A comparative overview of recent trends in judicial appointments: selected cases from Africa

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Abstract

One of Africa's major challenges in the last three decades has been the need to restore confidence in the judiciary. During the long years of dictatorial rule, judges were stripped of their independence and appointed or dismissed at the whim of presidents; the public consequently had scant trust in the judiciary. This paper provides a comparative overview of developments in Africa in the last three decades. It seeks to determine to what extent appointment processes promote critical judicial values such as independence, impartiality, transparency, inclusivity and efficiency. Have appointment systems restored public confidence in the judiciary? What are the emerging challenges? It is argued that although some countries have made progress in the quality of judicial appointments, in others serious challenges remain. Nevertheless, the executive proclivity to exploit its role in judicial appointments in Africa and thereby undermine the quality of justice continues to be as strong as ever.

Key words

African judiciaries; judicial appointments; judicial independence; judicial appointment bodies

I Introduction

One of Africa's major challenges in the last three decades has been the need to restore confidence in the judiciary. As a result of its docility and complicity with various pre-1990 repressive authoritarian regimes, judiciaries were left little able to function as impartial enforcers of the law. The main reason for this is that during the long years of dictatorial rule, judges were stripped of their independence and appointed or dismissed at the whim of presidents; the public consequently had scant trust in the judiciary. Indeed, in some

countries the rot in the judiciary continued into the 2000s. For example, among the reasons for Kenya's post-electoral violence in 2007 was that a chief protagonist in these events, Raila Odinga, refused to take his grievances before what he derisively referred to as 'Kibaki's courts'(Abuya 2010, 122).

Since the 1990s, however, most African countries followed the global trend in which judicial independence and powers are entrenched as well as expanded in constitutions (Fombad 2007; Smit 2015; Tate & Vallinder 1995). Crucially, the independence of the judiciary and its ability to discharge its functions without fear, favour or prejudice, depend largely on how judges are appointed. With politically sensitive cases increasingly being brought before the courts, judicial appointment has become an issue of heightened importance, given the extent to which the judiciary comes under scrutiny, especially by governments. The latter pose a serious threat to the ability of judges to decide matters fairly and impartially, not only because of governments' potential interest in the outcome of cases but also because of the enormous power they can exercise over judicial appointments. Judges therefore need to be insulated from threats or machinations that could force them to act unjustly in favour of the state. The manner in which judges are selected thus has great impact not only on the quality of justice, respect for the rule of law and the legitimacy of the courts, but also on the establishment and sustenance of a culture of constitutionalism.

This paper provides a comparative overview of developments in Africa in the last three decades but with its focus mainly on trends in Anglophone and Francophone Africa.[1] It seeks to determine to what extent appointment processes promote critical judicial values such as independence, impartiality, transparency, inclusivity and efficiency. Have appointment systems restored public confidence in the judiciary? What are the emerging challenges? In answering these and other questions, the paper begins in the next section with an overview of appointment systems in which it examines the diversity of appointment bodies and the historical contexts in which they evolved. Section three undertakes a critical appraisal of the two main judicial appointment bodies (JABs) on the continent. Section four then considers the key challenges to have emerged in spite of attempts to modernise African judicial appointment systems. In the conclusion, it is argued that although some

countries have made progress in the quality of judicial appointments, in others serious challenges remain.

II Overview of judicial appointment systems

This section opens with some preliminary observations that explain the historical roots and context of the different appointment systems in Africa. It goes on to look at the constitutional and legal framework of these systems and then to examine various judicial appointment bodies.

A Historical context of appointment systems in Africa

Owing to its diverse colonial background, Africa inherited different legal traditions, which in turn has led to different ways of selecting judges. Despite these differences in approach, the two main ones are the common law approach in Anglophone Africa and the civil law approach in Francophone, Hispanophone and Lusophone Africa.[2] The collapse of judicial integrity affected each of these legal traditions, even if the extent of this varied from one tradition to another and, within these legal traditions, from one country to the next. Taking into account the complexity of the legal traditions that are the subject matter of this discussion, a number of preliminary observations are necessary for understanding the analysis that follows.

First, the word 'judges' in this discussion needs to be explained. In the case of Anglophone jurisdictions, the discussion is limited to superior court judges as opposed to magistrates, who sit in the inferior courts. This term includes chief justices and their assistants, as well as presidents of courts and their assistants, who head some of the superior courts. In the case of Francophone Africa, 'judges' in this discussion is limited to those who sit in the ordinary courts and to some extent, constitutional courts or councils, as opposed to judges of the administrative and audit courts (Fombad 2014).

Secondly, the analysis is broadly comparative, aiming thereby to form a coherent picture of the trends and tendencies. It focuses, however, only on selected countries of the civil and common law traditions. In doing so, it compares and contrasts developments in those countries where there has been considerable progress in modernising the legal framework

for judicial appointments with those where there has been very little. As examples of the former, Kenya and South Africa, representing Anglophone Africa,[3] and Benin, representing Francophone Africa, are compared with countries where there appears to have been little progress, such as Cameroon, for civil law countries, and Botswana, for common law countries.

Thirdly, to appreciate the extent of changes that have taken place, it is necessary to factor in the point of departure – namely, the inherited legal culture, particularly with respect to the judiciary. In Anglophone Africa, that starting-point is the common law legal culture. Although England is usually regarded as the cradle of the ideal of judicial independence, the judiciary in England is neither a separate nor co-equal branch of government. In fact, the very concept of judicial independence in the English system has been described as an 'inchoate one' (Stevens 2001). Nonetheless, the English common law developed an essentially informal but effective system of judicial independence that relies largely on congeries of statutes, delegated legislation, customs and conventions. As a result, Britain's reputation for high standards of judicial independence – apparent in such hallmarks as security of tenure, fiscal independence, impartiality, and freedom from executive pressure – is due mainly to a strong political culture that has consistently provided protection for the judiciary.

That being said, during the colonial period British colonial administrators controlled the judiciary and made all judicial appointments. The independence constitutions that Britain bequeathed to its colonies sought to provide some separation of powers, with restrictions imposed on executive influence in judicial appointments. Nevertheless, the new leaders had no experience of constitutional governance. Under the pretext of promoting national unity and economic development, these leaders silenced critics and reverted to the dictatorial system they inherited. For instance, in 1957 Ghana became the first British colony to gain independence in Africa, inheriting a reasonably independent judiciary; however, within a few years its first president, Kwame Nkrumah, emasculated the judiciary after giving himself extensive arbitrary powers to appoint and remove judges.[4]

In Francophone Africa, the model of judicial independence adopted was shaped by the obsessive Gallic fear of legal dictatorship through a 'government of judges'(Merryman

1996; Tallon 1979).[5] This approach can be traced to pre-revolutionary France. Given the poor reputation of royal courts or *Parlements* before the French revolution, one of the first measures the revolutionaries took was to break the powers of these courts by subordinating them to the the executive. Due to this mistrust of the judiciary, post-independence constitutions relegated the judiciary to what was referred to as a 'judicial authority' (*autorité judiciare*), one entirely subservient to the president of the republic. Article 64 of the 1958 Constitution of the French Fifth Republic, which made the President guardian of the independence of the judiciary, with powers to appoint, promote, transfer and dismiss judicial personnel, was replicated in all the constitutions the French prepared for their African colonies. As for South Africa, its pre-1994 judiciary operated under a system of parliamentary supremacy in which judges were appointed by the executive and notoriously deferred to it without question in enforcing apartheid laws.

Finally, the focus of the analysis is on the constitutional framework and the clarity with which it provides an appointment system limiting the scope for executive manipulation and abuse of appointments. The rationale for such a framework is what we now turn to.

B The constitutional and legal framework for appointments

Constitutional entrenchment of the framework for judicial appointments is crucial for limiting their abuse for political ends. Unlike ordinary legislation, constitutions, as the supreme law of the land, are meant to endure. More importantly, they are often protected from careless, casual or arbitrary amendment by transient majorities or opportunistic leaders promoting self-interested agendas (Fombad 2013,382). Hence, an appointment system which is constitutionally entrenched holds a greater likelihood of affording institutional durability, certainty and predictability than one created by ordinary legislation, which can be changed by parliament at the convenience of the government in power.

Since the fever of constitutional reforms started in the 1990s, almost all modern African constitutions have now entrenched two very important core elements of constitutionalism. These are the separation of powers and judicial independence. In many cases, they have gone further to state that courts, in exercising their functions, must act independently, impartially without fear, favour or prejudice and owe their obedience only to the law and the constitution.[6] The critical question here is whether the manner in which judges are

appointed ensures that this will happen. Whether or not this may become a reality, will depend on the nature and scope of the constitutional entrenchment. A number of elements critical for an appointment system that is not vulnerable to abuse or manipulation have been identified and used to assess the constitutions of the five African countries that are the focus of this discussion.[7] These elements are:

- overarching protective principles;
- the appointment process;
- qualifications;
- conditions for removal;
- tenure;
- the role of the JAB; and
- the role of the state president.

Table 1 shows the extent to which the mechanism for appointment of judges has been entrenched in the constitutions of these five countries.

Table 1: Scope of entrenchment of appointment principles

	Benin	**Botswana**	**Cameroon**	**Kenya**	**South Africa**
Overarching principles and values	Articles 125 and 127	None	Article 37(3)	Article 161(2)(a)	Section 164(4) and (6)
Appointment process	Articles 115,116 and 129	Sections 96 and 100	Article 51	Article 166	Sections 174(3) and (4) and 175
Qualifications	Article 115	Sections 96(2) and 100	Article 51	Article 166	Section 174(1) and (2)
Conditions for removal	None	Sections 97(2)-(5) and 101(2)-(5)	None	Article 168	Section 174(8) and 177
Tenure	Article 115	Sections 95(2), 97, 99(3) and 101.	Article 51	Articles 160(2) and 167	Section 176
Role of JABs	Articles 127-128	Sections 96, 97, 101 and 103	Article 37(3)	Articles 166(1), 168, and 171-172	Sections 174(30 and (6), 177 and 178
Role of the President	Articles 115, 133 and 134	Sections 96 and 100	Articles 37 and 51	Articles 166(1) and 168	Section 174(3) and (6), and 177

Some observations may be made about the extent to which these constitutions provide for appointment processes that are ring-fenced from undue interference by external actors, in particular the executive branch. The emphasis here is on 'undue' interference, or what has been termed 'political insularity'(Fiss 1993). A degree of interference is both necessary

and unavoidable, in that judges cannot operate in rarefied isolation from the political system but have to be appointed or elected to their positions, paid salaries and held as accountable as every other member of society. Since absolute insularity is impossible and unnecessary, the challenge is therefore one of designing a system of appointment which ensures judicial appointments are made in a fair, rational manner based on merit and within the bounds of unavoidable judicial dependence on all political and social actors with a stake in good administration of justice.

First, with the exception of Botswana, all the constitutions offer what may be regarded as underlying principles and values applicable to aspects of the appointment process. In South Africa, these are reflected in section 165 (4) which obliges all 'organs of state, through legislative and other measures … [to]assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.' Furthermore, in subsection 6, the Chief Justice is declared the 'head of the judiciary'. As for the Kenyan Constitution, it is heavily laden with principles and values of good governance;[8] the section dealing with the judiciary, article 161(2)(a) – albeit couched in broader language – declares the Chief Justice as the head of the judiciary.

By contrast, the constitutions of both Benin and Cameroon provide for a judiciary that is no longer merely a 'judicial authority' but a 'judicial power' (*pouvoir judiciaire*). As will be demonstrated, the significance this has for judicial independence generally and specifically the right of the president to unduly influence the choice of judges is that it improves the situation to a reasonable extent under the Benin Constitution but leaves it entirely unchanged under the Cameroonian. It suffices at this stage to note that under both constitutions, the president remains the guarantor of the independence of the judiciary,[9] clearly meaning that the two branches are not co-equals: if they were, one of them could not serve to guarantee the independence of the other. The impact of this principle of presidential dominance (qualified in the Benin Constitution and, in the case of the Cameroonian Constitution, not merely unqualified but copied in its crudest form from the 1958 French Constitution) is explored below in further detail.

The second element is the appointment process. All five constitutions address it by specifying who makes appointments and how this is meant to be carried out. The issue

examined below is the extent to which the constitutions limit the scope for governments to manipulate the process and appoint preferred judges on considerations other than merit, integrity and competence.

Thirdly, qualification for office is probably one of the most important factors to consider in judicial appointments. Traditionally, the common law approach has been to appoint judges from legal practice, whilst in the civil law tradition it has been to appoint as judges those who have undergone formal training, graduated from a school of magistracy, and become career judges. The Kenyan and Botswana constitutions specify the requisite academic legal qualifications and practical experience, whereas South Africa's merely refers to 'any appropriately qualified' person 'fit and proper' to be appointed as a judicial officer.[10] In this regard, the hesitation in Anglophone countries to institute formal training for judges may have been influenced by Lord Devlin's view that the executive could misuse it for indoctrination purposes and so threaten the independence of judges (Develin 1979).

Two other developments are notable. First, there is a gradual convergence in approach. Although common law jurisdictions have not established any formal institutions for training judges, some form of institutional training for judges is now provided, especially on their first appointment to the bench. On the other hand, in Francophone Africa, many constitutions or the law regulating the judiciary now make provision for the appointment of judges from academia and from the ranks of legal practitioners.[11] Secondly, Cameroon in 1996 took the regressive step of providing that persons with no legal knowledge or qualification can be appointed to its Constitutional Council so long as they are of 'high moral integrity and proven competence'.[12] Many more Francophone countries have now explicitly reserved appointments to their constitutional courts or councils to jurists.[13]

As for the fourth element – removal from office – it is generally recognised that an arbitrary procedure for disciplining and removing judges undermines the independence of the courts. Whilst judges and other judicial personnel, as with every public officer, should be subject to disciplinary measures, the grounds that have been recognised as legitimate are incapacity or behaviour rendering a person unfit to discharge his or her duties. The three Anglophone constitutions provide detailed procedures and safeguards in this respect, but the issue is glossed over in the two Francophone ones. Indeed, in both of these countries, disciplinary

matters, promotions and transfers are dealt with by the High Judicial Council (HJC), which, as will shortly be shown, can hardly function in an independent and impartial manner.[14]

Insofar as tenure is concerned, generally judges in Anglophone countries have fixed-term appointments, whereas in Francophone Africa they have tenure for life. A close analysis of these constitutions suggests that there is a sort of compromise between the choice of life tenures and fixed-term appointments, with the latter not being too short as to endanger the independence of the judge. For example, in Francophone Africa, life tenure is reserved for ordinary judges, while those on Cameroon's Constitutional Council have a fixed tenure of nine years; in Benin's Constitutional Court, judges have a fixed tenure of five years, renewable once. Under the constitutions of Botswana, Kenya and South Africa, tenures vary. In many cases, judges on their appointment serve until they are 65 or 70 years old, or for 12-15 years, depending on the court. In principle, tenure – subject to the terms of removal from office, shields judges to a good degree from undue pressure.

Turning to the role of JABs, this is at the heart of every judicial appointment process. The overriding objective is to have a body that is independent and not amenable to influence or control by any person or authority. In this regard, the differences between the (Judicial Service Commission)JSC in Anglophone Africa and the HJC in Francophone Africa are stark, as Table 2 shows.

Table 2: Comparative overview of judicial appointment bodies (JABs)

	Benin	**Botswana**	**Cameroon**	**Kenya**	**South Africa**
Operational values and principles	None	(section 103(4))	None	Articles 172(2), 249(1) and (2)	Section 174 (7)
Total composition of JAB	Not specified (article 128)	6 members (section 103(1))	Not specified (article 37)	11 members (article 171(1))	23-25 members (section 178(1))
% of government appointees	Not specified (article 128)	5 out of 6 or 83% (section 103(1))	Not specified (article 37)	3 out of 11 or 27% (article 171(1))	12-14 out of 23-25 or 52-56% (section 178(1))
Nature of decision-making power	None	'advice' (sections 96(1) and 100(2))	'assist' and provide 'opinion' (article 37(3))	'recommend' (article 172(1))	Section 174(7)

On the basis of this table, several observations can be made about the JABs and their ability to perform their functions objectively. First, there are no regulatory values and operational principles specified in the constitution to guide the way the HJCs in Benin and Cameroon operate. By comparison, Botswana's Constitution makes it clear the JSC is 'not subject to the direction or control of any other person or authority'.[15] In Kenya, several provisions stipulate that the JSC should be guided by 'competitiveness and transparent processes' and the 'promotion of gender equality', be subject only to the Constitution, and act independently rather than be 'subject to direction or control by any person or authority'.[16] Similarly, in South Africa, the JSC is required to act without 'favour or prejudice'.[17]

Furthermore, while the Benin and Cameroonian constitutions are silent on the number of members that make up the HJC, the Anglophone countries spell out the exact numbers: six for Botswana, 11 for Kenya, and 23-25 for South Africa. What is significant in the JABs' composition is the extent to which persons are appointed directly or indirectly by the government – and the extent, therefore, to which the latter is in a position to dictate the outcome of JAB proceedings. It is of concern that about 83 per cent of Botswana's JSC members are directly or indirectly appointed by government, as compared to 27 per cent in Kenya and 52-56 per cent in South Africa. In turn, in Francophone Africa, the absence of a constitutional provision spelling out who can sit as members of the HJC means that most of this body's members are government appointees and thus unlikely to ignore the government's preferences. For example, the 7 members of the Cameroonian HJC were appointed by Presidential Decree No. 2014/594 of 24 December 2014. Like in most Francophone countries, although 6 of the 7 members were supposed to be based on nominations made by the National Assembly and the Supreme Court, in practice, the President of the Republic, because of the overriding control and influence he has over these institutions, effectively decides who sits on the HJC. In most Francophone countries, membership of the HJC is reserved almost exclusively to jurists and judges thereby excluding all other important stakeholders such as civil society in the decision of who is appointed as judge.[18]

There are, however, more serious concerns yet regarding the HJC. Unlike the JSC, the proceedings of which are usually presided over by the Chief Justice with the assistance of a deputy or another senior judge,[19] in Francophone Africa the HJC is presided over by the president of the republic with the assistance of the minister of justice. In addition to this, he also convenes the meetings of the HJC and prepares its agenda. [20] The composition of the JABs aside, the weight given to their decisions in the appointment process is important in assessing how fair, balanced and objective the system is. As such, this is an area of major concern about the HJC's role in appointments.

Regarding the JSC, the constitutions stipulate that, after interviewing applicants, it has to make recommendations or provide advice to the president, who is the ultimate appointing authority. In a number of decisions, the courts have made it clear that once the JSC gives

its advice or recommendation, the president has no discretion in the matter and is bound to act accordingly.[21] By contrast, in most Francophone jurisdictions, the HJC is required merely to 'assist' the President by giving him an 'opinion.'[22] There are two problems with this. First, it means the views of the HJC are not binding on the President. The second is that it entails a farcical situation in which the President chairs the HJC, which is supposed to submit an 'opinion' to him not only on whom to appoint as judge but in many cases also, whom to dismiss, transfer and promote.

Anglophone constitutions have anomalies, too. In Botswana and South Africa, ordinary judges are appointed only on the recommendation of the JSC. However, the heads of the judiciary and most senior courts – on the one hand, in Botswana, the Chief Justice of the High Court and the President of the Court of Appeal,[23] and on the other, in South Africa, the Chief Justice and Deputy Chief Justice of the Constitutional Court, as well as the President and Deputy President of the Supreme Court of Appeal – are appointed at the sole discretion of the President.[24] The only qualification is that, in South Africa, the President is required to undertake some consultations; the final decision, though, is his.

III Critical appraisal of the HJC and JSC

In assessing Africa's dominant appointment systems, the one based on the JSC and the other on the HJC, the question is whether they operate in a manner that fulfils the values of judicial independence, impartiality, transparency, representativeness and efficiency. In other words, do their methods ensure the selection of competent, well-qualified persons who will not easily succumb to pressure from external actors, especially the government?[25]

A Appointment systems and judicial independence

Judicial independence is an ideal, but in practical reality this does not refer to a quality a judiciary 'has' or 'does not have' – the consideration, rather, is whether it has 'more of it' or 'less of it' (Law and Policy Reform at the Asian Development Bank 2004). As such, an independent judiciary may be defined as one in which judges are able to render justice on all issues of substantial legal and constitutional importance fairly, impartially, in accordance with the law, and without threat, fear of reprisal, intimidation or any other

undue influence or consideration (Fombad 2007). The question then is whether, in design and operation, these appointment systems enable this condition.

Given that it is neither possible nor desirable for there to be such a thing as an absolutely independent judiciary, it follows that judges cannot operate in isolation from the political system: moreover, congruent with the checks and balances inherent in the separation of powers, judges must be appointed or elected by other political actors. Therefore, the ideal is an appointment system that, within the bounds of unavoidable dependence on other political actors, provides the best prospects of selecting judges who can render justice in the terms described above.

From this perspective, it is clear that an appointment system that is under the exclusive control of the executive and where the detail laws that regulate judicial appointments are left to be determined at the whims of a parliamentary majority, such as that in Francophone Africa, offers poor prospects for an effectively independent judiciary. In fact, it is difficult to see how the judiciary in these countries can operate with any reasonable degree of independence given the enormous powers conferred by the constitutions on the president of the republic in the appointment, dismissal, promotion and transfer of judges.

By contrast, whilst the JSC provides better prospects for judicial independence, this depends on its composition. Where the majority of its members are appointed directly or indirectly by the executive, as in Botswana, this considerably increases the likelihood of appointing executive-minded judges. Appointment systems in Anglophone countries are very similar when it comes to the appointment of the heads of the judiciary, such as in Botswana and South Africa. For reasons never fully explained, the president acts at his sole discretion, with at most only a duty to consult yet without being bound to follow any advice he receives. Nevertheless, other factors, such as the transparency of the process, to which we now turn, can mitigate the impact this has on judicial independence.

B Appointment systems and transparency of the process

The HJC and JSC differ markedly in the transparency of their appointment processes. As noted, in most Francophone countries the HJC is convened by the president, who also often sets its agenda. The entire process is opaque.[26] By contrast, in Anglophone Africa most

judicial positions are publicly advertised; their criteria are spelt out, applicants are interviewed in public, and an evidence-based approach to selection is adopted. Even where the majority of the JSC are executive appointees, the public appointment process introduces competition, openness and fairness. In South Africa, these interviews are not limited to judges whose appointments depends on the JSC's recommendations but extend to those heads of superior courts appointed at the sole discretion of the president.

Public interviews are important in moderating the effect of a JSC dominated by executive appointees. By contrast, the public hardly ever knows what transpires during the meetings of the HJC and it has sometimes been speculated that they do no more than rubber stamp decisions that have been made by the president.

C Appointment systems and the quality of judges

In Anglophone African constitutions, explicit selection criteria, such as minimum academic qualifications and a minimum number of years of experience as a legal practitioner or academic, serve as objective ways of mitigating against appointments determined solely by partisan considerations. These are usually complemented by other requirements, such as competence, integrity and financial probity.[27] The extent to which each is emphasised may depend on a country's particular needs. For South Africa, the selection criteria in section 174 of the Constitution are vague but apparently emphasise transformation. It has been supplemented with criteria prepared and used by the JSC (Oxtoby 2017, 152-175, 155-156).

By contrast, Francophone African countries rely on career judiciaries made up of persons trained at the national schools of magistracy and administration. As conceived by the French, these were prestigious elite schools designed to admit and train the best. Since the late 1980s, admission in most of these schools of magistracy and administration in Francophone Africa is no longer dependent on intellectual aptitude but rather political connections or failing that, the payment of huge bribes. An exception to this involves appointments to the constitutional court or council. Since this jurisdiction operates outside the normal judicial system, the constitutions, influenced by the original Gaullist French 1958 Constitution, usually specify the criteria for the appointment of its members. Cameroon in its 1996 Constitution retained the original vague French formulation which,

as mentioned, allows even non-jurists to sit as judges provided they are of 'high moral integrity and proven competence'.[28] Benin, in its more modernised version of the Gaullist constitution, sets elaborate minimum criteria for qualification for appointment to the Constitutional Court. In spite of this, there is a possibility that two of the seven members required to be appointed from 'persons of great professional reputation', may not necessarily be jurists.

Perhaps the main innovation in Benin is the requirement that appointees be persons of proven competence and experience. This limits the discretion of the President, who has ultimate powers of appointment, and is in contrast with the appointment of ordinary judges, a process usually subject to unpredictable ordinary legislation that can be changed at any time to suit the President's convenience.

D Appointment systems and representativity

A key factor in building public confidence in the judiciary is the extent to which those on the bench reflect the composition of society in terms of race, gender, religion, ethnicity and the like. Whilst the constitutions of the two Francophone countries, particularly that of Cameroon, gloss over issues of inclusivity with fairly disastrous consequences, those of Kenya and South Africa have mechanisms for promoting judicial representativity.

Inclusiveness is one of the national values and governance principles underscored in the Kenyan Constitution and meant to be reflected in every aspect of public life.[29] Under the equality provision, the state is obliged to take legislative and other measures to apply the principle that not more than two-thirds of the members of elective or appointive bodies should be of the same gender.[30] This principle is thus also supposed to be reflected in the composition of the judiciary. However, in *Federation of Women Lawyers of Kenya (FIDA-K) & 5 Others v Attorney-General & Another*,[31] the 'not more than two-thirds of either gender rule' in article 27(8) of the Constitution was invoked with respect to the composition of the Supreme Court but rejected. The High Court declared that '[a]rticle 27 imposes no duty on the part of the government other than the requirement to progressively take legislative and other measures to implement the said principles'.[32] Importing the idea of "progressive implementation" is certainly a pragmatic approach to dealing with a difficult situation but the failure to compel the government to actually take concrete steps

to implement the provision runs the risk of rendering this very important provision impotent.

The gender equality provision aside, the JSC is also guided by constitutional principles requiring competitiveness and transparency in the appointment process.[33] The Kenyan Judicial Service Act 2011 requires too that the JSC take into account not only gender but regional, ethnic and other diversities of the Kenyan people. In assessing the situation in Kenya, Yash Ghai *et al.* conclude that the Kenyan JSC has made 'major progress on gender representation' and that the judiciary is 'reasonably gender-balanced' as well as ethnically-balanced (Ghai et al 2017, 110).

In South Africa, meeting the constitutional injunction in section 174(2) for a judicial bench that 'reflect[s] broadly the [country's] racial and gender composition' has been more challenging. Since the establishment of the JSC, one of the major criticisms of it is its perceived bias against the appointment of white male judges, who previously dominated the bench. The issue of its alleged refusal to appoint highly experienced and regarded white male candidates came before the courts. In *Judicial Service Commission and Another v Cape Bar Council and Another*,[34] the Supreme Court of Appeal established the principle that, when properly called upon to do so, the JSC may be required to give reasons for a decision not to recommend a candidate for appointment. Chris Oxby, in a study of the JSC implementation of the transformation criteria, argues that while 'the narrative that the doors to the judiciary have been closed to white men is unhelpful and factually inaccurate', it remains true that, when appointing whites, preference is given to liberal-minded rather than independent-minded ones (Oxtoby 2017, 44). He adds that the lack of clear criteria to inform the JSC's recommendations on judicial appointments contributes to perceptions that the process is unfair and without integrity ((Oxtoby 2017, 44).

In an era of heightened sensitivity to representativity, it is surprising that so many Francophone constitutions are silent about it. This is particularly evident in Cameroon, where, because of its dual Anglo-French colonial past, two divergent legal cultures are supposed to co-exist (Fombad 1997).

IV Current challenges in the appointment systems

In considering the challenges that have emerged despite attempts to improve the methods of judicial appointment in Africa, it must be noted that no appointment system, even in advanced democracies, offers a perfect and irreproachable model. What matters most is whether the system adopted provides the opportunity for appointing persons in an objective and transparent manner based on their competence, integrity and experience. From this perspective, a number of challenges continue to undermine the prospects of insulating appointment processes in Africa from executive capture and the consequences that flow from this.

The first problem is one of fundamental design flaws. In most instances in Francophone Africa, the inherited colonial legal models have been treated as eternal biblical verities from which there can be no departure. Transforming the judiciary from a 'judicial authority' into a 'judicial power' has proven to be no more than an exercise in semantics. Many conservative Francophone countries such as Cameroon have adhered blindly to the spirit of the 1958 French Constitution and made little other than half-hearted symbolic changes. While Benin represents a more progressive approach to the HJC model, the main weakness of the model remains the overbearing role of the president of the republic in the appointment process. As pointed out earlier, and this point bears reiteration, the constitutions and laws in these countries not only declare the president the guarantor of judicial independence but also confer on his the powers to determine who sits as member of the HJC, decide when and where it meets, draw up its agenda and appoint those who serve in the secretariat of the commission.

In turn, in Anglophone Africa, Botswana, which is one of the only two countries that still operate under their independence constitutions (the other being Mauritius), has retained the system it adopted at independence. Despite the JSC's conservative nature, its role – unlike that of the HJC – is significant in the appointment process, with the president of the republic not having an entirely free hand. As for Kenya and South Africa, they have adopted more modern, progressive approaches that to some extent share the powers of appointment between the JSC and the president. Perhaps the most important difference between the HJC and JSC is that whilst the president, by decree or through legislation, determines who sits

in the HJC, the constitutions in Anglophone African countries usually specify the composition of the JSC. In doing so, they ensure that different stakeholders are represented and have a voice in deciding who is appointed as judge.

African judiciaries were at their most vulnerable before the 1990s, an era when they came under the control of authoritarian regimes. Unfortunately, political control of judicial appointment processes by presidents whose authoritarian inclinations are becoming ever more apparent is still a feature of Francophone Africa today. The situation is different in Anglophone Africa, where the JSC or parliament, or even sometimes the court, has intervened to reject presidential judicial nominations or appointments – a turn of events that almost never happens in Francophone Africa.[35] In fact, apart from the Benin Constitutional Court – which, like the South African Constitutional Court, has been among the most active in Africa in terms of cases disposed of – the judiciary in Francophone Africa has remained as docile as it was before the 1990s. Other examples of judges displaying excessive deference to the executive occur in countries employing expatriate or contract judges – the latter tend to favour the government so as to have their contracts renewed (Vijver 2006, 30,46 and 197).

The strengthening of appointment systems to limit the ability of the executive to pack the bench with executive-minded judges has worked reasonably well in most Anglophone countries, particularly in post-apartheid South Africa and in Kenya under the 1996 and 2010 Constitutions respectively. However, with many divisive and politically sensitive cases having come before the courts, and in view of the latter's growing assertiveness of their independence, the judiciary increasingly finds itself on a collision course with the executive branch. For example, in September 2017, when the Kenyan Supreme Court, in an unexpected and unprecedented decision, declared the 2017 presidential elections null and void, it came immediately under attack from the executive. An angry President Kenyatta declared the decision by the majority of four on the court 'a coup in Kenya carried out by four people in the court'. Referring to the judges as 'crooks' he added, 'Who even elected you? … We have a problem and we must fix it.' His deputy, William Ruto, described the Supreme Court's ruling as 'tyranny of the judiciary which... has no place in Kenya'.[36]

South Africa, with a longer post-1990 history of an independently minded bench, also illustrates the tensions that arise when the executive does not get its way. Unsurprisingly, almost all the attacks on the country's judiciary came during the Zuma presidency (2009-2018), a time when executive abuse of powers, corruption and state capture of institutions reached unprecedented levels. After various constitutional cases went against the government and prominent politicians, the government decided to review the jurisdiction of the two highest courts, the Supreme Court of Appeal and the Constitutional Court. Many critics, however, saw this as an attempt to intimidate the courts (De Vos 2012).

For instance, in the *Justice Alliance of South Africa* case,[37] the Constitutional Court stopped the President from illegally extending the term of his preferred judge to lead the judiciary as Chief Justice from 15 to 20 years. Mistrust of the judiciary runs deep in the ruling African National Congress (ANC) hierarchy, with many a senior figure describing the judiciary as 'counter-revolutionary'.[38] The South African Chief Justice, Mogoeng, who was unexpectedly appointed by President Zuma in disregard of the views expressed to him during the consultation process,[39] astonished his critics – and no doubt appalled those in the ANC who backed his appointment – when he turned out to be one of the boldest, most independently minded Chief Justices the country has had since the end of apartheid. By the end of the Zuma presidency, it had become clear that the attempts to undermine the judiciary had instead emboldened the judges, and, led by the Chief Justice, enabled the judicial branch to stand its ground. Nevertheless, efforts to capture the judiciary – not only in South Africa but in most countries where it asserts itself – remain a potent threat.

Apart from attacks on the judiciary, there has also been more direct action to reverse changes designed to ensure that judicial appointments are based on competence, not extraneous political considerations. For example, in Zimbabwe in 2017, the 2013 Constitution was amended to give the President sole responsibility to appoint the Chief Justice, his deputy and the Judge President of the High Court, with an obligation only to inform the senate if he does not act in accordance with the recommendations of the JSC.[40] As noted earlier, it is an anomaly to allow a president to act alone when appointing the heads of courts but act only on the recommendations of the JSC when appointing all other judges. Democratic accountability, legitimacy and the checks and balances fundamental to

a democratic polity demand that politicians and other actors play an important role in appointing judges. The judicial branch will remain vulnerable to manipulation so long as executive politicians are allowed to play a decisive role in appointing judges. The risk and stakes are particularly high where those appointed are the heads of the superior courts, given that they double as the heads of the judiciary or judges of the constitutional courts that deal with pressing constitutional controversies.

Whilst the progressive appointment systems in Kenya and South Africa have been able to bring judicial corruption under some control, it is with respect to the former that the changes have been dramatic. Although African judges, like those elsewhere, are well paid and earn salaries and benefits placing them far above the average civil servant, the judiciary is seen as the most corrupt institution in Africa (Mugwe 2011). Corruption in the Kenyan judiciary is well documented. A 2003 report described it as 'pathologically sycophantic', 'grossly incompetent' and 'shamelessly corrupt' (Vijver 2006). The saying is, 'Why hire a lawyer when you can buy the judge?' Although corruption has decreased substantially since the advent of a new judicial dispensation under the 2010 Constitution, it remains a serious issue. Although judicial corruption remains a huge problem in African countries generally, it is probably worse in Francophone Africa, where the level of judicial accountability is virtually nil.

Finally, whilst some constitutions, such as Kenya and South Africa's, have gone to great lengths to enhance the diversity and representativity, especially of women, on the bench, decisions in Kenya show how intractable the problem is. The demographics of the bench in most African countries little reflect the reality that women comprise more than half the population. More needs to be done to appoint competent women to the bench to enable it to provide the diverse perspectives it is supposed to afford in a modern democracy (Bauer &Dawuni 2015; Dawuni & Keuenyehia 2018).[41]

V Conclusion

Judicial appointment is a complex matter in which attempts are usually made to reconcile disparate factors such as professional qualifications and experience, technical expertise, judicial independence, judicial accountability, checks and balances and inclusiveness. It is

also the case that Africa's history has left it with essentially two choices, the common law and civil law legal traditions and their accompanying appointment bodies, the HCJ and JSC. Whilst there is no perfect judicial appointments body, a few conclusions can be drawn from the comparative analysis.

First, it is clear that political involvement – and, sometimes, interference – is a common and inevitable feature of all appointment systems. This is true not only in countries whose constitutions entrench progressive appointment systems, such as Benin, Kenya and South Africa, but also in those with conservative approaches, such as Botswana and Cameroon. The difference is the extent to which that political interference impacts on the quality of judicial appointees.

In this regard, looking at the two main appointment models, the HCJ exhibits a number of structural flaws that make judicial appointments in Francophone Africa heavily politicised. The reforms in the 1990 Benin Constitution have, albeit in a modest manner, and specifically only with regard to constitutional disputes, limited the near-absolute discretion that the president has in appointing the judges to this apex constitutional jurisdiction. The JSC model has been substantially modified under the Kenyan and South African Constitutions, and so far provides the best prospects for limiting political interference in the appointment judges.

Bearing in mind the need to reduce the dominant presence and influence of any of the three branches in the composition of either the HCJ or JSC, it is suggested that if the presence of persons directly or indirectly appointed by the executive and legislative is kept to just under 50 per cent of its membership, this considerably enhances the ability of these bodies to act independently and appoint competent judicial officers that will not be vulnerable to political manipulation.

Secondly, one way of assessing the success of the model of the JAB is its ability to ensure that the judges appointed have the outlook, skills and aptitude to dispense justice without fear, favour or prejudice. From this perspective, the decisions of the Benin Constitutional Court and the South African courts in general in the last three decades have been of outstanding quality. Since 2010, the changes in the appointment system in Kenya have also led to high-calibre independent-minded judges – the 2017 presidential election decision is

an accurate reflection of this progress. By contrast, the quality of judicial appointments in Botswana, particularly during the ten-year tenure of its highly autocratic former president, Ian Khama, dropped considerably.[42] In Cameroon, where judges serve at the pleasure of the virtual 'president for life', Paul Biya, who has been in power for more than 36 years, loyalty has been the main factor in judicial appointments.

Thirdly, the pressure to reverse some of the progress made with appointment systems is strong. Executives are relentless in seeking, in the case of the JSC, to recover, or in the case of the HCJ, to retain, their dominance in appointing judges. This is true not only in Kenya and South Africa but so too in Botswana and Cameroon. What is clear is that, of the appointment systems, the HCJ is more open to abuse than the JSC. Ultimately, no system is immutable: changes are inevitable.

Judicial representativity, especially of women and other minorities on the bench, remains an important issue, one even progressive systems, such as the Kenyan and South African JSCs, are still grappling with. A system of judicial appointments that is seen to allow independent-minded and competent people to be appointed is necessary to restore the trust in the courts that was lost in the pre-1990 era. An Afrobarometer survey covering 36 countries and measuring the confidence of ordinary Africans in the integrity of their judicial systems showed that just over half (53%) of citizens trust the courts 'somewhat' or 'a lot'. The significance of this is that it puts courts roughly in the middle compared with other key institutions (Logan 2017). This, as compared to a 2014 survey that showed that less than half of Africans have confidence in their judicial system, suggests some progress (Loschky 2014).

In the increasingly volatile environment prevailing today as the struggle to sustain Africa's fledging democratic transition intensifies, the choice of who sits on the bench to adjudicate these political battles will intensify. A combination of judicial assertiveness and civil society vigilance is needed to repel the continuous attempts by the executive to assume more power than it needs in making judicial appointments.

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BIBLIOGRAPHY

Books

Bauer G, and Dawuni J, (eds.), *Gender and the Judiciary in Africa: From Obscurity to Parity?* (Routledge 2015)

Dawuni J J and Kuenyehia A, (eds.), *International Courts and the African Woman Judge. Unveiled Narratives,* (Routledge 2018).

Devlin B P, *The Judges* (Oxford University Press 1979).

Lee G & Rackley E (eds.), *Debating Judicial Appointments in an Age of Diversity* (Routledge 2016).

Malleson K & Russell P H (eds.), *Appointment of Judges in an Age of Judicial Power: Critical Perspectives from Around the World*, (University of Toronto Press 2006).

Tate N C, and Vallinder T (eds), *The Global Expansion of Judicial Power* (New York University Press 1995).

Van De Vijver L, (ed), *The Judicial Institution in Southern Africa* (Siber Ink 2006).

Journal Articles

Abuya EO, 'Can African States Conduct Free and Fair Presidential Elections?' (2010) 8(2) *Northwestern Journal of International and Human Rights* (2010) 122.

Fiss O, 'The Limits of Judicial Independence' (1993) 25 *University of Miami Inter-American Law Review* 59.

Fombad C M, 'A Preliminary Assessment of the Prospects for Judicial Independence in Post-1990 Africa Constitutions' (2007) 2 *Public Law* 233.

Fombad C M, 'Appointment of Constitutional Adjudicators in Africa: Some Perspectives on How Different Systems Yield Similar Outcomes' (2014) 46 (2) *Journal of Legal Pluralism and Unofficial Law* 252.

Fombad CM, 'An Experiment in Legal Pluralism: The Cameroonian Bi-Jural/Uni-Jural Imbroglio' (1997) 16 *University of Tasmania Law Review* 209.

Fombad CM, 'Some Perspectives on Durability and Change under Modern African Constitutions' (2013) 11(2) *International Journal of Constitutional Law* 382.

Merryman J, 'The French Deviation' (1996) 44 *American Journal of Comparative Law* 109.

Tallon D, 'The Constitution and the Courts in France' (1979) 27 *American Journal of Comparative Law* 567.

Chapters in Books

Ghai Y, Cottrell-Ghai J, du Toit L and Miyawa M, 'Constitutional Reforms and Judicial Appointments in Kenya' in Corder H and Van Zyl-Smit J (eds), *Securing Judicial Independence: The Role of Commissions in Selecting Judges in the Commonwealth* (Siber Ink 2017).

Oxtoby C, 'Managing a Fraught Transition: The Practice of the South African JSC' in Corder H and Van Zyl-Smit J (eds), *Securing Judicial Independence: The Role of Commissions in Selecting Judges in the Commonwealth* (Siber Ink 2017).

Quashigah K, 'Defying Assumptions about the Nature of Power Relations between the Executive and Judiciary: An Overview of Approaches to Judicial and Executive Relations in Ghana' in Fombad C M (edit), *Separation of Powers in African Constitutionalism* (Oxford University Press 2016).

Stevens R, 'Judicial Independence in England: A Loss of Innocence' in Russell P and O'Brien D (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University of Virginia 2001).

Van Zyl-Smit J, 'All Change? Judicial Appointments in England and Wales Since the Constitutional Reform Act 2005' in Corder H and Van Zyl-Smit J (eds), *Securing Judicial Independence: The Role of Commissions in Selecting Judges in the Commonwealth*, (Siber Ink 2017).

Reports

Logan C, 'Ambitious SDG Goal Confronts Challenging Realities: Access to Justice is Still Elusive for Many Africans' *Afrobarometer* Policy Paper No. 39 (March 2017).

Internet Sources

— 'Botswana: How a "President" Captured the Judiciary' *LegalBrief* (Cape Town, 16 June 2017) <https://allafrica.com/stories/201706160515.html> accessed 10 October 2018.

— 'Kenya President Slams Annulled Poll as Judicial "Coup"' *News24* (Nairobi, 21 September 2017) <www.news24.com/Africa/News/kenya-president-slams-annulled-poll-as-judicial-coup-20170921> accessed 10 October 2018.

De Vos P, 'Another Brilliant Idea by our Political Youngsters' https://constitutionallyspeaking.co.za/another-brilliant-idea-by-our-political-youngsters/ (accessed in October 2018).

Loschky J, 'Less Than Half in Africa Confident in Their Judicial Systems' *Gallup* (World, 06 August 2014) <https://news.gallup.com/poll/174509/less-half-africa-confident-judicial-systems.aspx> accessed 10 October 2018.

Logan C, 'Ambitious SDG Goal Confronts Challenging Realities: Access to Justice is Still Elusive for Many Africans' *Afrobarometer* Policy Paper No. 39 (March 2017) <http://afrobarometer.org/sites/default/files/publications/Policy%20papers/ab_r6_policypaperno39_access_to_justice_in_africa_eng.pdf> accessed 10 October 2018.

Mugwe D, 'Africa: Courts Amongst the Most Corrupt Institutions in Eastern Africa' *Business Daily* (Nairobi, 26 October 2011) <http://allafrica.com/stories/201110270106.html> accessed 10 October 2018.

Reuters 'Kenya's Deputy Chief Justice Arrested, Suspected of Corruption' Times Live (Nairobi, 29 August 2018) <www.timeslive.co.za/news/africa/2018-08-29-kenyas-deputy-chief-justice-arrested-for-suspected-corruption/> accessed 10 October 2018.

Van Zyl Smit J, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice*, available at, https://thecommonwealth.org/sites/default/files/press-release/documents/Compendium%20on%20Judicial%20Appt%20Tenure%20and%20Removal%20in%20the%20Commonwealth.pdf accessed 20 December 2019.

Legislation

Benin

Constitution of Benin, 1990.

Article 115: 9; 10, 11

Article 127: 9

Article 128: 11

General: 6, 9, 12, 14, 26

Botswana

Constitution of Botswana, 1966.

Section 96: 14

Section 100: 14

Section 103: 13

General: 6, 9, 10, 11, 12, 14, 26

Cameroon

Constitution of the Republic of Cameroon, 1996.

Article 37(3): 9

Congo (DRC)

France

Kenya

Senegal

South Africa

Constitution of the Republic of South Africa, 1996.

Section 165: 9

Section 174: 9, 13, 14, 17

General: 6, 11, 14, 26

South African Police Service Act 68 of 1995

Zimbabwe

Constitution of the Republic of Zimbabwe, 2013.

General: 24

Newspaper Articles

Ramathlodi N 'The Big Read: ANC's Fatal Concessions' *Sunday Times* 01 September 2011.

Table of Cases

Botswana

Law Society of Botswana & Another v President of the Republic of Botswana & others, 031-16 <http://legalbrief.co.za/media/filestore/2017/06/Law_Society_of_Botswana_v_President_Appeal_Court_1.pdf> accessed 10 October 2018.

Ghana

The State v Otchere & Others [1963] 2 GLR 463, SC.

Kenya

Federation of Women Lawyers of Kenya (FIDA-K) & 5 others v Attorney-General & Another High Court Petition No. 102 of 2011 [2011] eKLR.

In re the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Supreme Court Reference No. 2 of 2012 [2012] eKLR.

South Africa

Judicial Service Commission and Another v Cape Bar Council and Another 2013(1) SA 170 (SCA).

Justice Alliance of South Africa v President of the Republic and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (29 July 2011).

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[1] The discussion includes occasional references to the Burundi and DR Congo, which are not strictly speaking Francophone countries, having been previously colonised by Belgium.
[2] Occasional references will be made to some Hispanophone and Lusophone African countries, although it must be pointed out that, whilst, like Francophone countries, they share the civil law tradition, there are often some significant differences in approach.
[3] The inclusion of two Anglophone countries is deliberate. Some may argue that South Africa has a mixed or hybrid legal system (comprising Roman-Dutch and English common law); if that is so, including the experience of such a jurisdiction enriches the otherwise familiar picture of a continent divided between common and civil law.
[4] For instance, in *The State v Otchere & Others* [1963] 2 GLR 463, SC discussed by Quashigah (2016).
[5] See D Tallon, 'The Constitution and the Courts in France' (1979) 27 *American Journal of Comparative Law* 567; and J Merryman, 'The French Deviation' (1996) 44 *American Journal of Comparative Law* 109.

[6] For example, article 37 (2) of the Cameroon Constitution; Article 160 (1) of the Kenyan Constitution; and section 165(2) and (3) of the South African Constitution.
[7] Unless otherwise indicated, the discussion is based on the updated versions of the Constitution of Benin, 1990; Constitution of Botswana, 1966; Constitution of the Republic of Cameroon 1996; Constitution of Kenya; 2010 and Constitution of South Africa, 1996.
[8] The entirety of chapter 6, articles 73-80, is devoted to leadership and integrity.
[9] See article 127 of the Benin Constitution and article 37(3) of the Cameroonian Constitution.
[10] See section 174(1) of the South African Constitution.
[11] For Benin, this is provided for in article 115 of the Constitution. For other countries, this is provided for in ordinary legislation. See for example, article 11(2)(b) of Decree No. 95/048 of March 1995 determining the status of judges in Cameroon; article 34 of Law No 2011-24 of 25 October 2011 determining the composition and functioning of the High Judicial Council of Burundi and article 4 of Organic Law No 06/020 of 10 October determining the status of Judges in the DR Congo.
[12] See article 51 of the Cameroonian Constitution. The 11 members of this body were appointed by presidential decree of 7 February 2018, 22 years after this institution was created and include at least 3 non-jurists.
[13] Besides Cameroon, other notable exceptions to this trend in Francophone Africa include the Constitution of the DR Congo, 2006 and the Constitution of the Republic of Senegal,2001.
[14] See article 128 of the Benin Constitution and article 37 of the Cameroonian Constitution. However, article 115 of the Benin Constitution provides a special procedure for removing judges of the Constitutional Court.
[15] See section 103(4) of the Constitution.
[16] See articles 172(2) and 249(1) and (2) of the Constitution.

[17] See section 174(7) of the Constitution.
[18] See, for example, article 152(2) of the 2006 Constitution of DR Congo; article 2 of Law No. 2011-24 of 25 October 2011 determining the composition and functioning of the Higher Judicial Council of Niger; and articles 1-3 of the Organic Law No. 2017-11 of 17 January 2017 determining the organisation and functioning of the Higher Judicial Council of Senegal,
[19] See, for example, section 103(1) of the Botswana Constitution and article 171(2) of the Kenyan Constitution.
[20] See for example, articles 1, 2 and 38 of Law No. 82-014 of 26 November 1982 determining the organisation and functioning of the JSC of Cameroon; article 15 of Law No. 1607 of 30 June 2003 determining the organisation and functioning of the HJC of Burundi; articles 2 and 7 of Law No. 2011-24 of 25 October 2011 determining the composition and functioning of the Higher Judicial Council of Niger; and article 1 of the Organic Law No. 2017-11 of 17 January 2017 determining the organisation and functioning of the HJC of Senegal. There are however, some civilian jurisdictions where the President of the Republic is not a member of the HJC. See for example, 4 of the Organic Law No 08/013 of 5 August 2008 determining the organisation and functioning of the HJC in the DR Congo.
[21] See, for example, *Law Society of Botswana & Another v President of the Republic of Botswana & others*, CACGB-031-16 <http://legalbrief.co.za/media/filestore/2017/06/Law_Society_of_Botswana_v_President_Appeal_Court_1.pdf> accessed 10 October 2018.
[22] See, articles127 and 129 of the Benin Constitution and article 37(3) of the Cameroon Constitution.
[23] Sections 96(1) and 100(1) of the Botswana Constitution.
[24] Section 174(3) of the South African Constitution.
[25] Lee & Rackley (2016) and Malleson & Russell (2006), discuss the various challenges that have arisen in the appointment of judges in the light of the heightened prominence given to judicial independence in the last 25 years.
[26] Various laws specifically make it clear that its meetings are held behind closed doors. See for example, article 38 of Law No. 82-014 of 26 November 1982 determining the organisation and functioning of the HJC of Cameroon; article 20 of Law No. 1607 of 30 June 2003 determining the organisation and functioning of the HJC of Burundi; and article 9 of Law No. 2011-24 of 25 October 2011 determining the composition and functioning of the HJC of Niger.
[27] See, for example, article 166(2)(c) of the Kenyan Constitution and section 174(1) of the South African Constitution.
[28] See article 51(1) of the Constitution.
[29] See article 10 of the Kenyan Constitution which is fully discussed by Ghai et al (2017, 85-113).
[30] See article 27(a) of the Kenyan Constitution.
[31] High Court Petition No. 102 of 2011[2011] eKLR.
[32] Ibid. See also *In re the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Supreme Court Reference No. 2 of 2012 [2012] eKLR where a similar position was taken with respect to gender representation in the National Assembly.
[33] See articles 172(2)(a) and (b).
[34] 2013(1) SA 170 (SCA).
[35] Examples of this abound. For instance, there was no surprise when, after the controversial Ivorian presidential elections of 2010, the Constitutional Council decided to ignore results from the election commission showing that Ouattara had won and instead declared the incumbent, Laurent Gbagbo, the winner.
[36] See 'Kenya President Slams Annulled Poll as Judicial "Coup"' *News24* (Nairobi, 21 September 2017) <www.news24.com/Africa/News/kenya-president-slams-annulled-poll-as-judicial-coup-20170921> accessed 10 October 2018.
[37] Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (29 July 2011)..
[38] For example, Mr Ramatlhodi (2011), a member of the ANC's National Executive Committee (NEC), argued that when it left office, the apartheid regime sought to retain white domination over the black government by transferring substantial power away from the legislature and executive and vesting it in the judiciary, Chapter 9 institutions (established in the Constitution), and civil society movements.

[39] Zuma ignored the tradition of promoting the Deputy Chief Justice to that position, as he wanted to avoid having the incumbent, Dikgang Moseneke, become Chief Justice.
[40] The original section 180 of the Zimbabwean Constitution provided that the President could appoint only those who had been recommended to him by the JSC.
[41] See generally, Gretchen Bauer and Josephine Dawuni (eds.), *Gender and the Judiciary in Africa: From Obscurity to Parity?* (Routledge 2015); and Josephine Jarpa Dawuni and Akua Kuenyehia (eds.), *International Courts and the African Woman Judge. Unveiled Narratives,* (Routledge 2018).
[42] See 'Botswana: How a "President" Captured the Judiciary' *LegalBrief* (Cape Town, 16 June 2017)<https://allafrica.com/stories/201706160515.html> accessed 10 October 2018.