of external and internal judicial independence in Eswatini.[544] However positive steps toward securing an independent Judiciary have also been taken in Eswatini.

In 2018, less than three months after King Mswati III's made the declaration to change his country's name, a direct challenge to the legality of this decision was launched by the Institute for Democracy and Leadership (IDEAL) and its director, Thulani Maseko. Mr Maseko argued that Eswatini is a democratic country and therefore it was essential that government and its officials exercise their powers in line with the law. He further argued that the King did not have the legislative power to unilaterally decide upon the name change and therefore he acted upon powers he does not hold. This case has garnered a lot of attention and was deemed to be the test case for true judicial independence in Eswatini. It seems that the international community is waiting for the outcome of this matter to judge if true progress towards judicial independence has been made in Eswatini.[545]

The IDEAL case is also especially important against the backdrop of the Simelane case in which the court infamously held that the king was exempted from any legal action. This case is of note since it involves Justice Simelane was also intertwined in the judicial crisis that came to a head in 2015.[546] This case caused a stir in the international community and created confusion as to the independence of the Judiciary and its support toward an "untouchable" monarch. In this case the Law Society of Swaziland sought a declaratory order stipulating that the appointment of Justice Mpendulo Simelane as a Justice of the High Court was inconsistent with the provisions of the Constitution of Swaziland and therefore unconstitutional, null and void, and that the appointment should be set aside.[547]

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gazette-dated-2004-11-23-no-134.pdf and https://gazettes.africa/archive/sz/2007/sz-government-gazette-dated-2007-12-07-no-126.pdf.

[544] Joint Submission to the 2nd Cycle Universal Periodic Review of Swaziland (April – May 2016) *Southern Africa Litigation Centre, Lawyers for Lawyers Foundation, International Bar Association's Human Rights Centre, Judges for Judges* at 8 available at https://www.upr-info.org/sites/default/files/document/swaziland/session_25_-_may_2016/js5_upr25_swz_e_main.pdf, hereafter "Joint Report on Swaziland".

[545] Rickard C "Judicial independence at stake in Swaziland name-change suit" (25 July 2018) *GoLegal Industry News and Insight Online* available online at https://www.golegal.co.za/judicial-independence-swazi-eswatini/.

[546] A full discussion of this is included in paragraphs 1 and 2 above.

[547] *The Law Society of Swaziland v Mpendulo Simelane N.O. & 3 Others (527/2014) [2014] SZHC 179 par 3.*

The court held that the case be dismissed with costs to the Law Society stating that:

> It behoves the Court to point out at the very outset that in terms of…the Constitution…, the appointment of the Chief Justice and the other Justices of the superior courts, is the exclusive preserve and prerogative of His Majesty the King, on the advice of the Judicial Service Commission. We say *'exclusive preserve and prerogative'* of His Majesty the King because of the use of the word *'shall'* therein. Further to this prerogative of His Majesty the King, and in terms of the same Constitutional Act…, headed *'Protection of King and iNgwenyama in respect of legal proceedings',* the King and iNgwenyama shall be immune from *'suit or legal process in any case in respect of all things done or omitted to be done by him….' [Court's emphasis]* 'flowing from all things done by him'… Under no circumstances therefore should any litigant, attempt, directly or indirectly, to challenge the authority of His Majesty the King in any cause in respect of all things done or omitted to be done by him! Once the King has spoken it is the end of the matter.[548]

Given the judgment above in Simelane it would be quite the leap forward if the court were to rule in favour of IDEAL in the name change matter. It would be a positive step toward the expression of judicial independence and establishing lines in the sand regarding the separation of powers and ultimately respect for the rule of law.

34.2. Positive developments toward change

Despite concerns raised about judicial independence and impartiality due to political interference, there is also evidence that some courts continue to play a significant role in promoting human rights.[549]

Eswatini is also making significant progress in fighting corruption and improved by 13 point on the Mo Ibrahim corruption index between 2012 and 2014 alone. This placed Eswatini amongst the ten least corrupt countries in Africa.[550] This change was attributed to a strengthened Anti-Corruption Commission, Eswatini's ratification of the United Nations Convention Against Corruption (UNCAC), and an increased number of corruption cases that were brought before the courts.[551]

[548] *The Law Society of Swaziland v Mpendulo Simelane N.O. & 3 Others (527/2014) [2014] SZHC 179 par 1-2.*
[549] SALC Report on Eswatini (2019) 64.
[550] UNDAF (2016-2020) 27.
[551] UNDAF (2016-2020) 27.

United Nations Eswatini has also pledged its support to the Government in strengthening the justice system. The aim is to provide an efficient system that is accessible to all, particularly the most vulnerable groups.[552] Here the Eswatini National Development Plan lends further assistance by providing for the promotion of the rule of law through proper access to justice and key improvements in the court system.[553]

The Eswatini National Development Plan also recognised that there are many archaic pieces of legislation in desperate need of reform, and a strong need for a body such to ensure that these laws speak to the present, future, and emerging issues affecting Eswatini society.[554] As part of its key sectoral outcomes in this regard Eswatini will work to reduce the backlog of cases and increase efficiency of case processing.[555]

35. Recommendations for upholding the rule of law and an independent Judiciary.

Recommendations shared in this section are based upon the outcome of the research conducted for purposes of this report and recommendations made by other international bodies.

35.1. Cease interference in the Judiciary

There must be a public and real respect for the independence of the Judiciary and the impartiality of the institution. There can be no interference with judicial functions by the Executive or politicians. To this end there is a crucial need to bring the Eswatini Constitution in line with regional and international standards in this regard. This would specifically speak to the King's influence over the JSC, and sections 7 and 11 of the Constitution which guarantees the Crown's immunity from judicial proceedings.

[552] UNDAF (2016-2020) 28.
[553] "National Development Plan 2019/20 – 2021/22: Toward Economic Recovery" *Ministry of Economic Planning and Development Kingdom of Eswatini* at 109 available at http://www.gov.sz/images/CabinetMinisters/NDP-2019-20-to-2021-22-final.pdf (accessed 14 April 2021) hereafter Eswatini NDP.
[554] Eswatini NDP 109.
[555] Eswatini NDP 109.

35.2. Proper separation of powers

It is also necessary to bring Eswatini legislation and the Constitution in line with regional and international best practices on the proper separation of powers. To this end it may be of use to implement human rights treaties to which Eswatini is not a party to.[556]

Decisions and recommendations of regional and international human rights mechanisms should also be put in place.[557]

35.3. Strengthen the legal and regulatory frameworks that speak to judicial independence

This can be achieved by an in-depth review of the laws and regulations pertaining to the JSC and brining these in line with regional and international law and standards. As discussed in this report there is minimal regulation of the JSC and its functions and most of the processes are described in a very opaque fashion. There is a severe lack of clarity and it is essential that the Crown's control over the Commission's composition be abolished.

The current Judicial Service Commission Act 13 of 1982 is extremely broad and not consistent with regional and universal international law and standards. The Act should be amended to include a detailed process for the appointment of judges which allows for a public, transparent, and fair processes that duly respects the separation of powers. It should also allow for a public announcement of judicial vacancies and must ensure there is full participation of all concerned stakeholders. It should also go further to speak to the necessary safeguards guaranteeing security of tenure for judges and an independent and impartial disciplinary system for them that clearly removes any possible influence from the Crown. Given the current composition of the JSC and the integral role the Crown plays in choosing the members of the JSC, it is advised that the entire JSC be reconstituting under revised laws and regulations.

The Constitution and laws should also be amended to cease temporary and contract appointments of judges unless there is an absolute need due to potential conflicts of interest or the need to clear case backlogs.[558]

[556] ICJ Report (2016) 36.
[557] ICJ Report (2016) 37.
[558] ICJ Report (2016) 37.

35.4. Repeal and amendment of Practice Directives

Although the controversial 2011 Practice Directive was repealed, as discussed in this report, its replacement still made Crown interference possible. Therefore, it is recommended that an entirely new Practice Directive which adequately provides for a fair process, judicial independence and due separation of powers should be enacted.

35.5. Code of Conduct for judges

To strengthening the integrity of the Judiciary and improve the accountability of judges, it is recommended that a Judicial Code of Conduct be drafted and implemented.[559]

35.6. Case management system

A proper case allocation and management system representing impartiality and fairness should be drafted and implemented. It is vital that the Chief Justice's direct control and ability [560]to influence the allocation and management of cases be removed.[561]

35.7. Education and Training

To ensure judges are fully appraised of their duties and obligations to the Judiciary it is recommended that a mandatory continuous professional development programme be implemented for judicial officers. This should be aimed at improving the understanding of the independence of judges and lawyers and raising awareness of basic human rights, like the right to fair trial.[562]

35.8. Involvement of the Law Society

As noted in this report, there has been a lot of tension between the Law Society and the Judiciary. This relationship should be mended, and it is therefore recommended that regular consultations and briefings be held between the two entities on administrative matters that are of mutual concern to both the Judiciary and the legal profession. This may work to ensure an effective and profession relationship between the Judiciary and the legal profession.[563]

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[559] ICJ Report (2016) 37.

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[561] ICJ Report (2016) 37.

[562] Swaziland United National Development Assistance Framework (UNDAF) 2016-2020 at 11 available at https://eswatini.un.org/sites/default/files/2019-09/SWZ%202016%20UNDAF%20%281%29.pdf, hereafter the UNDAF. Also see ICJ Report (2016) 38.

[563] OCJ Report (2016) 38.

35.9. Stronger measures to ensure the independence of the Judiciary

There are a few recommendations toward creating, implementing, or strengthening measures to ensure an independent Judiciary. These include:[564]

(a) Processes and regulations that will ensure the appointment of impartial judges.
(b) Specialised regulations for the punishment and prosecution of those responsible for acts that undermine the independence or impartiality of Judiciary or its proceedings.
(c) Ensure the judge's safety of tenure.
(d) Rules relating to the removal and appointment of judges should be brought in line with international and regional standards.
(e) Disciplinary procedures should be in line with sections 17-20 of the Basic Principles on the Independence of the Judiciary.[565]

36. Conclusion

The rule of law seems to be extremely weak in Eswatini with a long history of disregard for the independence of the Judiciary and violations of the right to a fair trial.[566] The main obstacle to Eswatini's judicial transformation is its lack of principles speaking to proper separation of powers and a functioning democracy.[567] Although there is an effort to present Eswatini as a democratic country, the inclusion of contradictory elements of the Constitutions directly affect the practical implementation of this. While sections 138 and 141 of the Constitution, for example, speak to judicial independence the constitution and legislative framework does not respect the separation of powers nor does it provide the necessary safeguards for the independence of the Judiciary.[568]

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[564] Swaziland United National Development Assistance Framework (UNDAF) 2016-2020 at 11 available at https://eswatini.un.org/sites/default/files/2019-09/SWZ%202016%20UNDAF%20%281%29.pdf, hereafter the UNDAF. Also see ICJ Report (2016) 38.
[565] Joint Report on Swaziland (2016) 11-12.
[566] ICJ Report (2016) 12.
[567] "Justice Locked Out: Swaziland's Rule of Law Crisis" *International Commission of Jurists Fact-Finding Mission* 18 February 2016 at 5 available at: https://www.refworld.org/docid/57ee89474.html (accessed 14 April 2021) hereafter the "ICJ Report."
[568] ICJ Report (2016) 8.

Although the Judiciary displays a degree of independence in some cases, the king holds ultimate authority over the appointment and removal of judges.[569] An independent Judiciary has the capacity to promote and preserve the rule of law which is the building blocks of any democratic country. Therefore, it is essential to have an independent Judiciary that functions reasonably and efficiently.[570] However, the conundrum is that an independent Judiciary cannot be attained in an undemocratic society. There needs to be more than just Constitutional provisions, there also needs to be political will on the part of the Executive to enforce and respect the rule of law.[571]

The involvement of the King in the process of appointing judges goes against the very grain of judicial independence and the doctrine of separation of powers. Appointments made in such a way cannot be said to be free from political considerations.[572]

[569] "Freedom in the World: Eswatini" 2020 *Freedom House Annual Indicator* par F available at https://freedomhouse.org/country/eswatini/freedom-world/2020 (accessed 14 April 2021), hereafter Freedom House Annual Indicator.
[570] The Kingdom of Eswatini Ministry of Justice and Constitutional Affairs Webpage available at http://www.gov.sz/index.php/ministries-departments/ministry-of-justice/Judiciary.
[571] Dube *et al* (2016).
[572] Dube *et al* (2016).