

Appointment processes for Judicial Services Commissions (JSCs) and their Role in
Promoting Independence of the Judiciary in Southern Africa: A Focus on Law
Society/Bar Association Representatives on the JSCs



By Makanatsa Makonese

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List of Abbreviations

ABACHR- American Bar Association Centre for Human Rights

ACHPR- African Charter on Human and People's Rights

AfriMAP- Africa Governance Monitoring and Advocacy Project

AGM- Annual General Meeting

CKGR- Central Kalahari Game Reserve

GCB- General Council of the Bar

JSC- Judicial Service Commission

LAZ- Law Association of Zambia

LCN- Lesotho Council of Non-Governmental Organisations

LSSA- Law Society of South Africa

LSN- Law Society of Namibia

LLS- Lesotho Law Society

LSB- Law Society of Botswana

LSZ- Law Society of Zimbabwe

MLS- Malawi Law Society

NGO- Non Governmental Organisation

OSISA- Open Society Initiative for Southern Africa

PSC- Public Service Commission

SADC- Southern African Development Community

SADCLA- Southern African Development Community Lawyers Association

SC- Senior Counsel

SI- Survival International

TLS- Tanganyika Law Society

UN- United Nations

Chapter 1: Introduction

1.1 Introduction

The relationship between effective and sustainable democracies, the development of democratic states and the establishment of effective mechanisms of accountability cannot be over-emphasised. With this realisation, it is critical for the Southern African region to focus on the foundational values of solid, transparent and fully functional rule of law institutions to achieve social, economic and political development (Ellett, 2014: 4). The judiciary and other institutions supporting the rule of law, access to justice and justice delivery to the citizens are a critical part of this equation. It is a fact that in the Southern African region, institutions supporting constitutional democracies have been a feature of many of the post-colonial states. The role of the Judiciary in enabling the development of the nascent States has been pivotal with a realisation that the judicial system is key in supporting the aspirations and rights of the citizens following years of colonialism, apartheid and other forms of race based discrimination and injustices. The post-colonial states have therefore focused on ensuring that the judiciary is transformed in line with the general social, economic and political transformation that was expected after the end of colonialism. A key focus of transformation during the early years of independence has been on race, with gender transformation of the judiciary coming in as a secondary issue of consideration. With time however, the issue of gender transformation of the judiciary has become an important aspect of this debate. The question that remains however is whether or not the outward efforts to democratise post-colonial states and create functional and effective attendant institutions have made a difference in the lived realities of citizens.

To be truly effective and in order for citizens to have confidence in institutions such as the judiciary, it is important for these bodies to be independent and be seen to be independent, both as institutions and the individuals that constitute them. However, it has been argued that in Southern Africa, despite the outward trappings of constitutionalism and independent judiciaries, the reality is that many of the judiciaries in the region face various forms of interference thereby undermining their independence (Ellett, Undated: 11). Political interference in particular is a major challenge. Even the judiciary in South Africa, the country that is often regarded as the most advanced constitutional democracy in the region is not free from such interference

and executive intimidation (Ibid, 10). Many actors in the region have therefore continued to work to ensure that the independence of the judiciary in Southern Africa becomes a reality and that institutions and instruments that are created to make this a reality are respected and observed.¹

1.2 Principle of Independence of the Judiciary

The principle of independence of the judiciary has not been developed to protect the judiciary itself but to protect the citizens by ensuring that the judiciary is able to effectively deliver on its mandate of serving justice to the citizens. In 1996, the then Chief Justice of Australia, The Hon Sir Gerard Brennan, observed that:

“Judicial independence does not exist to serve the judiciary; nor to serve the interests of the other two branches of government. It exists to serve and protect not the governors but the governed.” (Brennan, 2006)

And in emphasising the importance of the principle of independence of the judiciary to citizens, Judge Ojwang² has noted that:

“Firstly, the citizen has to trust that the court’s judgment has finality, and is entitled to obedience, as a matter of constitutional obligation. Then the citizen has to trust that the Judiciary shall be guided by rules, principles and discretions not influenced by the very power-wielders who cause oppression, or other harm. That is to say, the citizen expects the Judiciary to be independent, in its decision-making. And lastly, the citizen expects the Judiciary to be fair, in its decision-making. All these attributes underline one theme, independence, as the hallmark of the Judiciary, in a constitutional set-up that protects the citizen, as an individual, even as the nation’s broad social goals are pursued by the relevant public agencies, which are driven by a political-cum-administrative mandate.” (Ojwang 2008: 4)

Judges from the Southern African region have made similar pronouncement and in the process buttressed the viewpoint that like other regions in Africa and other parts of the region, the Southern African region recognises the importance of the independence of

¹ Some of these actors include civil society organisations such as the SADC Lawyers’ Association (SADCLA) and the International Commission of Jurists (ICJ) as well as the judiciaries themselves. The Southern Africa Chief Justices Forum (SACJF) has brought leaders in the Judiciary in Southern Africa together to try and address some of the challenges faced by the judiciaries in the region.

² Judge of the High Court of Kenya from 2003-2011 and Judge of the Supreme Court of Kenya from 2011

the judiciary. In his speech at the Cape Law Society Annual General Meeting (AGM), the late former Chief Justice of South Africa Justice Arthur Chaskalson³ stated that:

“Judicial independence is a requirement demanded by the Constitution, not in the personal interests of the judiciary, but in the public interest, for without that protection judges may not be, or be seen by the public to be, able to perform their duties without fear or favour”⁴

At a conceptual level, a definition of the principle of judicial independence is complex with many legal researchers and theorists defining it in different ways. A key determinant factor however is that judicial independence is found at two levels; namely at an individual level but also at an institutional level as discussed below.

1.3 Pillars of Judicial Independence

Individual level judicial independence has been defined as the ability of a judge to impartially and independently apply his or her mind to a matter without undue influence (Siyo and Mubangizi, Undated:1). Securing terms and conditions of service of judges is an important way of guaranteeing the individual independence of judges by ensuring that they are not subjected to undue executive influence in return for keeping their positions. An appointment and removal process that is based on set criteria, based on law and supported by fair procedural requirements therefore helps in securing the independence of individual members of the judiciary. Constitutional guarantees of this independence is equally important.

Institutional independence on other hand reinforces the principle of separation of powers and is premised on the need for the judiciary to be independent from the other arms of government, that is the executive and the legislature (Rugege S, 2005:412). Protecting the institutional independence of the judiciary is important because often the courts can make far reaching decisions that have got an impact on the operations of the other two arms of government. These include situations where the courts can declare

³ Justice Arthur Chaskalson was the Chief Justice of South Africa from 2001 until his retirement in 2005. He died on 1 December 2012 (See <http://www.sahistory.org.za/people/chief-justice-arthur-chaskalson>)

⁴ The late former Chief Justice was addressing members of the Cape Law Society (South Africa) on 9 November 2012

an administrative act of the executive as illegal, null, void or unconstitutional or declare an Act of Parliament to be unconstitutional. Yet the judiciary depends on these two arms of government in order to effectively deliver on its mandate. The executive and the legislature make decisions regarding budget allocations for the judiciary, pegging remuneration and setting conditions of service, confirmation of appointment of judges or the enforcement of court orders (Ibid, 412). Such interdependence can often be used to stifle the judiciary, for example when it is used to deprive an independent judiciary of resources, make conditions of service untenable or refuse to enforce court orders. It is for this reasons that the institutional independence of the judiciary must be guaranteed to ensure that the interdependence with other arms of government is not used as a tool in interfering with and infringing on the independence of the judiciary.

The United Nations (UN) Basic Principles on the Independence of the Judiciary⁵ is one of the most notable international instruments guiding governments in securing the independence of the judiciary. The Principles provide the following as important in guaranteeing both the individual and institutional independence of the Judiciary:

- That judicial independence must be guaranteed by the Constitution;⁶
- Member States must provide adequate resources to enable the judiciary to properly perform its functions;⁷
- Tenure of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement are to be adequately secured by law;⁸ and that
- Suspension or removal of judges shall only be for reasons of incapacity or behaviour that renders them unfit to discharge their duties and such suspension and removal can only be in accordance with set and established standards of judicial conduct.⁹

⁵ Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

⁶ Article 1

⁷ Article 7

⁸ Article 11

⁹ Articles 18 and 19

In line with international law dictates, these principles are not binding on UN State Parties but they nonetheless play an important persuasive role and have also acted as an important reference point in developing national level legal and constitutional provisions, codes and standards for the promotion of judicial independence. To this end, the Principles state that they are:

“formulated to assist Member States in their task of securing and promoting the independence of the judiciary [and that they] should be taken into account and respected by Governments within the framework of their national legislation and practice” (Preamble)

Article 1 of the Principles, which calls for constitutional guarantees for independence of the judiciary has been widely embraced and all the Constitutions of the nine Southern African countries that are the subject of this research provide such guarantees. The constitutional guarantees however have to be weighed against the lived realities on the ground and the extent to which the Governments in the region have taken practical measures to ensure that these provisions are implemented.

As most of the countries that are the subject of this research are members of the Commonwealth¹⁰, it is also important to make reference to the Commonwealth (Latimer House) Principles on the three branches of Government. The Principles address the issue of the independence of the judiciary focussing on the need for the judiciary to be independent from the other two branches of government. In order to ensure independence of the judiciary, the Principles highlight the following as important:

- That judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process;
- There must be appropriate security of tenure and protection of levels of remuneration;

¹⁰ These include Botswana, Lesotho, Malawi, Namibia, South Africa, Tanzania, Zambia and Swaziland. Of the nine research countries, only Zimbabwe is not a member of the Commonwealth following its pullout in 2003. (See <http://thecommonwealth.org/member-countries>) for a list of all member states of the Commonwealth.

- Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought; and
- Interaction, if any, between the executive and the judiciary should not compromise judicial independence.¹¹

The essence of the guidelines is to ensure that each branch of government exercises restraint and allows the other branches to perform their mandates within the confines of the law and the constitution and without undue pressure, influence or interference (Olivier 2000:23). The Latima House Guidelines (annexed to the Principles) provide practical guidelines to member states of the Commonwealth on how the principles can be implemented at the national level. The role of the Constitution in enshrining the independence of the judiciary and subsidiary law in providing implementation mechanisms is emphasised. This means that countries must provide the legal mechanisms for ensuring that the independence of the judiciary is a reality.

At the African level, Article 26 of the African Charter on Human and People's Rights (ACHPR/Banjul Charter) provides that:

“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.”

This provision must be understood in light of the main purpose of the African Charter, which is the protection and the promotion of human rights. In developing this provision, the State Parties displayed an awareness of the need for free and independent courts if the rights of the citizens were to be promoted and protected and the provisions of the Charter were to be implemented.

The regional treaty for Southern Africa, the SADC Treaty however makes no specific reference to the need for Member States to ensure independence of the judiciary at the national level. The Treaty however provides for the principles that must guide SADC and its Member States. Amongst these principles are those related to human rights,

¹¹ Article 4

democracy and the rule of law.¹² With broad interpretation, the principle's reference to human rights and the rule of law also implies the need to protect the independence of the judiciary if these tenets are to be realised. In addition the Treaty also enjoins members of the SADC Tribunal (as well as the Executive Secretary and members of staff of SADC) in the performance of their duties to:

“not seek or receive instructions from any Member State, or from any authority external to SADC”¹³

This provision suggests the need for the Tribunal (the regional court) to be independent in the discharge of its duties although this independence is lumped together with that of the Secretariat of the Community. The provision places the burden for the protection of the independence of the Tribunal on the members (judges) of the Tribunal but does not place a reciprocal duty on the Member States to promote and ensure the independence of the same institution. The same provision suggests that an authority that is internal to SADC can give instructions to the Tribunal or that members of the Tribunal can seek instructions from such authority. Overall, SADC's main legal instruments (the Treaty) has a weak reference point on the independence of the judiciary. The actions of SADC Member States leading up to the suspension of the SADC Tribunal in 2010 seem to suggest that the region has not fully embraced the principle of the independence of the judiciary given that the Tribunal was disbanded for independently discharging its duties in a manner that was not viewed favourably by the SADC Heads of State and Government¹⁴

The UN Principles and Guidelines on the Independence of the Judiciary, the Latima Guidelines and the ACHPR however provide solid reference points that SADC countries can use in making the necessary national level reforms and improvements in their Constitutions and laws to ensure the independence of the judiciary.

¹² SADC Treaty, 1992, Article 4 (c)

¹³ SADC Treaty, 1992, Article 17 (2)

¹⁴ The SADC Tribunal was disbanded in August 2010, after the Tribunal had given rulings that were against the Government of Zimbabwe in relation to its land reform programme. The Tribunal labeled the land reform programme as racist. Following these judgments, the Government of Zimbabwe lobbied other Member States to suspend the operations of the Tribunal and succeeded. Since then, the SADC region has been without an operational regional court.

1.4 The Judicial Service Commissions

For many years in Southern Africa and indeed in many other parts of the world, the appointment of judges has been an opaque process, often dominated by the Executive of any country. In reference to the first JSC after the end of apartheid in South Africa, Moarane SC and Trengove SC¹⁵ had this to say:

The establishment of the Commission marked a sharp and decisive break with the past mysterious ways of appointing judges. Gone are the days when, in some cases, the sole reason for such appointments was the repayment of political debts” (Moarane and Trengove, 1995: 149).

However, even with the progress made in recent years in addressing this challenge, there still remains controversy and concerns with the appointment processes for judges in almost all the jurisdictions in Southern Africa. In some instances, there have been concerns that nothing much has changed in terms of ensuring that the appointment and management of judges and the judiciary is transparent, fair and is protective of the independence of the judiciary. However in all the nine countries of Southern Africa which are the subject of this research, the JSC is a common institution. The JSC was established to address the challenges of lack of transparency in the appointment, retention and removal of judges, which in turn have an impact on the independence of the judiciary. The idea in establishing JSCs therefore was to place the appointment, determination of conditions of service and dismissal of judges and other judicial officers as well as the management of the judiciary in an independent body. It has been noted that the JSC must be a watchdog of certain fundamental values and principles namely:

“the independence and autonomy of the judiciary, the protection of judicial pluralism, the role of the judiciary as the custodian of fundamental freedoms and rights, and the development of the judicial review of the constitutionality of laws. At the same time-----it should maintain a high level, ongoing debate about the role of the judiciary within a democratic system” (Council of Europe, 1993: 32)

The establishment of the JSC on its own however is not a guarantee on the independence of the judiciary. The SADCLA together with other civil society

¹⁵ The two were the first representatives of the advocates’ profession in the post-apartheid South African JSC.

organisations in the region, have over the years interrogated the appointment process for members of the JSC and how such appointment can directly or indirectly impact the independence of the judiciary. Concerns have been raised that whilst the other arms of government may not be directly or solely responsible for the appointment and removal of judges, they could still exercise considerable influence in the process if the JSC was compromised. Such compromising of the JSC is a reality if members of the JSC themselves are not appointed in a transparent manner that allows them to exercise their functions without undue influence or interference. Of particular concern is that many JSCs in the region are dominated by *ex-officio* members or Presidential/Head of State appointees. In many instances, the *ex-officio* members are appointed to the positions that give them the right to sit in the JSC by the President/Head of State of the country or some other executive authority. Such *ex officio* positions include those of the Attorney General, the Chairperson of the Public Service Commission and the Chief Justice. Often, the Head of State also has powers to appoint any other persons into the JSC. Effectively therefore some of the JSCs in the region are dominated by direct or indirect appointees of the President/head of State or the executive. The question however has not been on suitability of these office bearers to be members of the JSCs. The concern has been on the need for the JSC to be more representative of the wider society and the need to dispel the view, real or otherwise that the JSCs are beholden to the President/Head of State or the executive by virtue of these being the appointing authorities for the majority of members. It has been noted in this regard that although independence might be enshrined in the Constitution and other laws,

“it is the visible fact of independence that will give security to those seeking justice and ensure the effective operation of law” (Council of Europe, 1993: 34)

In that regard, the representativeness and openness in the appointment process for the JSCs gives the much needed security and confidence to the generality of the population. The International Commission of Jurists has recommended that it is preferable that the JSC be broadly representative of the major stakeholders in the administration of justice and that it functions in a transparent manner. They further recommend that generally, the JSC should include representatives from the judiciary, the Executive, the legislature, the legal profession, law teachers and civil society (ICJ, 2013: 58.)

Whilst, it is not possible for all major interest groups to be represented in the JSCs, the presence of independently appointed individuals plays an important role in injecting the much needed public confidence in the JSC and ultimately in the judiciary itself. Members of the legal profession that sit in the JSC are often (although not always) viewed as independent and with some exceptions are directly nominated by the profession and then appointed by the Head of State to sit in the JSC. In South Africa, Zimbabwe and Botswana for example, the legal profession is solely responsible for the nomination of its representatives on the JSC.

1.5 The Legal Profession in the Judicial Service Commission

A prominent jurist in Southern Africa once opined that;

“In my view, judges and law officers should play a major role in the selection of new judges. They should not be outnumbered in the Judicial Service Commission by politicians or political nominees”¹⁶

In line with this view, the legal profession is represented on the JSC in many of the countries in the SADC region. There are only a few countries in the region such as Lesotho and Tanzania that do not provide for such representation. The legal profession representatives are often some of the independently appointed representatives on the JSC and are therefore together with other independently appointed commissioners expected to bring balance and transparency in the operations of the JSC. In reality however, questions have been asked about the transparency of the appointment process of the legal profession representatives to the JSC. Despite the supposed independence of the representatives of the legal profession in the JSCs, concern arises from a nomination process that is not transparent and often an internal affair of the Council of the Law Society or Bar Associations. The end result is a nominated representative from the legal profession to the JSC without necessarily the input of the generality of the profession. In several instances, the nominees are members of the Law Society/ Bar

¹⁶ Justice McNally speaking at the Southern Africa Chief Justices’ Forum in Kanase, Botswana in 2009. The United Nations Special Rapporteur on the Independence of Judges and Lawyers has equally stated that “While a genuinely plural composition of this body is recommended with legislators, lawyers, academicians and other interested parties being represented in a balanced way, in many cases it is important that judges constitute the majority of the body so as to avoid any political or other external interference” See A/HRC/11/41 24 March 2009, Page 9

Association Council, meaning that the Council members nominate each other to sit in the JSC. In extreme instances, the “representatives” of the legal profession are picked by the Head of State and end up sitting in the JSC without the mandate of the profession.¹⁷

Whilst most constitutions provide for the selection of a member or members from the legal profession to sit in the JSCs, there are no set procedures for the nomination processes for the legal profession’s representative (s). The end result therefore can be that the lack of a transparent, consultative, participatory and inclusive nomination process, threatens the independence of the law society/bar association representatives, which in turn compromises the JSCs and ultimately the independence of the judiciary. To address this challenge, some law societies/bar associations have developed their own rules and procedures for the nomination of representatives to the JSC. In the Kenya Law Society (KLS) for example¹⁸, all lawyers that are members of the society are allowed to vote for their JSC representative in an election that is presided over by the country’s national Independent Electoral and Boundaries Commission.¹⁹ Barring other challenges such as election rigging and political interference in the law society elections, such a process is by and large transparent. This transparency is important because once they take up office within the JSC, the legal profession representatives will represent the public interest and not the interests of the legal profession as the nominating authority. How the law society/bar association representatives get into the Commission is therefore important in ensuring that members of the public have confidence in their independence from any other person or authority, including the legal profession or its leaders.

A participant during the SADCLA/IBA Southern Africa Bar Leaders’ Meeting which was held as part of this research however argued that in all the research countries, law society councillors are voted into council and are therefore representing the profession.

¹⁷ For example in Swaziland.

¹⁸ The KLS example may not necessarily answer all possible loopholes and challenges. For example such a huge election costs money for the society and the individuals involved in the election. This may dissuade some competent lawyers from participating in the process.

¹⁹ See The Star, 25 February 2016 “Heated Race for LSK nominee to the JSC”

If the law society council, as an elected body then nominates lawyers to sit in the JSC, such process must be viewed as representing the interests of the profession.²⁰ It was also argued during the same meeting that the KLS model whilst helping in providing transparency, was not necessarily the best model given the costs associated with holding such an election. Given that many of the law societies/bar associations in Southern Africa face serious resource constraints, such a model would therefore present some challenges.²¹

It is in light of the above concerns that this research will seek to understand how legal profession representatives in the JSC in the nine research countries are nominated by the profession, or other bodies, and the implication of this process on the independence of both the JSCs and the judiciary. Whilst it is acknowledged that the legal profession representatives on the JSCs are only a small percentage of the total membership of the Commissions, their presence and independence remains critical as they can help in positively shaping the operations and functions of the JSCs.

1.6 Research Methodology

The research focused on nine countries in Southern Africa that follow a common law system, namely; Botswana, Lesotho, Malawi, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Literature review was the main research methodology with a focus on primary sources of law (constitutions, statutes and case law) from the various SADC countries dealing with the establishment of the JSCs and independence of the judiciary. International legal instruments were also consulted. The research also benefited from a review of legal texts and other scholarly writings on the subject. Following the literature review, the draft research report was circulated to law society/bar association leaders of the nine Southern African countries that are part of the research in order for them to provide comments. This was followed by a physical meeting of the law society/ bar association leaders which was held in Johannesburg, South Africa from 23-24 May 2016 where these leaders made their input into the draft

²⁰ Contribution by Mr. Tandaza Masiye-Moyo, Councillor, Law Society of Zimbabwe at the Southern Africa Law Society/Bar Leaders' Meeting, Johannesburg, 23-24 May 2016

²¹ Contribution by Mr. Arnold Tsunga, Director, International Commission of Jurists Africa Regional Programme at the Southern Africa Law Society/Bar Leaders' Meeting, Johannesburg, 23-24 May 2016

research report and also provided detailed analysis of the JSCs and the nomination procedures for legal profession representatives to the JSCs in their respective countries. The inputs from the bar leaders were consolidated and included in the final report.

Chapter 2: Appointment Processes for Judicial Service Commissions in Southern Africa

2.1 Introduction

This section will analyse the legal and constitutional provisions dealing with the independence of the judiciary, appointment processes, composition and functions of the JSCs as well as the role and place of the legal profession therein. The analysis will seek to provide a determination on whether or not the current legal and constitutional provisions are adequate in ensuring the independence of the JSCs, which in turn plays an important role in determining the independence of the judiciary in the region. Equally important is the role and place of the legal profession in the JSC and whether the processes and procedures of nominating legal profession representatives in the JSC inspire confidence in members of the public regarding the role of these representatives and the profession in promoting judicial independence. The analysis will be done per country and where necessary comparisons will be made.

2.2 Botswana

2.2.1 Introduction

For many years after independence from British colonial rule in 1966 there has been international acknowledgment that Botswana is a true democracy with a functional judiciary that carries out its mandate independently, without fear or favour and without any external influence, including from government. The economic success of Botswana after its independence from Britain has in part been attributed to the country's positive rule of law record and the independence of the judiciary (Hoffman, 2003:35).

The courts in the country have over the years issued judgments that were not in favour of the Government, and unlike jurisdictions such as Zimbabwe and Swaziland, the Government respected and implemented those judgments. Such judgments include the one in the case of Attorney General vs. Unity Dow.²² The case challenged the country's gender biased citizenship laws which gave citizenship to Botswana born children of male Batswana citizens married to foreigners whilst denying citizenship to similarly

²² 1992 BLR 119 (CA)

situated children of female citizens married to foreigners. The High Court granted the order in favour of Dow and the Government appealed to the Court of Appeal, which upheld the decision of the High Court. The vigorous efforts by the Government to defend the suit and ultimately appeal against the order of the High Court when they lost showed that the Government was extremely opposed to the claim and disagreed with the judgments that ensued. However when the courts ruled against it, the Government complied with the order of the court.

Another case that tested the independence of the Judiciary in Botswana was that of *Matsipane Mosethlanyane and Another vs. The Attorney General of Botswana*.²³ The case related to the decision of the Government of Botswana to deny the “Basarwa”²⁴ people living in the Central Kalahari Game Reserve (CKGR) water as a way of making their stay in the Game Reserve impossible following protracted efforts to relocate the community from the Game Reserve. To achieve this objective, the Government sealed a borehole that was a source of water for the community and also stopped delivering water to the community through bowsers as it had done for many years. The High Court in a similar case²⁵ had ruled in favour of the “Basarwa” Community. The long running battles in court and efforts by the Government to remove the Basarwa from the Game Reserve showed how determined the Government was to implement the relocation policy which dated back to 1984 based on Government’s perceived “incompatibility” of the Basarwa staying side by side with animals (*Matsipane Mosethlanyane and Another vs. The Attorney General of Botswana*, Para 6.) However even with these contestations, the Court of Appeal in the *Mosethlanyane* case (and the High Court before it in the *Sesana* case) ruled against the Government and upheld the Basarwa community’s right to water. In reviewing the *Mosethlanyane* case, Dinokopila concluded that:

“The decision is important in so far as it indicates the independence of the judiciary in Botswana. It is beyond doubt that the issue of the Basarwa living in the CKGR is

²³ Court of Appeal, Civil Appeal No CACLB-074-10 and High Court Civil Case No MAHLB-000393-09

²⁴ This is the community normally referred to as the “San” or “Bushmen” people in Botswana and other countries in Southern Africa where they live.

²⁵ *Roy Sesana and Others vs. The Attorney General of Botswana*, 2002 (1) BLR 452 (HC)

heavily contested, pitting the government of Botswana against local NGOs, such as Ditshwanelo — The Centre for Human Rights (Ditshwanelo), and international NGOs, such as Survival International (SI). The government feels strongly regarding the relocation of the Basarwa from the Reserve and the provision of essential services within the Reserve. It is indeed laudable that the Court has taken this stance with regard to the issue of access to water by communities residing within the CKGR. By its decision it has shown that, indeed, the judiciary in Botswana is committed to the protection of human rights as enshrined in the Constitution.” (Dinokopila, Undated: 293)

Despite the Government’s unhappiness with the ruling²⁶ and efforts to frustrate the Basarwa Community, it has not directly interfered with the implementation of the ruling. In August 2011, it was reported that the first borehole was drilled for the Basarwa in the CKGR with the help of non-profit organisations and the private sector and that “for the first time in 9 years the Bushmen [had] access to their own clean, drinking water.” (<http://voxunited.org/botswana-bushmen-drink-from-well/>)

The efforts that have been made by Botswana over the years and the Government’s restraint in not interfering with the independence of the judiciary have however been under threat in recent years. The recent decision by the Government of Botswana to suspend four judges of the High Court²⁷ for alleged misconduct has brought into the fore increasing concerns about the rule of law and interference by the executive in the work of the judiciary. There was an international outcry following the suspension of the judges with organisations such as SADCLA and Amnesty International calling on

²⁶ Soon after the ruling, the Government Spokesperson Mr. Jeff Ramsay was quoted as saying “While we do not agree with certain aspects of the basis on which the decision was reached, we recognise that this is a decision of Botswana’s highest court. As such, the government of Botswana will, in line with its established policy of respect for the decisions of the courts and the rule of law, facilitate implementation of the decision of the court as reflected in the order” (See <http://www.afrol.com/articles/37150>, “Botswana split over Kalahari court ruling”)

²⁷ The judges, Oagile Key Dingake, Mercy Thebe, Rainer Busanang and Modiri Letsididi were suspended on 28 August 2015 under Section 97 of the Botswana Constitution for alleged misconduct and bringing the judiciary into disrepute. This followed a petition signed by 12 judges, including the suspended four, calling for the impeachment of Chief Justice Maruping Dibotelo (See <https://www.amnesty.org/en/latest/news/2015/10/botswana-suspension-of-judges-potentially-threatens-freedom-of-expression-and-judicial-independence/>)

the Government of Botswana to reverse the decision.²⁸ The judges in question however remain on suspension²⁹. As such whilst Botswana has over the years been hailed as the epitome of democracy, the rule of law and the respect for the independence of the judiciary, recent developments in the country have shown that this positive label is slowly getting eroded.

2.2.2 The Constitution, Appointment Processes, Composition and Functions of the JSC

The Judicial Service Commission in Botswana is established in terms of Section 103 (1) of the Constitution. The Commission is composed of the following individuals:

- The Chief Justice who shall be Chairman;
- The President of the Court of Appeal (or the most Senior Justice of the Court of Appeal if the Chief Justice is the *ex officio* president of the Court of Appeal)
- The Attorney-General;
- The Chairman of the Public Service Commission;
- A member of the Law Society nominated by the Law Society; and
- A person of integrity and experience not being a legal practitioner appointed by the President.

The composition and appointment process for members of the JSC has, like in other jurisdictions with similar or closely related provisions in Southern Africa been a bone of contention in the country. This is the case even though the Constitution protects the independence of the JSC by stating that, the JSC “shall not be subject to the direction or control of any other person or authority in the exercise of its functions under this Constitution”³⁰ The perceptions of lack of independence despite the constitutional protections arise from the fact that other than the Law Society representative, the rest of the members of the Commission are direct or indirect Presidential appointees. The four *ex-officio* members are appointed to their principal positions by the President and the fifth person “of integrity and experience” is also directly appointed by the President

²⁸ See <https://www.amnesty.org/en/latest/news/2015/10/botswana-suspension-of-judges-potentially-threatens-freedom-of-expression-and-judicial-independence/>

²⁹ At the time of the Law Society/Bar Leaders’ Meeting in May 2016

³⁰ Botswana: Constitution of Botswana, Section 103 (4)

to the JSC. This composition has been rejected by various non-state actors with the Law Society of Botswana being amongst the most vociferous proponents of a more balanced JSC.³¹

The Functions of the JSC include the following:

- Advising the President on the appointment, disciplining and removal of judicial officers³². Such officers include the Registrar of the Court of Appeal and High Court, Magistrate or such other Presidents or members of any court or connected with any court as may be prescribed by an Act of Parliament.³³ Such other officers may include members of the Industrial Court.
- Advising the President on the appointment of Judges of the High Court and Court of Appeal.³⁴ The Chief Justice and the President of the Court of Appeal are however appointed by the President without any reference to the JSC.³⁵
- Appointment of the Delimitation Commission³⁶
- Appointment of the Independent Electoral Commission³⁷

The JSC therefore plays an important role, not only on issues relating to the judiciary and justice delivery, but in other governance issues in the country as well. For example, the Delimitation Commission and the Independent Electoral Commission are central institutions in electoral processes in the country and as such determine the integrity of any election and that of the leaders that emerge to govern the country after an election. The fact that the JSC is tasked with untrammelled and exclusive powers to appoint these commissions therefore places the JSC in a central position in the governance of the country.

The removal of judges of the higher courts from office, a process in which other JSCs in the region play an important role, is solely in the hands of the President in Botswana. The Constitution makes no mention of the role of the JSC in that regard with the

³² Botswana: Constitution of Botswana, Section 104 (1)

³³ Botswana: Constitution of Botswana, Section 104 (2) (a), (b) and (c)

³⁴ Botswana: Constitution of Botswana, Section 96 (2) and 100 (2)

³⁵ Botswana: Constitution of Botswana Section 96 (1) and Section 100 (1)

³⁶ Botswana: Constitution of Botswana, Section 64 (1)

³⁷ Botswana: Constitution of Botswana, Section 65 (A) (1) (a), (b) and (c)

President entitled to set up a Tribunal at his own discretion if the question of removal of a Judge arises. A positive aspect however is that the Constitution does not give the President a discretion but to dismiss a judge when the Tribunal set up to investigate the suitability of a judge to hold office recommends that such a judge must be discharged from office.³⁸

2.2.3 The Legal Profession in the JSC

The Constitution of Botswana provides for a legal practitioner nominated by the Law Society to be a member of the JSC³⁹. There is significant expectation from this member of the JSC from both the profession and the general public because he or she is the only member that is in the JSC independent of the President's direct or indirect appointing powers. As such, though in the minority, the legal profession representative is expected to be the voice of the public in the operations of the JSC. The Law Society of Botswana (LSB) has played a prominent role in fighting for the independence of the judiciary and that of the JSC in Botswana, including litigating to protect the independence of both the judiciary and the JSC as will be detailed below. Similarly, the profession's representative in the JSC is expected to uphold and protect the independence of the judiciary.

In 2015, the LSB took the President of Botswana to court challenging his decision to reject for appointment as a judge, a candidate that had been recommended by the JSC.⁴⁰ The Law Society argued that the provisions of Section 96 (2) of the Constitution, which gave the President power to appoint judges "on the advice of the JSC" did not give the President the discretion to reject such advice. Once a person has been recommended for appointment, the LSB argued, the President must appoint him/her. The court dismissed the argument of the LSB in this regard, indicating that:

"The power to appoint a judge vests in the President. He shall be the appointing authority but in the exercise of his power as such, he may not appoint a person not recommended by the JSC" (Para 113).

³⁸ Botswana: Constitution of Botswana, Section 97 (4) and 101 (4)

³⁹ Botswana: Constitution of Botswana, Section 103 (1)

⁴⁰ Botswana: Law Society of Botswana and Anor vs. The President of the Republic of Botswana and Ors, MAHGB-000385-15

Effectively therefore the court concluded that the President had the discretion to reject a candidate recommended by the JSC, although all candidates that the President appoints must have been recommended by the JSC.

This approach is different from that applied in South Africa where the President is required to appoint a person as a judge once a recommendation to that effect has been given by the JSC.

In the same application, the LSB also sought a declaratory order to the effect that “the representative of the LSB on the JSC is entitled to report to and consult with the Council of the Law Society on all matters relating to the appointment of judges.” The court did not make a ruling on the matter after the JSC submitted that they had never stopped the LSB representative from consulting with the Law Society on the appointment of judges. The JSC however stressed that in making such consultations, the LSB representative must be alive to the fact that matters of a confidential nature may not be revealed. Whilst the JSC may have taken this approach, the question that arises however is whether the Law Society can compel their representative on the JSC to report and consult the law society without breaching Section 103 (4) of the Constitution, which states that:

“The Judicial Service Commission shall not be subject to the direction or control of any other person or authority in the exercise of its functions under this Constitution”

At the meeting of Law Societies/Bar leaders held in Johannesburg on 23 and 24 May 2016, there was general agreement that a requirement by the Law Society for their representative to report back to them on the appointment of judges breached this constitutional provision. The general view was that once appointed into the JSC, the Law Society representative is there to represent the greater public interest and not the interests of the legal profession. As such a requirement for them to report back to the Law Society means that the society can influence their decision-making in the JSC. This would not allow the legal profession representative to act in accordance with the provisions of the Constitution and in the public interest.

An important point to note however is that whilst the LSB may have lost the case, they made tremendous efforts to protect the independence of the JSC, promote transparency

within the institution and promote constitutionalism in the work of the JSC and the judiciary.

In terms of the nomination process for the legal profession representative to the JSC, the LSB does not have any set or written procedure in place, nor do they have a set criteria to use in identifying suitable candidates. Current procedure involves the Council of the LSB sitting and agreeing on a candidate whose name is then recommended to the president for appointment. The candidate can be a councillor or can be from outside the council, as long as they are a member of the Law Society. Although there is no set criteria to be considered, the LSB is often guided by a number of considerations. These include the candidate's years of experience as a legal practitioner, track record in their professional work, demeanour, their participation in the affairs of the profession and that the person should be someone that they are confident would not embarrass the profession.⁴¹

2.3 Lesotho

2.3.1 Introduction

The history and role of the judiciary in Lesotho has been marred by various challenges over the years. Research has identified some of the major areas that have led to these challenges in the Kingdom as:

- Long-term resource constraints
- Public perceptions of corruption and weak independence; and
- A hostile and unstable political environment. (Ellett, Undated: 4)

Whilst addressing issues of resource constraints and public perceptions of corruption within the judiciary is important, it is the hostile and unstable political environment in Lesotho that has stood out as one of the biggest impediments to judicial independence in the country.

⁴¹ Submissions by the President of the LSB, Mr. Lawrence Lecha at the Law Society/Bar Leaders' Meeting

The security of tenure of judges is clearly provided for in the Constitution.⁴² However the events that have taken place in the country in recent years following changes of government suggest that this security lies on very shaky ground. In 2013, the Prime Minister of Lesotho, Dr. Tom Thabane recommended to the King the suspension and subsequent impeachment of the President of the Court of Appeal, Judge Michael Ramodebedi. This was barely a year after the Prime Minister had taken over as the Head of Government in Lesotho. Justice Ramodebedi subsequently resigned without appearing before the impeachment tribunal. Following this resignation, the King, on the advice of Prime Minister Thabane appointed Justice Kananelo Mosito to the position of President of the Court of Appeal in January 2015, barely a month before the 28 February 2015 elections. Following the elections, Dr. Thabane was replaced by Dr. Pakalitha Mosisili as the Prime Minister and Head of Government. The new Prime Minister soon put in motion processes to remove Justice Mosito as the President of the Court of Appeal and in February 2016 Justice Mosito was suspended pending an impeachment enquiry. In reporting on Justice Mosito's suspension, a Lesotho newspaper underlined that:

“The senior judge's suspension by King Letsie III is the culmination of a seemingly spirited bid by Prime Minister Pakalitha Mosisili to get rid of the judge promoted to the most high judiciary post by the premier's predecessor Thomas Thabane.” (Lesotho Times, 19 February 2016)

⁴² Section 121 and 125 of the Constitution of Lesotho provide for circumstances under which a Judge of the High Court or the Court of Appeal may be removed from office. Sections 121 (3) and 125 (3) specifically provide that a Judge (of the High Court and Court of Appeal respectively) can only be removed from office for inability to perform the functions of their office or for misbehavior. Such removal may only be done in accordance with the provisions of the Constitution.

This research will not go into details of whether the two judges had cases to answer or not, because one resigned before appearing before an impeachment tribunal and the other resigned after the impeachment hearing but before the impeachment Tribunal's findings were made public.⁴³ An important point to note is that in both cases, the hand of politics is not very difficult to detect. Efforts to remove the judges started almost soon after a new government came into office thereby giving the impression that unlike the constitutionally entrenched security of tenure, the tenure of these judges was tied to who was in Government. This has the effect of undermining the independence of the judiciary by giving the suggestion that for one to survive in the judiciary after the coming in of a new government, one must align with the government of the day. Such challenges can partially be addressed if there is an independent and widely representative JSC that is tasked with the appointment and removal processes for judges. The existence of such a commission gives the confidence that due process will be followed and that all decisions will be made on the basis of law, procedure and fact and not out of political considerations.

2.3.2 The Constitution, Appointment Processes, Composition and Functions of the JSC

The Lesotho JSC is a small one, with only four members. These are the Chief Justice who is the Chairperson of the Commission, The Attorney General, The Chairperson of the Public Service Commission (PSC) and a member appointed by the King acting in accordance with the advice of the Chief Justice. Such an appointed member must hold or must have held high judicial office.⁴⁴ The functions of the Commission include the following:

⁴³ Justice Dr. Kananelo Mosito resigned on the 13th of December 2016. This was after the impeachment tribunal had concluded its hearings and handed over its findings to the King of Lesotho, King Letsie III. The report or its findings had not at that stage been made public. On 23 December 2016, the King acting on the impeachment tribunal findings, wrote to Dr. Kananelo Mosito, advising him that he had been removed from office as the President of the Court of Appeal in Lesotho. Dr. Kananelo insisted that this letter was of no effect as it was sent to him after he had already resigned from the bench (See <http://lestimes.com/mosito-speaks-out-on-exit/>)

⁴⁴ Lesotho: Constitution of Lesotho, Section 132

- To attend to the appointment, disciplining and removal from office of judicial officers to whom the JSC Act applies⁴⁵ (These officers are: Registrar or Assistant Registrar of the Court of Appeal, Registrar or Assistant Registrar of the High Court, Magistrate, judicial commissioner or such other officers as may be prescribed by the Minister in the gazette.)⁴⁶
- To advise the King on the appointment of the chairman and other members of the PSC⁴⁷

All members of the JSC are appointed by the King of Lesotho as the Head of State. In terms of the Constitution, the Chief Justice is appointed by the King, acting in accordance with the advice of the Prime Minister.⁴⁸ The Attorney General is also appointed by the King, acting on the advice of the Prime Minister⁴⁹. The Constitution provides that there shall be a PSC which shall consist of a Chairman.....appointed by the King acting in accordance with the advice of the JSC.⁵⁰ The other member as stated above is appointed by the King on the advice of the Chief Justice. Essentially therefore all members of the JSC are appointed by the King with the Prime Minister playing a leading role in the appointment process and therefore giving the impression of lack of independence and executive control over the institution. In its report on the independence of the judiciary in Lesotho, Freedom House Southern Africa underlined the need for the JSC membership to be opened up to the legal profession and civil society (Ellett, Undated: 9) in order to strengthen the independence of the institution. Another report by AfriMAP/OSISA concluded that:

“All members of the JSC are, therefore, people who were appointed to their positions by the Prime Minister. On the face of it, this limits the independence of the judicial appointment process. The independence of the JSC can be enhanced by expanding its membership to include non-state stakeholders such as representatives of the Bar, the Law Society and civil society, which could be represented by an umbrella body such as the Lesotho Council of Non-Governmental Organizations (LCN)” (Pholo, 2013: 9)

⁴⁵ Lesotho: Judicial Service Commission Act, Section 5 (1) and Constitution, Section 133 (1)

⁴⁶ Lesotho: Judicial Service Commission Act, Section 5 (2) (a-e)

⁴⁷ Lesotho: Constitution of Lesotho, Section 136 (1)

⁴⁸ Lesotho: Constitution of Lesotho, Section 120 (1)

⁴⁹ Lesotho: Constitution of Lesotho, Section 140 (1)

⁵⁰ Lesotho: Constitution of Lesotho, Section 136 (1).

The opening up of the JSC in Lesotho is therefore an issue that has been identified by many actors as critical to the independence of the judiciary in that country.

2.3.3 The Legal Profession in the JSC

The Constitution of Lesotho unlike others in the region does not provide for the representation of the legal profession in the JSC. Yet the legal profession is a critical component in the administration of justice in any country. The United Nations Basic Principles on the Role of Lawyers assert that lawyers are essential agents of the administration of justice.⁵¹ Section 4 of the Law Society Act (1983) also lists as one of the objectives of the law society, the need to assist in the administration of justice and improvements in the practice of law. Their participation in the JSC, a key institution in the administration of justice is therefore an essential element in justice delivery and administration in the country. The JSC is however allowed by law to include representatives of other interest groups in their work, although such co-opted individuals do not have voting powers. Using this provisions, the Law Society of Lesotho has been making efforts to be allowed to sit in the JSC but the JSC itself has been resisting such requests.⁵²

There are current discussions in Lesotho around the development of a new Constitution/ Constitutional review in the Kingdom. It is hoped that the discussions and the resultant constitution if it is developed will address broader issues including the administration of justice as opposed to focusing on addressing purely political issues. The restructuring of the JSC to include lawyers and other stakeholders as well as the general strengthening of the judiciary in the country would be important aspects to be covered during the constitution making process and to be included in the new constitution in that event that such a process takes place.

⁵¹ United Nations Basic Principles on the Role of Lawyers, Article 12

⁵² Submissions by the President of the Law Society of Lesotho, Mr Shale Patrick Shale at the Law Society/Bar leaders' meeting.

2.4 Malawi

2.4.1 Introduction

Politics in Malawi is volatile, dynamic and unstable and in all this volatility, the judiciary is viewed as a stabilising factor (Ellet, Undated:4). Over the years, the judiciary has been viewed as playing an important role in electoral processes in the country, which are often marred by allegations of irregularity and consequently producing contested outcomes. For example with regards to the 2004 elections, Gloppen and Kanyongolo argue that:

“The judiciary assumed four crucial functions in the electoral process: it performed an accountability function, serving to “unblock the democratic channels” and secure the integrity of the electoral process (although not succeeding); it functioned as a safety-valve diffusing tension and averting violence; it served as an internal arbiter for political parties; and it provided political leverage for individuals and parties contesting the elections. Particularly in terms of the first two functions, the judiciary contributed positively to the electoral process.” (Gloppen and Kanyongolo, 2006:279)

In 2014 after a hotly contested election that was won by the opposition, the incumbent President, Joyce Banda purported to annul the election results citing irregularities and fraud and ordered a new election. Once again the courts stepped in to save the day (Tungwarara, 2015) and this and other election law rulings brought the presidential election to a peaceful and lawful conclusion (<http://lilongwe.usembassy.gov/new-events/2014-malawi-human-rights-report.html>).

It has however been observed that the growing prominence of the courts in resolving political crises also makes the courts vulnerable and subject to external attacks and makes the executive want to assert more control over the courts (Gloppen and Kanyongolo, 2006:279). However generally it is accepted that the government in Malawi respects the independence of the judiciary. Challenges however emerge in the areas of budgetary allocation where resources are woefully inadequate (Ellett, Undated:8) thereby impacting on the effectiveness and independence of the judiciary.

2.4.2 The Constitution, Appointment Processes, Composition and Functions of the JSC

The JSC in Malawi is established in terms of Section 116 of the Constitution. It is composed of the following:

- The Chief Justice, who is the Chairman;
- Chairman of the Civil Service Commission;
- A Judge of Appeal or judge designated by the President after consulting with the Chief Justice;
- A legal practitioner designated by the President after consulting with the Chief Justice; and
- A magistrate designated by the President after consulting with the Chief Justice.⁵³

The structure above shows that the JSC in Malawi is appointed by the President of the country with no independent input save for that of the Chief Justice. As a result, the function and composition of the JSC can be bone of contention in the country in as far as they give the impression that the institution is not independent due to the appointment process. Although there is agreement that the Executive respects the independence of the judiciary, perceptions of executive control over the JSC and the judiciary need to be addressed so that the independence of the judiciary is clearly seen to be there. The Malawi Constitutional Review Commission in 2007 following national public consultations made a number of observations regarding the JSC. Some of the pertinent observations were:

“That the Judiciary is over-represented on the Judicial Service Commission with three out of five members. This was viewed as unrepresentative of all parties that have an interest in the proceedings of the Judicial Service Commission. The Commission felt that the mandate of the Judicial Service Commission under section 118 makes it prone to the satisfaction of the collective interest of the Judiciary above any other interest. The Commission also observed that the current membership of the Judicial Service Commission creates a lingering perception that judicial self-interest is likely to take centre stage at the Commission.” (Malawi Law Commission, 2007:109)

In addition, the Constitutional Review Commission noted that lack of security of tenure for members of the JSC could also have an impact on their independence and thus recommended that such tenure be guaranteed emphasising that:

⁵³ Malawi: Constitution of Malawi, 1994, Section 117

“Tenure of office for the membership of the Judicial Service Commission is directly linked to the independence in the performance of the duties of the Judicial Service Commission” (Malawi Law Commission, 2009: 110)

Increasing the representation within the JSC and ensuring the tenure of members is therefore important. Addressing these two issues therefore would be important in ensuring public confidence in the JSC and in giving the JSC the independence to perform its mandate without members fearing dismissal or exclusion from the institution.

It is also a point of concern that the JSC in Malawi works without any guidelines, rules, regulations or an Act of Parliament to direct their functions and mandate. Where they are stuck with regards to process and procedure, the JSC resorts to the use of Public Service Regulations.⁵⁴ Pressure has been mounting on the JSC to formulate its own regulations and indications are that there is now a process in Malawi to create a new law for the JSC.⁵⁵ This will be important in strengthening the JSC and its role in promoting and protecting the independence of the judiciary in the country.

2.4.3 The Legal Profession in the JSC

The 1994 Constitution of Malawi requires that one member of the JSC must be a legal practitioner. The previous Constitution did not have such a provision and therefore the inclusion of a legal practitioner as a member of the JSC in the 1994 Constitution was a positive provision that sought to recognise the role of the legal profession in the administration of justice, in line with other progressive constitutions. However the legal practitioner in question is appointed by the President in consultation with the Chief Justice. The legal profession therefore, at least at law has no say in the appointment of such legal practitioner. The practice on the ground however shows that sometimes the Malawi Law Society is consulted and even allowed to nominate the preferred legal practitioner before they are appointed into the JSC. The current legal practitioner who sits on the JSC was nominated by the law society.⁵⁶ However since this is not a legal

⁵⁴ Submission by Justice Charles Mkandawire at the Law Society/Bar Leaders’ Meeting.

⁵⁵ As at 24 May 2016.

⁵⁶ Submissions by the Vice President of the Malawi Law Society, Professor Dr. Mwiza Jo Nkhata at the Law Society/Bar Leaders’ Meeting

requirement but a discretionary act of the President, it follows that depending on the situation and the administration in power at any particular point in time, the legal practitioner can be appointed without any reference to or consultation with the legal profession. To ensure that this practice is entrenched and sustained, it is therefore important for the provision to be constitutionally protected.

The lack of term limits for the members of the JSC has also meant that the legal practitioner who was appointed to the JSC in 1994 remained in that position until 2014 when he was appointed as the Attorney General of Malawi. For many members of the profession, it was unclear how this member ended up in the JSC and because he stayed in this position for more than 20 years, many legal practitioners were of the view that this was a personally held position that had nothing to do with the profession.⁵⁷ The politicisation of the legal profession in Malawi has placed a dent on the integrity of the profession and their capacity to act impartially and independently when appointed to institutions such as the JSC. This has also had an impact on the legal practitioners that are appointed not only to the JSC but to other Commissions as well since the parties involved in the process always question the political affiliation of the nominees or appointees as a precondition to supporting or rejecting the nominations or appointments.⁵⁸ Whilst lawyers cannot be stopped from supporting political parties of their choice, it however remains important that they are seen to be objective and professional when it comes to the protection of the constitution and constitutionalism, including in the promotion and protection of the independence of the judiciary.

2.5 Namibia

2.5.1 Introduction

There is general consensus in Namibia that the principle of separation of powers between the judiciary and executive is firmly entrenched in the Constitution and also well recognised in Namibian case law. Researchers also agree that in general terms, this principle has been well respected by all branches of government (Nakuta J and

⁵⁷ Submission by Justice Charles Mkandawire at the Law Society/Bar Leaders' Meeting

⁵⁸ Submissions by Justice Charles Mkandawire at the Law Society/Bar Leaders' Meeting

Chiperera F, Undated: 18). Following a statistical analysis of 250 judgments rendered by the High and Supreme Courts of Namibia during the period between 1990 and 2005⁵⁹, Peter VonDoepp⁶⁰ concluded that:

“The study indicates that, as a whole, the judiciary has performed quite admirably in terms of independence from the other branches. The extent of deference to the executive has been minimal. This is true regardless of the period during which decisions have been taken, and regardless of the type of case being decided. This said, the analysis tentatively suggests that one category of judges – foreign judges appointed in the mid-1990s – has displayed a modest tendency to side with government.” (VonDoepp, 2008:177)

Cautioning that the conclusion on foreign judges should be taken with circumspection after taking other factors into consideration, the author sought to give an explanation on why the foreign judges were likely to make decisions (modest as they were) that were in favour of the Government. He noted that in the year 2000, foreign judges were singled out for attacks and specifically, they were threatened by the then Home Affairs Minister Jerry Ekandjo with revocation of their work permits (VonDoepp, 2008:191). This state of affairs suggested political interference in the work of the courts and further suggests that the vulnerability faced by foreign judges can be manipulated to tamper with their independence.

During the bar leaders’ meeting, it was generally agreed that the differential treatment between citizen judges and foreign judges leaves the foreign judges exposed and vulnerable to manipulation in order for them to keep their jobs. The engagement of foreign justices in itself is not the problem given that the reality in a number of jurisdictions in the SADC region is that they still depend on foreign judges in order to have an adequate compliment of judges. In addition to Namibia, Botswana, Lesotho and Swaziland routinely employ the services of foreign judges. To protect these judges and to protect the independence of the judiciary, it is therefore important that the foreign judges are given the same conditions of service as the citizen judges. This will also

⁵⁹ The period between the year of independence and the year the research was undertaken

⁶⁰ Assistant Professor, Department of Political Science, University of Vermont, USA and Research Affiliate, Institute for Public Policy Research, Namibia

make it easier for institutions such as the JSC to apply similar standards for all judges in their work to promote the independence of the judiciary.

2.5.2 The Constitution, Appointment Processes, Composition and Functions of the JSC

The JSC is appointed in terms of Section 85 (1) of the Constitution and it consists of the following:

- The Chief Justice;
- A Judge appointed by the President;
- The Deputy-Chief Justice;
- The Attorney-General; and
- Two members of the legal profession nominated in accordance with the provisions of an Act of Parliament by the professional organisation or organisations representing the interests of the legal profession in Namibia.

Effectively therefore the two legal practitioners are the only members of the JSC that are appointed independent of the President. Although the President makes the final appointment, he can only do so from a list of names submitted by the legal profession.

The Functions of the JSC in Namibia are to:

- Make recommendations to the President with regards to the appointment of persons to judicial offices, whether in a permanent or acting capacity, and the removal from office of persons holding or acting in such offices;
- Review or make recommendations on the terms and conditions of service, including retirement benefits, of persons holding or acting in judicial offices;
- Conduct disciplinary inquiries into the conduct of persons holding or acting in judicial offices, and receive and investigate complaints from the members of the public concerning the conduct of such persons or the administration of justice at superior court level; and
- Make recommendations to the Minister concerning any matter which by law pertains to the Judiciary or the administration of justice, with a view to the improvement thereof.⁶¹

⁶¹ Namibia: Judicial Service Commission Act, Number 18 of 1995, Section 4 (1) (a-e)

Other functions may be assigned to the JSC by the President or under the law. The JSC therefore plays an important role in managing the whole justice delivery system and in particular in the appointment, disciplining, removal and determining the terms and conditions of service of judicial officers. As such it wields considerable power over the judicial officers and its independence determines the independence of the judicial officers at an individual level and the judicial system as a whole.

2.5.3 The Legal Profession in the JSC

The two members of the legal profession who sit in the JSC are nominated by the Law Society as provided for in Section 85 of the Constitution. The Legal Practitioners Act gives the Law Society the powers to:

“Appoint representatives of the Law Society to serve on a board, committee, institution or any other body where or when required to do so by or under any law”⁶²

Whilst the JSC Act provides for procedure on how the President receives the nominees for the representatives of the legal profession, the Legal Practitioners Act does not provide procedure on how the members are nominated/elected by the profession for recommendation to the President. The JSC Act provides in terms of appointment of legal practitioners to the JSC that the President shall:

“Invite in writing each of the organisation or organisations (the attorneys’ and advocates’ professions) representing the interests of the legal profession in Namibia to submit to him or her the names of two legal practitioners nominated by each organisation from amongst its members; and

Appoint two persons from amongst the legal practitioners nominated in accordance with paragraph (a), to serve on the Judicial Service Commission.”⁶³

The Act however does not go as far as providing guidance on how these members are nominated by the legal profession. Such a provision could instead be provided for in the Legal Practitioners Act (or regulations made in terms of the Act) by expanding the provision that gives the Law Society the power to nominate members to sit on various institutions, committees, etc. The current practice in Namibia like in other SADC

⁶² Namibia: Legal Practitioners Act, 15 of 1995, Section 42 (1)

⁶³ Namibia: Judicial Service Commission Act, Section 2 (2) (a and b)

countries is that members that represent the legal profession on the JSC are selected for appointment by the law society/bar association council⁶⁴

2.6 South Africa

2.6.1 Introduction

The current debates on independence of the judiciary in South Africa are informed by a racially discriminatory and repressive regime in which for over 300 years, the judiciary was used to enforce oppressive laws and keep an authoritarian system in government. During the apartheid era, judicial appointments were secretive with the State President at face value solely responsible for the appointment of judges. Commentators and scholars have however noted that even though the President was supposedly the appointing authority, in reality, the Minister of Justice was the *de facto* appointing authority with the President only endorsing the Minister's nominees. (see Mokgoro, 2010:44, Davis, 2010:40, Andrews 2006:568). In this regard, Judge Yvonne Mokgoro has noted that

“Relative to the judicial appointment procedure prior to 1994, the establishment of the JSC with its constitutionally created role and function indeed constituted the most radical break from the pre-1994 procedure for judicial appointments” (Mokgoro 2010: 45)

Clearly therefore, the JSC is viewed as a critical institution in the history of independent South Africa. Resultantly, it has been mandated with a huge task to transform the South African Judiciary, not only in terms of race but with regards to addressing gender imbalances in the judiciary as well. As a result, over time, the legal system in South Africa has been viewed as one that has moved from a system that was premised on racism, sexism, and authoritarianism, to one that strives to provide human rights for all South Africans (Andrews 2006:555).

⁶⁴ Submission by Ms. Gaenor Michaels, Councilor of the Law Society of Namibia at the Law Society/ Bar Leaders' Meeting

2.6.2 The Constitution, Appointment Processes, Composition and Functions of the JSC

The Constitution of South Africa provides the basis for the appointment of the JSC. The South African Constitution is regarded as one of the most progressive constitutions in the world and has received worldwide acclaim as a result. The courts in the country are also generally regarded as independent and well positioned to promote constitutionalism, the rule of law, democracy and human rights.

Section 178 (1) of the Constitution provides for the Judicial Service Commission and states that:

There is a Judicial Service Commission consisting of:

- a. The Chief Justice, who presides at meetings of the Commission;
- b. The President of the Supreme Court of Appeal;
- c. One Judge President designated by the Judges President;
- d. The Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
- e. Two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
- f. Two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
- g. One teacher of law designated by teachers of law at South African universities;
- h. Six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
- i. Four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces; and
- j. Four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly

The JSC therefore consists of 23 permanent members and temporary provincial representatives who only sit in the commission when an issue for consideration relates

to a specific High Court. These representatives are *ex-officio* and are the Judge President of the relevant court and the Premier of the province concerned.⁶⁵

The powers and duties (functions) of the JSC are as stipulated in the Constitution and in relevant national legislation. These include advising the national government on any matter relating to the judiciary or the administration of justice⁶⁶ and playing an oversight role over judicial conduct and the accountability of judicial officers.⁶⁷ The JSC also plays an important role in the appointment of judges in the country. In terms of Section 174 (3) of the Constitution, the President of the Republic appoints the Chief Justice and the Deputy Chief Justice as well as the President and Deputy President of the Court of Appeal. In appointing the Chief Justice and the Deputy Chief Justice, the President must consult the JSC and the leaders of parties represented in the National Assembly, whilst the President must consult the JSC in appointing the President and Deputy President of the Court of Appeal. In the appointment of these four judges, it is important to note that the President plays the leading role whilst the JSC plays a subsidiary role.

The JSC however is the process leader and facilitator in relation to the appointment of all other judges and the President can only appoint these judges on the advice of the JSC.⁶⁸ Unlike in Botswana, once the JSC has recommended a candidate for appointment, the President must appoint such a person as a judge and does not have a discretion in the matter. The JSC also plays an important role in the removal of judges from office in that the process for the removal of a judge is triggered when the JSC makes a determination on the issue of whether or not a judge is grossly incompetent or is guilty of gross misconduct.⁶⁹ When such a decision is made by the JSC, Parliament is then called in to make a resolution (by a two thirds majority) for the dismissal of the Judge in question⁷⁰ upon which the President must remove the judge. In essence therefore, the JSC holds a “cradle to grave” responsibility with regards to the tenure of

⁶⁵ South Africa: Constitution of South Africa, Section 178 (1) (k)

⁶⁶ South Africa: Constitution of South Africa, Section 178 (5)

⁶⁷ South Africa: Judicial Service Commission Act, 9 of 1994, Sections 7-20

⁶⁸ South Africa: Constitution of South Africa, Section 174 (6)

⁶⁹ South Africa: Constitution of South Africa, Section 177 (1) (a)

⁷⁰ South Africa: Constitution of South Africa, Section 177 (1) (b)

office of judges in the country. This gives the institution a huge responsibility in maintaining both the institutional and individual independence of the judiciary.

The South African JSC has a disproportionately high number of members/commissioners who are political appointees. Of the 23 members in the JSC, 15 are either Parliamentarians or are directly or indirectly appointed to the JSC by the President. The indirect appointees to the JSC include members that are appointed by the President to political positions but end up in the JSC as *ex officio* members.⁷¹ The presence of presidential appointees in the JSC is not unique to South Africa as other JSCs in the region have similar provisions. A unique aspect of the South African JSC however is the presence of Members of Parliament directly representing political parties. Most constitutions in the SADC region are silent about political parties and Members of Parliament in the JSC but the Constitution of the United Republic of Tanzania specifically prohibits the presence of Members of Parliament in the institution. Section 112 (2) of the Constitution of Tanzania in this regard provides that:

“A person shall not qualify to be appointed member of the Commission if he is a Member of Parliament or the holder of, any other office prescribed in that behalf by a law enacted”

Whilst the appointment of Members of Parliament to the JSC helps in ensuring that political formations, the institutions that they represent and by extension their constituencies are represented in decision-making processes within the JSC, a concern, real or perceived is that the politically skewed composition of the JSC may lead to political considerations dominating in decision-making. Some have justified the presence of politicians on the JSC in South Africa stating that:

“Part of the purpose in having politicians on the JSC is to allow for a broader input of views in the judicial selection process. Having a JSC of lawyers alone might seem logical, but could risk the commission turning into a professional cabal.”⁷²

⁷¹ These 15 include the Cabinet member responsible for the administration of justice, Six persons designated by the National Assembly from among its members, Four permanent delegates to the National Council of Provinces and the four persons designated by the President as head of the national executive (after consulting the leaders of all the parties in the National Assembly)

⁷² South Africa, The Mail and Guardian, 29 July 2014 “New judicial watchdog is more than Malema”

This is despite the fact that politicians in the JSC in South Africa have been seen to:

“Rigorously interrogate candidates on the issue of the judiciary needing to show greater deference to the executive and legislative branches of government, and evinced a discomfort with candidates from more activist backgrounds” (Ibid).

The discomfort with the presence of politicians on the JSC in South Africa is therefore not without basis. Whilst the system might have worked perfectly to date, there is no guarantee that it will stay the same in future if the political figures in government and in the JSC are of a different mind-set. As shown above, warning shots have been fired before, and given the view that the JSC must not only be independent but must be seen to be independent, the presence of politicians therefore poses a real challenge.

Another question that has been raised in South Africa on the work of the JSC is whether the deliberations of the JSC regarding the appointment of judges must be made public or must stay confidential. The Constitution of South Africa allows the JSC to determine its own procedure and in terms of this provision the JSC developed a procedure that allows it to hold its deliberations in private following the public interview of candidates.⁷³ Regulation 3 (k) provides that:

After completion of the interviews, the Commission shall deliberate in private and shall, if deemed appropriate, select the candidates for appointment by consensus, or if necessary, majority vote”

This provision was challenged in 2014 by the Hellen Suzman Foundation,⁷⁴ which sought to have the deliberations of the JSC in selecting candidates published in full despite the JSC having provided a summary of their deliberations. In dismissing the application, the court noted the need to maintain a balance between secrecy and transparency and stating in conclusion that:

“Confidentiality breeds candour; it is vital for effective judicial selection, [and] too much transparency discourages applicants, and will have an effect on the dignity and

⁷³ South Africa: Judicial Service Commission Act, 1994 (Procedure of Commission)

⁷⁴ South Africa: Hellen Suzman Foundation vs. the Judicial Service Commission, 8647/2013, Western Cape Division

privacy of the applicants who applied with the expectation of confidentiality.” (Para 48).

This is the same approach that was taken by the courts in Botswana in the Case of the Law Society of Botswana vs. the Judicial Service Commission (*supra*). In both instances the courts concluded that the procedure by the JSCs in the two countries in holding the deliberations in private was comparable to other jurisdictions both in Africa and internationally. In addition, in both cases it is important to note that the legal profession played an important role in ventilating the issues that made it possible for the courts to deliberate and make determinations on the issue at stake, the Law Society of Botswana as an applicant and the National Association of Democratic Lawyers (NADEL) in South Africa as *amicus curiae*.

2.6.3 The Legal Profession in the JSC

Section 178 (1) (e) and (f) of the Constitution of South Africa provides for two advocates and two attorneys to represent the legal profession in the JSC. The legal profession in South Africa from both the advocates and attorneys’ profession plays an important role in promoting the independence of the judiciary in the country. They have often come out in defence of the judiciary whenever there are threats directed at the institution by the executive and others. In 2012, when the executive announced plans to review the work of the Constitutional Court and its role in transformation in the country, the Law Society of South Africa (LSSA) insisted that any such initiatives must not be used to undermine the independence of the judiciary. The LSSA also stood in defence of the judiciary when it faced subsequent attacks.⁷⁵ They have also played an important role in advocating for the independence of the judiciary in other countries and in particular Lesotho and Swaziland. Their representatives on the JSC are therefore expected to adopt a similar approach and play an important and independent role in ensuring that the profession’s momentum in promoting and defending judicial independence is maintained through their work in the JSC. In terms of the actual appointment of the legal professional representative to the JSC, the LSSA Council or the General Council of the Bar (GCB) is responsible for the nomination of the candidates who can be either members for the council or simply members of the associations. The LSSA is of the view that there is no reason to doubt the integrity of

⁷⁵ See for example, <http://www.derebus.org.za/profession-stands-behind-chief-justice-judiciary-raising-concern-attacks-judiciary-rule-law/>

the candidates that are nominated by the law society council to sit in the JSC nor that of the law society council that nominates the candidates. As such, members must not view their non-participation in the process as a subversion of the process or of their rights because after electing the council, the members must have faith in the ability of the council to undertake its work as mandated by the members.⁷⁶

2.7 Swaziland

2.7.1 Introduction

The history of Swaziland is littered with judicial crises of one form or another. Often, the root cause of these crises has either been the lack of independence of the judiciary or excessive interference by the executive in the work and operations of the judiciary. The lack of judicial independence has been both at institutional and individual level, with some of the judges presenting themselves as all too ready to conform and follow executive directives. One of the most well-known judicial crises in Swaziland happened in 2002 when the Prime Minister of the country publicly declared that the government would not recognise two judgements that had been issued by the Court relating to the King and the Commissioner of the Royal Swazi Police. This presented a serious rule of law and constitutional crisis in the country and the six judges of the Court of Appeal resigned *en masse* in protest. Despite an international outcry over these developments, the Government of Swaziland continued with its onslaught on the independence of the judiciary, the separation of powers and the rule of law. These included the subsequent forced resignation of the Chief Justice and the dismissal or demotion of other judicial officers. Expatriate judges were threatened with deportation (Seiderman, 2004: 4), in a fashion similar to what happened in Namibia as indicated above. An encouraging aspect of this epoch is that the judiciary was not prepared to compromise its independence and credibility by remaining silent in the face of such an onslaught by the executive and clear disregard of the rule of law.

Developments during the tenure of Chief Justice Michael Ramodebedi presented a different scenario, where the judiciary became pliant, an extension of the executive and where independence was punishable by expulsion or harassment of the judges

⁷⁶ Submission by Mr. Busani Mabunda, Immediate past co-chairperson of the LSSA and past representative of the LSSA on the JSC.

concerned. Over the years, the judicial challenges in Swaziland have not shown any signs of abating. Some of the challenges have centred on persecution of independent minded judges⁷⁷ and questionable judicial appointments.⁷⁸ In all this, former Chief Justice Michael Ramodebedi did not help the situation when he clearly acted in a manner that suggested that he was under the control of the King and the Government. Some of the Chief Justice's actions included the issuing of a Practice Directive that protected the King from being sued under any circumstances⁷⁹ and reports of the Chief Justice presiding over or allocating cases in matters that he had an interest in (ICJ, 2016: 5). The Law Society of Swaziland boycotted the courts for four months in response to these actions and the general lack of judicial independence in the country.⁸⁰ The Law Society also lodged a communication with the African Commission on Human and People's Rights accusing the Chief Justice of undermining the independence of the Judiciary in the country (ICJ, 2016: 10)

⁷⁷ One of those judges was Justice Thomas Masuku who was hounded off the bench and out of the country to Namibia where he now sits on the Supreme Court Bench.

⁷⁸ In June 2015, the King appointed the Attorney General (AG) as an acting Judge of the Supreme Court thereby bringing into the question the issue of separation of powers between the judiciary and the executive. The issue arose because the AG remained in his substantive position and therefore a member of the Executive at a time when he was on the bench as a member of the judiciary.

⁷⁹ Practice Directive No 4/2011 stated 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.

⁸⁰ This was between July and November 2011



Lawyers in Swaziland demonstrating in defence of judicial independence in the country: Source: Times of Swaziland, 14/10/2011

In reference to the actions of the Chief Justice, following a fact-finding mission to Swaziland on the independence of the judiciary, the ICJ concluded that:

“Moreover, the mission found that some members of the Judiciary have exercised their mandate with a lack of integrity and professionalism. In particular, former Chief Justice Ramodibedi failed to protect and defend the institutional independence of the Judiciary, and played a reprehensible role in undermining both the institutional independence of the Judiciary and that of individual judges in Swaziland.” (ICJ, 2016:5)

Whilst a new Chief Justice has been appointed in Swaziland, the structural challenges that impinge on independence of the judiciary and separation of powers still remain. These challenges can only be effectively addressed through constitutional and legal changes that guarantee the independence of the judiciary and a political system that is prepared to respect those guarantees. Following its promotional mandate mission to Swaziland in March 2016, the African Commission on Human and People’s Rights also concluded that there was

“Lack of effective and adequate separation of powers, which hinders the full and effective performance of the oversight role of Parliament and the delivery of justice by the Judiciary”⁸¹

⁸¹ Press Statement at the Conclusion of the Promotion Mission of the African Commission on Human and Peoples’ Rights to the Kingdom of Swaziland, 14 March 2016

The challenges in the country with regards to judicial independence are therefore structural and the presence of leaders like Chief Justice Michael Ramodibedi in the judiciary only helps to exacerbate the situation.

2.7.2 The Constitution, Appointment Process, Composition and Function of the JSC

The JSC in Swaziland is constituted in terms of Section 159 of the Constitution. The Commission consists of the following:

- The Chief Justice, who is the Chairman
- Two legal practitioners of not less than seven years' practice and in good professional standing to be appointed by the King;
- The Chairman of the Civil Service Commission; and
- Two persons appointed by the King.

The functions of the JSC in Swaziland are provided for in Section 160 of the Constitution and these are to:

- Advise the King in the exercise of the power to appoint persons to hold or act in any office specified in this Constitution which includes power to exercise disciplinary control over those persons and to remove those persons from office;
- Advise the King on the appointment, discipline and removal of the Director of Public Prosecutions and other public officers as provided in this Constitution;
- 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);
- Receive and process recommendations and complaints concerning the judiciary;
- Advise the Government through the Minister responsible for Justice on improving the administration of justice generally; and
- Any other function prescribed by this Constitution or Parliament.

The JSC also has the powers to appoint and exercise disciplinary control over the following office holders:⁸² in addition to any other offices that are connected with the courts as may be prescribed by Parliament.⁸³

- Registrar of the Supreme Court;
- Registrar of the High Court;
- Deputy Registrar of the Supreme Court;
- Deputy Registrar of the High Court;
- Master of the High Court;
- Deputy Master of the High Court; and
- Magistrate.

Effectively therefore all members of the Commission are directly appointed by the King. Whilst both the Chief Justice and the Chairman of the Civil Service Commission hold their positions in the JSC *ex officio*, they are still appointed to their principal positions by the King. This has the effect of compromising the independence of the Commission and ultimately the independence of the judiciary as well. Another issue of concern is that in terms of the Judicial Service Commission Act of 1982 (as amended), the Principal Secretary to the Ministry of Justice is the Secretary to the Judicial Service Commission.⁸⁴ Since the Principal Secretary in the Ministry of Justice runs a key Ministry within the Executive, it follows that his/her presence as the Chief Administrator in the Judicial Service Commission impacts on the principle of separation of powers and therefore the independence of the judiciary. The standard practice in other jurisdictions in Southern Africa and internationally is to ensure that the JSC runs its own independent administration without interference from other arms of government, with a Secretary/Director/Chief Executive Office who is appointed specifically to lead the administrative arm of the JSC.

⁸² Swaziland: Constitution of the Kingdom of Swaziland, 2005, Section 160 (3) (a)

⁸³ Swaziland: Constitution of the Kingdom of Swaziland, 2005, Section 160 (3) (b)

⁸⁴ Swaziland: Judicial Service Commission Act, 1982, Section 3 (5)

2.7.3 The Legal Profession in the JSC

Section 159 (2) (b) of the Constitution of Swaziland, provides for two legal practitioners to be members of the JSC. The two are appointed by the King and in making this appointment, the King is not required to consult the legal profession either generally or through the leadership of the profession (Law Society President or Council). In essence therefore the two legal practitioners cannot be said to represent the profession in the JSC but are merely appointed by the King for their skills as legal practitioners. A process that allows for the involvement of the legal profession in the appointment of these representatives in the JSC would however be ideal.

2.8 Tanzania

2.8.1 Introduction

The United Republic of Tanzania is made up of Tanzania Mainland (what used to be called Tanganyika) and Tanzania Zanzibar (comprising of the Islands of Unguja and Pemba). Both Tanzania Mainland and Tanzania Zanzibar have their own independent court systems up to the High Court level and these systems converge at the Court of Appeal, which is the highest court in the hierarchy of the judiciary in the United Republic of Tanzania. At the lower level, Mainland Tanzania has Primary, District and Resident Magistrates' Courts (Regional Courts) whilst Tanzania Zanzibar has in addition, Khadhi's Courts that are established to administer Islamic law, especially in the areas of family law. Administratively and jurisdictionally, there is no interaction between the judiciaries in Zanzibar and Mainland Tanzania except at the Court of Appeal level, which is the highest judiciary authority in respect of both.⁸⁵ Even then, not all issues are subject to the scrutiny of the Court of Appeal.

The independence of the judiciary in the United Republic of Tanzania therefore has to be analysed in light of these two operating systems and the attendant court structures.

2.8.2 The Constitution, Appointment Processes, Composition and Function of JSC

The JSC in Tanzania Mainland is established in terms of Section 112 (1) of the Constitution. The members of the JSC are:

⁸⁵ Submission by the President of the Tanganyika Law Society, Mr John Seka at the Law Society/ Bar Leaders' Meeting.

- The Chief Justice who shall be the Chairperson
- The Attorney General
- A Justice of the Court of Appeal
- Principal Judge of the High Court
- Two members appointed by the President

The structure of the JSC in Tanzania like in other countries in the region shows that the President is solely responsible for the appointment of members. As a result, like in the other countries with similar appointment processes, this raises questions about the independence of the JSC from the Executive and in particular the Head of State. The composition also suggests an institution that is tilted heavily in favour of the judiciary as three of the 6 members are judges. The perception that can be drawn therefore is that the JSC would be overly concerned about issues affecting judges as opposed to general justice delivery issues and the concerns of other officers working in the justice delivery sector. Unlike South Africa, Members of Parliament are specifically prohibited from being appointed as members of the JSC.⁸⁶

The functions of the JSC are provided for in the Constitution and elaborated in the Judiciary Administration Act, 2011 which gives the JSC, the responsibility to appoint, confirm, promote and discipline non-judicial officers.⁸⁷ For the purposes of recruitment, promotion, confirmation and discipline of non-judicial officers, the Commission is required to establish an Employment Advisory Committee. Appeals by non-judicial officers on the decisions of the JSC lie with the Public Service Commission (PSC) and if unsatisfied with the decision of the PSC, a non-judicial officer can appeal to the President of the country.

In terms of Section 109 (2) of the Constitution, the President when appointing the Principal Judge and other Judges of the High Court is required to do so in consultation with the JSC. The JSC however has no role to play in the appointment of the Chief Justice of the Court of Appeal and other Justices of Appeal. The President appoints the Chief Justice and in consultation with the Chief Justice appoints the other Justices of Appeal.

⁸⁶ Tanzania, Constitution of Tanzania, Section 112 (2)

⁸⁷ Section 14 (1)

2.8.3 The Legal Profession in the JSC

There is no provision in the Constitution of Tanzania for the representation of the legal profession in the JSC. However the proposed draft constitution of Tanzania expands the membership of the JSC and includes a representative of the Tanganyika Law Society and the Zanzibar Law Society amongst other new entrants. The adoption of the new constitution has however stalled and there is no indication regarding the resumption of the process to adopt the new constitution.⁸⁸

Even though there is no mention of the legal profession in the composition of the JSC, there has always been a representative of the legal profession in the JSC in Tanzania and the TLS has also been consulted in the appointment of such a member. The TLS normally submits just one name for appointment and the President has customarily accepted the nomination. The Law Society will only appoint a person of impeccable character to be a member of the JSC. The Governing council of the TLS and the Law Society of Zanzibar normally meet and consider a name from the members of the law society to propose to the president for appointment into the JSC.

In addition to the legal profession representative, another member in the JSC normally comes from the universities that teach law and for the past 10 years this member has also happened to be a member of the law society. The TLS therefore effectively has two representatives in the JSC.⁸⁹

2.9 Zambia

2.9.1 Introduction

The Constitution of Zambia (Amendment) Act, No 2 of 2016 made extensive changes to the 1996 Constitution. The new constitutional amendment however provides no changes to the JSC, its composition and its functions. These issues remain as provided for in the 1996 constitution and other relevant pieces of legislation as will be detailed below. Research has shown that whilst the judiciary in Zambia is viewed as largely independent, there have been some cases of executive interference in the work of the

⁸⁸ Submission by the President of the Tanganyika Law Society, Mr John Seka at the Law Society/Bar Leaders' Meeting.

⁸⁹ Submission by the President of the Tanganyika Law Society, Mr John Seka at the Law Society/Bar Leaders' Meeting.

judiciary. In a research report on “Justice Sector and the Rule of Law” OSISA and AfriMAP, concluded that:

“The judiciary remains reasonably independent, though some incidents of blatant executive interference have been reported” (AFriMAP/OSISA, 2013: 70)

Cases cited in this regard include the one involving the corruption trial of the late former President of Zambia, Fredrick Chiluba. (Ibid, 71). The suspension of three judges in 2012 by President Michael Sata, namely Justices Philip Musonda, Charles Kajimanga and Nigel Mutuna also raised worldwide concern on the independence of the judiciary in Zambia and executive interference in the work of the judiciary. This was because the judges were suspended under circumstances that suggested that they were being victimized for doing their work as judicial officers.

2.9.2 The Constitution, Appointment Processes, Composition and Function of JSC

Section 123 (1) of the 1996 Constitution of the Republic of Zambia provides for a Judicial Service Commission. It states that:

“There shall be established for the Republic a Judicial Service Commission which shall have functions conferred on it by this Constitution and such other functions and powers, as may be prescribed by or under an Act of Parliament.”⁹⁰

The composition of the JSC is also provided for in the Services Commissions Act and in particular Amendment No. 2 of 2014 which provides the members of the commission as follows:

- A Chairperson, appointed by the President, who shall be a person who holds or qualifies to hold high judicial office
- A judge nominated by the Chief Justice
- The Attorney General, with the Solicitor General as the alternative
- A representative of the division responsible for the public service management, nominated by the Secretary to Cabinet
- A magistrate nominated by the Chief Justice
- A Member of the National Assembly appointed by the Speaker of Parliament

⁹⁰ Zambia: Constitution of Zambia, Section 123 (1)

- A representative of the Law Association of Zambia, nominated by that Association and appointed by the President
- A Dean of a Law School of a public higher education institution nominated by the Minister responsible for Justice and appointed by the President; and
- One member appointed by the President.

Like in the case of South Africa, the JSC has a Member of Parliament amongst its numbers and similar questions can be raised with regards to the impartiality of such a member.

The functions of the JSC amongst others include the following:

- It is consulted by the Chief Justice in the appointment of a Tribunal to investigate matters relating to the impeachment of the President of the country;⁹¹
- It is consulted by the President in the designation of a Supreme Court Judge to act in the position of the Deputy Chief Justice;⁹²
- It is consulted by the President in the designation of a Constitutional Court Judge to act in the position of Deputy President of the Constitutional Court;⁹³
- Recommends to the President the appointment of the Chief Justice, Deputy Chief Justice, President of the Constitutional Court and Deputy President of the Constitutional Court and other judges;⁹⁴
- Appoints judicial officers;⁹⁵ (and also confirms, promotes and hears appeals from such judicial officers;⁹⁶)
- Appoints the Chief Administrator of the Judiciary;⁹⁷

These functions are by and large similar to those of other JSCs in the region, with minor variations. Unlike other jurisdictions in the region, however, the JSC in Zambia is not tasked with the discipline or removal of judges from office, a responsibility that is given

⁹¹ Zambia: Constitution of Zambia, Amendment Act No 2 of 2016, Section 108 (4) and (5)

⁹² Ibid, Section 137 (2)

⁹³ Zambia: Constitution of Zambia, Amendment Act No 2 of 2016, Section 139 (2)

⁹⁴ Ibid, Section 140

⁹⁵ Zambia: Constitution of Zambia, Amendment Act No 2 of 2016, Section 145 (1)

⁹⁶ Ibid, Section 220 (2) (c)

⁹⁷ Zambia: Constitution of Zambia, Amendment Act No 2 of 2016, Section 146 (1)

to the Judicial Complaints Commission (JCC)⁹⁸. Amongst other duties, the JCC is tasked with enforcing the code of conduct for judges and judicial officers, ensuring accountability by judges and judicial officers to the public for the performance of their duties, receiving and hearing complaints lodged against judges and judicial officers and making recommendations regarding these issues to the appropriate institution or authority.⁹⁹

2.9.3 The Legal Profession in the JSC

The Constitution of Zambia provides for a representative of the legal profession in the JSC and gives the LAZ the powers to nominate such a member to sit in the JSC. The LAZ has over the years played an important role in supporting and defending the independence of the judiciary and the rule of law in Zambia. For example in 2013, it filed an application seeking the removal of Justice Lombe Chibesakunda as the Acting Chief Justice of Zambia indicating that her appointment to that position was unconstitutional.¹⁰⁰ In seeking the intervention of the courts, LAZ sought to ensure that judicial appointments in the country were done in accordance with the provisions of the Constitution. Like in other jurisdictions in the region, the lawyer appointed by LAZ to sit in the JSC would therefore be expected to observe the same principles that seek to advance the independence of both the JSC and the judiciary. However, the challenge still remains that like with the other law societies in the region, the process of appointing the lawyer to sit in the JSC is the responsibility of the Council of the Law Society, leaving no room for direct participation by members in this process.

2.10 Zimbabwe

2.10.1 Introduction

The Republic of Zimbabwe adopted a new Constitution, Amendment (Number 20) Act of 2013 that came into effect on 22 May 2013. To a great extent, the country is still experiencing teething problems with regards to the implementation of the new

⁹⁸ Established in terms of Section 236 of the Constitution

⁹⁹ Ibid, Section 236

¹⁰⁰ Lusaka Times, 24 September, 2013 “LAZ in court to have Chief Justice Lombe Chibesakunda removed”

constitution with over 400¹⁰¹ laws requiring alignment with the new constitution. Three years into the life of the new constitution, limited success has been achieved in this alignment process. One area that the new Government has managed to comply with however is with regards to the operations of the judiciary and the implementation of the attendant constitutional provisions. In particular the issue of public interviewing of judges has to some extent improved public confidence in the judiciary and given a perception that the appointment process is transparent and therefore useful in promoting independence of the judiciary in the country.¹⁰² The JSC in the country has played an important role in ensuring that the constitutional imperatives requiring a more transparent appointment process for judges is implemented.

2.10.2 The Constitution, Appointment Processes, Composition and Function of JSC

The new Zimbabwean Constitution provides for a Judicial Service Commission in Part 3 (Sections 189-191). Section 189 provides for the establishment and composition of the JSC and states that:

“There is a JSC, consisting of:

- The Chief Justice;
- The Deputy Chief Justice;

¹⁰¹ See <https://ihrclinic.uchicago.edu/page/promoting-domestication-constitutional-human-rights-principles-zimbabwe>

¹⁰² At the time of finalising this research, the Government of Zimbabwe had, in early 2017, initiated a constitutional amendment process to remove the requirement for public interviews by the JSC for key judicial positions and instead give the President the prerogative to make direct appointments for such positions, after consulting the JSC. These included the positions of the Chief Justice, the Deputy Chief Justice and the Judge President of the High Court. The amendment initiative commenced at a time when the JSC was in the process of interviewing candidates for the position of Chief Justice. A challenge by University of Zimbabwe law student Mr. Romeo Taombera Zibani, seeking to stop the interviews pending the constitutional amendment was supported by the Ministry of Justice, Legal and Parliamentary Affairs, granted by the High Court but finally dismissed by the Supreme Court on Appeal. Mr Zibani filed another application with the Constitutional Court challenging the composition of the Supreme Court Bench that had heard the appeal, but whilst this application was pending, the President of Zimbabwe appointed one of the candidates that had been recommended by the JSC after holding public interviews, Justice Luke Malaba as the Chief Justice of Zimbabwe. The Constitutional Amendment Bill was yet to be debated in Parliament.

- The Judge President of the High Court;
- One Judge nominated by the judges of the Constitutional Court, the Supreme Court, the High Court, the Labour Court and the Administrative Court;
- The Attorney General;
- The Chief Magistrate;
- The Chairperson of the Civil Service Commission;
- Three practising legal practitioners of at least seven years' experience designated by the association, constituted under an Act of Parliament, which represents legal practitioners in Zimbabwe;
- 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;
- One person who at least for 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
- One person with at least seven years' experience in human resources management, appointed by the President.

Of the 13 members of the JSC listed above, 6 are *ex-officio* and one is appointed directly by the President. The other 6 members are nominated by their constituencies or associations. Unlike other jurisdictions, the Constitution of Zimbabwe makes an attempt to provide minimum prerequisites in order for a legal practitioner to be appointed to the JSC, i.e. that the practitioner must have at least seven years' experience.¹⁰³ Other constitutions merely provide that the person must be a legal practitioner. Considering the important work that the JSC does, it is important that the person to be appointed from within the legal profession has the requisite experience that allows them to understand issues and make well considered decisions in the execution of their mandate. Where no requirements are provided for in the Constitution, it may therefore be necessary for law societies/bar associations to internally formulate such requirements and use them in their nomination processes. Even where there are requirements stated in the Constitution like in the case of Zimbabwe, the profession

¹⁰³ Zimbabwe: Constitution of Zimbabwe, Section 189 (1) (h)

may also augment those requirements to ensure that the members that they nominate are truly in a position to effectively implement their mandate in the JSC.

2.10.3 The Legal Profession in the JSC

Section 189 (1) (h) of the Constitution provides that three legal practitioners nominated by the legal profession shall sit in the JSC. This provides the legal profession with the second highest level of representation in the JSC after the judiciary itself. With three members in the Commission, this representation is also one of the highest in the region, second only to South Africa (which has two attorneys and two advocates). Such a representation can therefore play an important role in ensuring that issues of concern to members of the public in justice delivery as well as issues of concern to the profession are addressed through the JSC. To ensure public confidence and that of the profession in these representatives, the issue of how they are nominated is critical. The Law Society of Zimbabwe is allowed by law to make its own by-laws¹⁰⁴, in relation to certain of its functions. The nomination or election of the profession's representatives to the JSC could be one area where such a provision could prove useful. Currently the legal profession representatives to the JSC are nominated by the Council of the Law Society without any input from the general membership of the Law Society.¹⁰⁵ This process is similar to processes in other jurisdictions in the SADC region with regards to nomination of legal profession representatives in the JSC.

¹⁰⁴ Zimbabwe: Legal Practitioners Act, Chapter 27:07, Section 63

¹⁰⁵ Submission from Mr Thandaza Masiye-Moyo, Law Society of Zimbabwe Councillor at the Law Society/Bar Leaders' Meeting.

Chapter 3: Conclusions and Recommendations

The constitution of the JSC and ultimately the judiciary with men and women of integrity in Africa is an important facet of the democratisation process on the continent. The constitutional and legal design of any country play an important role in ensuring that the judiciary is truly independent and is able to dispense justice to the citizens, without fear or favour. For the past few years, the JSCs and the judiciary in Southern Africa have come under increasing scrutiny from academics, ordinary people and civil society seeking to ensure that both are independent and able to effectively deliver on their mandate. The membership of the JSCs and the appointment of the judiciary has therefore become an increasingly important issue.¹⁰⁶ This research has shown that whilst there are variations in the appointment processes and composition of the JSCs in the region, all the nine countries that are the subject of this research have embraced JSCs as an important part of their governance architecture and an important aspect in ensuring independence of the judiciary. The research has also shown that concerns still remain with regards to the independence of the JSCs, the judiciary and with the role and position of the legal profession in the matrix. Legal and Constitutional amendments can address some of the problems whilst the legal profession can also play an important role in addressing some of the problems, by merely changing some of their rules and operating procedures with regards to the appointment of legal professionals to the JSCs.

The section below outlines the recommendations emanating from this research and from the participants of the SADCLA Law Society/Bar Leaders' Meeting held in Johannesburg on the 23rd and 24th of May 2016:

- There are no formalised internal rules to guide the appointment processes for legal profession representatives in the JSCs, rendering the process susceptible to manipulation by the leadership of the law societies/bar associations. Formalised and clear rules setting out the process to be followed are therefore important. Examples of procedures to be followed may include sending out notices to members to express interest in being nominated, ratification of the nomination of the law society/bar association leadership by the general membership or conducting interviews after an

¹⁰⁶ Submission by Justice Oagile Key Dingake, Judge of the High Court of Botswana at the Bar Leaders' Meeting.

application process. This ensures certainty and if any changes are to be effected, this must be done openly and procedurally;

- Criteria must be set out and be used in selecting members for nomination. Such criteria may include the following: a minimum period of experience after qualification, involvement in the affairs of the law society/bar association, integrity and independence amongst others. This helps in ensuring certainty and consistency in the calibre of members that are appointed to sit in the JSC;
- The push for legal profession representatives in the JSC to report back to the councils of the law societies must be discouraged bearing in mind that the representatives are appointed to serve the public interest and not the interests of the law societies or the legal profession. That requirement would also infringe on the representatives' constitutional obligation to undertake their work without being subject to the direction or control of any other person or authority;
- The KLS example of holding elections for positions in the JSC, though noble, presents some challenges, particularly with regards to financial resources that may be required to hold such an election, which must be held at a national level if all members are to participate.

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Annexure 1: List of Participants for the Bar Leaders' Meeting, Johannesburg, South Africa, 23 and 24 May 2016

Attendance Register

Delegate #	Name	Position/ Organisation	Email Address
1	Mr James Banda	Vice President, SADC Lawyers	james.banda@iconnect.zm
2	Mr Lawrence Moagisi Lecha	President, Law Society of Botswana	lawlecha@yahoo.com
3	Mr Shale Patrick Shale	President, Law Society of Lesotho	shalechambers@gmail.com
4	Dr. Mwiza Joy Nkhata	Vice President, Malawi Law Society	mwizankhata@gmail.com
5	Ms. Gaenor Michaels	Councillor, Law Society of Namibia	rsteinmann@lawsocietynamibia.org
6	Ms Linda Kasonde	President, Law Association of Zambia	kasondelc@gmail.com
7	Mr John Seka	President, Tanganyika Law Society President	johnseka@gmail.com
9	Mr Richard Scott	Councillor, Law Society of South Africa	richard@scottattorneys.co.za
10	Mr Thandaza Masiye-Moyo	Councillor, Law Society of Zimbabwe	secretary@lsz.co.zw
11	Judge Oagile Bethuel Dingake	Judge of the Residual Special Court of Sierra Leone and Professor of Public Law	oagiledingake@gmail.com
12	Judge Mankhambira Charles Mkandawire	Judge of the High Court, Malawi	kamkandawire@yahoo.co.uk
13	Mooya Nyaundi	Staff Attorney, Sub-Saharan Africa - American Bar Association Center for Human Rights (ABACHR)	Mooya.Nyaundi@americanbar.org
14	Makanatsa Makonese	Executive Secretary, SADC Lawyers Association	makanatsa@yahoo.ca
15	Perseverance Zanele Bhebhe	Finance Officer, SADC Lawyers Association	zanele@sadcla.org
16	Prudence Mabena	Administrator, SADC Lawyers Association	prudence@sadcla.org
17	Busani Mabunda	Councillor, Law Society of South Africa	busani@mabundainc.co.za
18	Max Boqwana	Treasurer, SADC Lawyers Association	max@boqwanaburns.com
19	Arnold Tsunga	Director, International Commission of Jurists (ICJ), Africa Regional Programme	arnold.tsunga@icj.org