

**A critique of the superior courts judicial selection mechanisms in Africa: The  
case of Mozambique, South Africa and Zimbabwe.**

by

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Annexure G

## University of Pretoria

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## DEDICATION

I dedicate this masterpiece to my family which was always a pillar of support and inspiration. Thank you mum for always believing. A special thank you to two amazing ladies, Fadzi and Sithembile for the friendship and for being there always. To Tyrese, Gift jnr, Takudzwa, Primrose, Tinodaishe, Tanatswa, you guys are the best and this work must further inspire you to greater heights.

## ABSTRACT

The effectiveness of legal institutions is of paramount importance in consolidating democratic ethos especially in Africa's emerging democracies. In order to promote democratic governance, it is critical that the judiciary be constituted in a manner which facilitates the personal and decisional independence of the judges. This thesis examines the superior court judicial selection mechanisms in Mozambique, South Africa and Zimbabwe. As a critical element of an independent judiciary, the comparative examination of judicial selection processes in all three countries enables useful lessons on how each country can further enhance the prospects for politically independent and efficient judiciaries.

The thesis begins by analyzing the judicial independence concept focusing on its theoretical foundations, how it is measured and the analysis of its different elements. To put the judicial selection mechanisms into perspective, an analysis of the leading judicial selection systems which have influenced countries across the civil and common law divide is undertaken. An important observation emanating from these discussions relates to the indeterminate nature of the judicial independence concept. It is hardly surprising therefore that countries utilize a variety of judicial selection mechanisms which basically reflect the different conceptions of judicial independence. In order to put the study into context, the thesis makes a comparative assessment of the politico-economic and legal contexts in all three countries. Significantly, critical points of convergence and divergence emerge in this assessment, the most obvious being the dominance of former liberation movements in the political landscape in all three countries. The thesis argues for clear constitutional and legislative frameworks governing superior court judicial appointments as well as the constitutional entrenchment of Judicial Appointment Commissions in all three countries. Important observations are made in respect of critical JAC aspects such as the JAC status, composition and appointment of members, and the procedures utilized in judicial selection. These observations are underpinned by feedback from stakeholders in the justice delivery system in each polity. The thesis identifies the criteria for judicial selection as a significant source of the controversy that bedevils superior court judicial appointments. The study critiques this aspect which is put into perspective in the Supreme Court judicial appointments case studies. The thesis observes that all three systems of judicial selection are grappling, albeit in different degrees, with balancing judicial independence and accountability in the selection of superior court judges. While the study concedes that politicians are unavoidable in the judicial selection process, it however argues for a clear boundary of political influence in the process. The study further proposes practical recommendations which address the identified gaps/weaknesses in each polity. These suggestions are informed by experiences in

all three comparators, as well as lessons learnt from emerging global trends in superior court judicial selection. Overall, the study makes a case for a law reform agenda in all three countries. It is further argued that the adoption of the study's recommendations will enhance the prospects for politically independent and efficient judiciaries in Mozambique, South Africa and Zimbabwe. Notwithstanding this, the study's findings are also useful in other countries as well, especially new democracies in Africa which are still grappling with this key ingredient of judicial independence.

## ABBREVIATIONS

ANC.....	African National Congress
DA.....	Democratic Alliance
ESAP.....	Economic Structural Adjustment Programme
FRELIMO.....	Liberation Front of Mozambique
GNU.....	Government of National Unity
GPA.....	Global Political Agreement
JAC.....	Judicial Appointment Commission
MDC.....	Movement for Democratic Change
PF ZAPU.....	Zimbabwe African Peoples Union
RENAMO.....	Mozambican National Resistance
SADC.....	Southern Africa Development Community
ZANU PF.....	Zimbabwe African National Union Patriotic Front

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## CHAPTER I

### INTRODUCTION

There is a global consensus that the mechanisms of judicial selection are a critical element of an independent judiciary in modern day constitutional democracies. This study critically examines the superior court judicial selection processes in Mozambique, South Africa and Zimbabwe.<sup>1</sup> Significantly, a comparative examination necessarily reviews the judicial selection processes with a view to addressing identified gaps and/or weaknesses in all three countries. In the judicial selection discourse in emerging democracies in Africa generally, a comparative study of this nature has a useful contribution to make in further enhancing the prospects for politically independent and efficient judiciaries in each polity.

This chapter introduces the study. It begins by providing the background to the study focusing on preliminary matters such as the problem statement and the central research questions which the study seeks to answer. Thereafter, the significance of the study discussion is followed by an analysis of the study's methodological aspects. A discussion of the study's limitations leads to an overview of the key issues addressed in all chapters which concludes the chapter.

#### 1.1 Background to the study

The effectiveness of legal institutions in Africa is of paramount importance to legal scholars, academics, politicians and policy makers, and one such key institution is the judiciary.<sup>2</sup> Recent studies have suggested that countries which wish to grow economically should be concerned with the rule of law and the effectiveness of their legal institutions.<sup>3</sup> An effective and

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<sup>1</sup> In this study, the term 'superior courts' refers to courts with the same or higher status than the High Court in the case of South Africa and Zimbabwe, and the Court of Appeal in the case of Mozambique.

<sup>2</sup> See Joireman, 'Inherited legal systems and effective rule of law: Africa and the colonial legacy' 2001, *Journal of Modern African Studies*, 39, 4, 571. See also Malleson; Russell, "Appointing Judges In An Age Of Judicial Power: Critical Perspectives From Around The World" 2006, Toronto; Buffalo: University of Toronto Press.

<sup>3</sup> See Joireman, 2001 *Journal of Modern African Studies*, 39, 4, 571. In general, economic theory supports the idea that judicial independence facilitates economic growth. Nevertheless, judicial independence is not necessary to investment. See Klerman, 'Legal Infrastructure, Judicial Independence, and Economic Development' 2007, *Global Business & Development Law Journal*, 19, 427-434. See also Feld; Voigt, 'Economic Growth and Judicial

independent judiciary assures a better human rights record and the entrenchment of democratic tenets in a polity.<sup>4</sup> Further, judicial independence seeks to ensure the freedom of judges to administer justice impartially without any fear or favour.<sup>5</sup> Most theories of judicial independence place a great deal of emphasis on judicial selection systems as a key element of judicial independence.<sup>6</sup> However, identifying the qualities of a good judge is not only an 'illusory task but a daunting one' for policymakers and those responsible for making judicial appointments.<sup>7</sup> It is therefore critical that the mechanisms of judicial selection aspire to produce candidates who can enhance the effectiveness and independence of the judiciary. Significantly, current 'constitutional developments in Africa in relation to judicial independence continue to be influenced by Western constitutional models.'<sup>8</sup> The American, British and French

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Independence: Cross Country Evidence Using A New Set Of Indicators' CESIFO Working paper No. 906 available at [www.CESifo.de](http://www.CESifo.de) accessed on 2/08/15.

<sup>4</sup> See Fombad, 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa' 2007, *The American Journal of Comparative Law*, 55, 1, 10. According to Fombad, 'an independent judiciary can be defined as one that is free to render justice on all issues of substantial legal and constitutional importance, fairly, impartially, in accordance with the law, without threat, fear of reprisal, intimidation or any other undue influence or consideration'.

<sup>5</sup> See generally Russell; O'Brien, "Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World" 2001, Charlottesville: University Press of Virginia. See also Akkas, 'Appointment of judges: A key issue of judicial independence' 2004 *Bond Law Review*, 16, 2, 200; McDonald; Kong, 'Judicial Independence As A Constitutional Virtue' in "The Oxford Handbook Of Comparative Constitutional Law", 2012, Oxford University Press, 832.

<sup>6</sup> See generally Russell; O'Brien, 2001, Charlottesville: University Press of Virginia.

<sup>7</sup> See [www.dgru.uct.ac.za/usr/dgru/downloads/Judicial SelectionOct2010](http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010), a report by Advocate Susannah Cowen commissioned by the DGRU, University of Cape Town accessed on 4/05/12. Furthermore, Chief Justice Mohamed in an address to the International Commission of Jurists in Cape Town on 21 July 1998 remarked as follows: 'Society is ... entitled to demand from judges fidelity to those qualities in the judicial temper which legitimize the exercise of judicial power. Many and subtle are the qualities which define that temper. Conspicuous among them are scholarship, experience, dignity, rationality, courage, forensic skill, capacity for articulation, diligence, intellectual integrity and energy. More difficult to articulate but arguably even more crucial to that temper, is that quality called wisdom, enriched as it must be by a substantial measure of humility and by an instinctive moral ability to distinguish right from wrong and sometimes the more agonizing ability to weigh two rights or two wrongs against each other which comes from the consciousness of our own imperfection.'

<sup>8</sup> See Fombad, 'A preliminary assessment of the prospects for judicial independence in post-1990 African constitutions' 2007, *Public Law*, 2, 236.

constitutional models provide illuminating examples of the divergent approaches to the issue of checks and balances in judicial appointments.<sup>9</sup>

Emerging democracies in Africa are grappling with the expectations concomitant with a democratic state. Judiciaries in Africa are under the spotlight as they have to satisfy the expectations of societies which had been oppressed for a long time. These expectations are unavoidable. The end of colonial rule brought with it the promise and prospects for good governance and emerging new states which subscribed to democratic tenets. The role of the judiciary in strengthening democracy and the appointment of independent-minded judges according to the constitution is therefore critical in post-colonial African countries.<sup>10</sup> The necessity for judiciaries which are independent from the political actors, and which are effective in promoting and upholding the fundamental rights of citizens, and the rule of law is apparent.

It must be underscored that judicial selection systems have several implications for the rule of law, especially if one has regard to the issues of judicial tenure. A system of appointing judges for life for example, has far reaching implications on the rule of law if the judges so appointed are unmeritorious or partisan.<sup>11</sup> Further, there is an incentive on the part of the political players to influence the judicial selection processes or to have a compliant judiciary which dances to the whims of the executive even when not expected to do so. When politicians serve as the 'final appointing authorities, obtaining some partisan political advantage remains the primary motivation' for particular judicial appointments.<sup>12</sup> Also of utmost importance are extra-legal

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<sup>9</sup> See Madhuku, 'The appointment process of judges in Zimbabwe and its implications for the administration of justice' 2006, SAPR/PL, 21, 346.

<sup>10</sup> See [www.sabar.co.zw/law-journals/2010/december](http://www.sabar.co.zw/law-journals/2010/december) volume 023 no 3, 43 accessed on 10 April 2012.

<sup>11</sup> See also discussions on the US judicial selection systems in Chapter 2 of this study.

<sup>12</sup> See Volcansek, 'Exporting the Missouri Plan: Judicial Appointment Commissions' 2009, Missouri Law Review, 74, 785.

mechanisms such as the political culture in a polity which act as a buffer against partisan political interests in the selection of judges.

Several regional and international instruments highlight the importance of an independent judiciary in modern day governance systems. Article 26 of the African Charter of Human and Peoples Rights states that, 'State parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.'<sup>13</sup> The same ideals are also echoed in Article 10 of the Universal Declaration of Human Rights, 1948; and the UN Basic Principles on the Independence of the Judiciary which focus on six critical areas including the qualification, selection and training of judges.<sup>14</sup> Notwithstanding this, 'the struggle for judicial independence is occurring not only in the transitional democracies in Africa' but throughout the world as polities seek to entrench democratic tenets in their governance systems.<sup>15</sup> This is hardly surprising because judicial independence as a concept has never been adequately spelt out.<sup>16</sup> In relation to judicial appointments, the 'question in each case becomes one of the extent to which the judicial selection process has sufficient checks and balances against purely political appointments'.<sup>17</sup>

This study focuses on one key element of an independent judiciary, that is, superior court judicial selection mechanisms in Mozambique, South Africa and Zimbabwe. The main challenge

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<sup>13</sup> Mozambique, South Africa and Zimbabwe are State Parties to the African Charter on Human and Peoples' Rights.

<sup>14</sup> Principle 10 of the UN Principles provides that the judicial appointment process must inspire public confidence. There are other guidelines such as the Latimer House Guidelines and the Bangalore Principles.

<sup>15</sup> See Fombad, 'A preliminary assessment of the prospects for judicial independence in post -1990 African constitutions' 2007, Public Law, 2, 233.

<sup>16</sup> Ibid.

<sup>17</sup> See Madhuku, 'Constitutional protection of the independence of the judiciary: A survey of the position in Southern Africa' 2002, Journal of African Law, 4, 234.

in ensuring judicial independence at the superior court level in all three countries is with regards to the selection of the judges which is often unregulated by the constitution or statute resulting in unfettered discretion being conferred on the appointing authority.<sup>18</sup> A comparative enquiry of the judicial selection processes in these three countries will not only highlight the similarities and differences in all three countries. It will go further and explore the explanations for the convergences and divergences, as well as proffering suggestions for creating judicial selection systems which guarantee effective and politically independent judiciaries. The choice of countries/comparators to include in this study has been informed by two critical factors. First, all three countries are in the same sub-region and share more or less the same colonial experiences. Second, South Africa and Zimbabwe have legal systems based on the Roman Dutch legal tradition with a lot of English law influences. By way of contrast, Mozambique's legal system is based on the civil law tradition inherited from the Portuguese. The inclusion of Mozambique into the analyses is important as it sheds light on the factors at play in a different legal tradition.

The juxtaposition of two legal systems with a similar context on one hand, with one with a dissimilar context can only make this comparative analysis richer and more meaningful.<sup>19</sup> The overall objective is to draw important lessons from each jurisdiction's experiences. In this respect, one has to be mindful of the fact that the countries under study have experienced different legal and constitutional transformations, which have had a tremendous influence on their judicial selection processes. As one scholar aptly observed, 'the similarity of the experiences that African countries have gone through from colonialism and its aftermath... means that they can learn from each other's experiences.'<sup>20</sup>

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<sup>18</sup> Observation from external review of the study.

<sup>19</sup> See Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Reimann; Zimmermann, "The Oxford Handbook of Comparative Law" Oxford University Press, 411.

<sup>20</sup> See Fombad, 'African Bills of Rights in Comparative Perspective' 2011, *Fundamina* , 17, 1 , 40.

The study focuses on the ordinary and specialized superior courts in all three countries since most of the controversy relating to judicial selection have been generated by appointments to these courts.<sup>21</sup> Further, all three countries have in one form or another constitutionally proclaimed the independent role of the judiciary. Whilst constitutional prescriptions alone are not enough to guarantee the independence of the judiciary, a 'constitutionally entrenched independent judiciary is a necessary precondition to functional and substantive judicial independence.'<sup>22</sup> This comparative study therefore seeks to determine the extent to which the constitutionally entrenched judicial appointment frameworks in each polity have fostered the prospects for the independence and effectiveness of the judiciary. It proceeds under the assumption that the South African judicial appointment framework offers better prospects for enhancing the independence and effectiveness of the judiciary compared to Mozambique and Zimbabwe. However, this assumption which is based on the available literature on the topic, will be tested in the following discussions.<sup>23</sup>

It is critical at this juncture to provide a brief overview of the judicial selection processes in all three countries. The post-independence South African judicial selection mechanisms are a marked departure from the pre 1994 judicial selection procedures. According to Du Bois, a new

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<sup>21</sup> This study will focus on the Constitutional Courts, Supreme Courts, High Courts, Court of Appeal, Administrative Courts, Competition Appeal Court, Electoral Courts, Labour Courts, Land Claims Court and the Fiscal Appeals Court.

<sup>22</sup> See Fombad, 2007 *The American Journal of Comparative Law*, 55, 1, 10.

<sup>23</sup> See generally Murray, 'Who chooses Constitutional Court judges?' 1999, *South African Law Journal*, 116, 865; Du Bois, 'Judicial Selection in Post-Apartheid South Africa' in Malleson; Russell, "Appointing Judges in An Age of Judicial Power, Critical Perspectives from Around the World" 2007, University of Toronto Press, 280; Fombad, 'Constitutional Reforms and Constitutionalism in Africa: Reflections on some Current Challenges and Future Prospects' 2011, *Buffalo Law Review*, 1061; Madhuku, 'The Appointment Process of Judges in Zimbabwe and its Implications for the Administration of Justice' 2006, *SAPL*, 21, 345; Madhuku, 'Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa' 2002, *Journal of African Law*, 4, 234; Matyszak, 'Creating a Compliant Judiciary in Zimbabwe' in Malleson; Russell, "Appointing Judges in an Age of Judicial Power, Critical Perspectives from Around the World" 2006, University of Toronto Press, 334; Santos, Trindade; Meneses, 'Law and Justice in a Multicultural Society' 2006, *CODESRIA*; Santos, 'The Heterogeneous State and Legal Pluralism in Mozambique' 2006, *Law and Society Review*, 40, 1, 55; Trindade; Pedroso, 'The Judicial System: Structure, Legal Education and Legal Training' in Santos; Trindade; Meneses, "Law and Justice in a Multicultural Society. The Case of Mozambique" 2006, *CODESRIA*, 114.

process of judicial appointments was considered necessary in order to guarantee an independent and accountable bench whose 'demographic profile and jurisprudential orientation' would be aligned to the transformed constitutional order.<sup>24</sup> The South African Constitution emphasizes the importance of an independent judiciary in section 165.<sup>25</sup> Section 174 provides for the judicial appointment criteria.<sup>26</sup> In terms of this section, the judicial appointment process is predicated on three key constitutional criteria namely, an appropriate qualification, the appointee must be a fit and proper person and racial and gender composition considerations.<sup>27</sup> A detailed critique of this criteria follows in Chapter 5 of the study.

Considering the apartheid history of colonial South Africa, the judicial selection framework as constitutionally entrenched was intended to strengthen democracy, the rule of law and the protection of fundamental rights.<sup>28</sup> The constitutional dispensation ushered in 1994 was meant to provide a point of departure from the apartheid regime's judicial selection system which was controlled by the executive.<sup>29</sup> Under apartheid, the criteria for judicial selection was shrouded in secrecy and political factors played a key role in determining appointment and promotion.<sup>30</sup> Any meaningful analysis of the judicial selection framework in South Africa necessarily focuses

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<sup>24</sup> See Du Bois, 'Judicial selection in post-Apartheid South Africa' in Malleon; Russell, 2007, University of Toronto Press, 280.

<sup>25</sup> Section 165(2) of the South African Constitution states that the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution further obliges organs of state to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

<sup>26</sup> Section 174(1) of the South African Constitution provides as follows, 'Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person appointed to the Constitutional Court must also be a South African citizen.'

<sup>27</sup> According to Du Bois at 293, several texts are critical of representivity as an aim in judicial appointments fearing that it might result in a dilution of the quality of the judiciary through the implementation of a quota system.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> See Wesson; Du Plessis, 'Fifteen years on: Central issues relating to the Transformation of the South African judiciary' 2008, South African Journal on Human Rights, 24, 188.

on the role of the executive in the judicial selection process, and the Judicial Appointment Commission's (JAC)<sup>31</sup> selection criteria and processes.<sup>32</sup> The South African Constitutional Court underscored the role of the JAC in *Re Certification of the Constitution*<sup>33</sup> as providing a 'broadly based selection panel for appointments to the judiciary and providing checks and balances to the power of the executive to make such appointments'.<sup>34</sup>

A common criticism of the judicial selection process in South Africa is that there is little transparency in respect of the criteria used for selection.<sup>35</sup> It has also been observed that the President and the JAC should make their selection criteria known and subject to public scrutiny.<sup>36</sup> Openness about the judicial selection criteria enables a principled public debate about the adequacy of the criteria used thereby enhancing the prospects for meritorious judicial appointments.<sup>37</sup> The need for constitutional clarity is all the more compelling especially considering the significant representation of politicians on the JAC.<sup>38</sup> There has even been criticism that the JAC is 'overloaded with politicians and subject to lobbying influences that

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<sup>31</sup> In this study, any references to the Judicial Appointment Commission unless the context clearly indicates otherwise should be taken to refer to the Judicial Council in Mozambique and the Judicial Service Commissions in South Africa and Zimbabwe.

<sup>32</sup> Section 178 of the South African constitution provides for the composition and function of the Judicial Service Commission. See also Judicial Service Commission Act 9/94. See also [www.dgru.uct.ac.za/usr/dgru/downloads/Judicial SelectionOct2010](http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010), a report by Advocate Susannah Cowen commissioned by the DGRU, University of Cape Town at 10 accessed on 4/05/12.

<sup>33</sup> 1996 (4) SA 744 (CC).

<sup>34</sup> See Cowen available at [www.dgru.uct.ac.za/usr/dgru/downloads/Judicial SelectionOct2010](http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010) accessed on 4/05/12.

<sup>35</sup> This is so despite the JAC having published supplementary criteria on judicial appointments.

<sup>36</sup> See [www.dgru.uct.ac.za/usr/dgru/downloads/Judicial SelectionOct2010](http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010), a report by Advocate Susannah Cowen commissioned by the DGRU, University of Cape Town at 7 accessed on 4/05/12.

<sup>37</sup> Ibid. The JAC has been criticized for allegedly focusing more on race than merit when making judicial appointments.

<sup>38</sup> See note 33 above at 13.

candidates and the public know nothing about.’<sup>39</sup> According to Sir Sidney Kentridge QC, the JAC while having made important strides, it still ‘had not been rigorous enough in ensuring that legal knowledge and experience accompany the other qualities needed for judicial transformation’.<sup>40</sup> Furthermore, the appointment of acting judges in South Africa is another cause for concern as too much leeway is given to the executive over these appointments.<sup>41</sup>

Moving on to Mozambique, since attaining independence from Portugal in 1975, Mozambique has experienced significant constitutional transformations. This transformative epoch is characterized by two constitutional revisions, the first in 1990 and the second in 2004.<sup>42</sup> An important point to note is the attempt by the 2004 constitutional revision to re-organize the judiciary as a separate branch of state.<sup>43</sup> The Mozambican Constitution proclaims the independence of the judiciary in Article 217. It also provides for the appointment of members of the Constitutional Council,<sup>44</sup> the Supreme Court<sup>45</sup> and Administrative Court judges.<sup>46</sup> A peculiarity of the Mozambican legal system relates to the dual system of professional judges and elected magistrates with separate selection systems.<sup>47</sup>

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<sup>39</sup> See Du Bois, 2007 University of Toronto Press, 290.

<sup>40</sup> See Kentridge, ‘The Highest Court: Selecting The Judges’ 2003, Cambridge Law Journal, 62,1, 69.

<sup>41</sup> Section 175 of the South African Constitution states that ‘the President may appoint a woman or a man to be an acting judge of the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice. The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.’

<sup>42</sup> See generally Trindade; Pedroso, ‘The Judicial System: Structure, Legal Education and Legal Training’ in Santos; Trindade; Meneses, “Law and Justice in a Multicultural Society. The Case of Mozambique” 2006 CODESRIA,114.

<sup>43</sup> Ibid.

<sup>44</sup> See Article 242 of the Mozambican Constitution.

<sup>45</sup> Ibid. Article 226.

<sup>46</sup> Ibid. Article 229.

<sup>47</sup> Article 216 of the Mozambican Constitution. See also Articles 36, 49, 57 of Law no.10/1992.

The selection of professional judges in Mozambique is regulated by three key legislative instruments namely, the Statute of Judges of the Judicial Courts, the Organic Law of the Judicial Courts and the 2004 Constitution.<sup>48</sup> Further, there are two separate commissions which play critical roles in the selection processes of professional judges, that is, the Superior Council of the Judiciary,<sup>49</sup> and the Superior Council of the Administrative Judiciary.<sup>50</sup> It is important to note that the functioning of these commissions is regulated by subsidiary legislation. As one scholar observed, ‘the scope for judicial independence is quite diminished in Mozambique because the relevant constitutional provisions are very narrow in scope, vague in formulation and many details of the critical determinants of judicial independence are reserved for regulation by ordinary laws’.<sup>51</sup>

A peculiarity of the Mozambican judicial selection process relates to the role of Parliament in the appointments of the President, and Vice President of the Supreme Court, the President of the Administrative Court and the President of the Constitutional Court.<sup>52</sup> Taking into account the civil law tradition of Mozambique and its political context, the possibility of executive overreach in judicial appointments remains a strong possibility which will be explored in the following discussions.

By contrast, Zimbabwe has a relatively new Constitution which proclaims the independence of the judiciary in section 164. Since attaining independence in 1980, Zimbabwe has had one significant constitutional revision exercise in 2013.<sup>53</sup> Prior to 2013, several constitutional

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<sup>48</sup> See AfriMAP, ‘Mozambique: Justice sector and the rule of law’ 2006 at 76 available at [www.afrimap.org](http://www.afrimap.org) accessed on 16/07/12. In terms of the Organic Law of the Judicial Courts, Parliament organizes elections for Supreme Court lay judges while Provincial and District court judicial elections are organized by the Ministry of Justice.

<sup>49</sup> See Articles 220 to Article 222 of the Mozambican Constitution.

<sup>50</sup> Ibid. Article 232.

<sup>51</sup> See Fombad, ‘Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa’ 2007, *The American Journal of Comparative Law*, 55,1, 10.

<sup>52</sup> See AfriMAP report, 2006, 77.

<sup>53</sup> A constitution revision exercise in 2000 failed after the draft was rejected in a referendum.

amendments had been effected which were mainly driven by the executive. Furthermore, these amendments were largely piecemeal reforms which were targeted mainly at the bill of rights.<sup>54</sup> A new Constitution was promulgated in 2013 which marks a clear departure from the former Lancaster House Constitution insofar as the mechanisms of judicial selection are concerned. Under the former constitution, the President appointed judges 'after consultation with the JAC. Further, Parliament was to be notified in the event that any appointment was not consistent with the JAC recommendations.<sup>55</sup> Nevertheless, the critical aspect of this selection process was that it was based on secret soundings by the Ministry of Justice.<sup>56</sup> In fact, only candidates acceptable to the government were proposed to the JAC for its consideration.<sup>57</sup>

It is apparent that the executive had an unfettered discretion in the selection of superior court judges.<sup>58</sup> The constitutionally entrenched JAC which played more of a rubberstamping role, was overtly weak in checking executive excesses in judicial selection. As Saller observed, the appointment of superior court judges in Zimbabwe under the former constitution was exposed to significant political interference.<sup>59</sup> For example, the appointment of Chief Justice Chidyausiku in 2001 who was then a High Court judge at the expense of more senior judges created a huge public furore.<sup>60</sup> It is hardly surprising therefore that the mechanisms of judicial selection were targeted for reform in the constitution revision exercise. The 2013 Constitution provides for a new superior court judicial appointment process in section 180. It is important to note also that

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<sup>54</sup> See Nherere, 'How can a bill of rights be protected against undesirable erosion and amendment?' 1995, *Legal Forum*, 7, 2, 41.

<sup>55</sup> See section 84(2) of the Lancaster House Constitution.

<sup>56</sup> See Matyszak, 334.

<sup>57</sup> *Ibid.*

<sup>58</sup> See section 84 of the Lancaster House Constitution.

<sup>59</sup> See Saller, "The Judicial Institution in Zimbabwe" 2004, *Siber Ink*, 18.

<sup>60</sup> See the report of the IBA Zimbabwe mission in 2001 available at [www.ibanet.org/Document/Default.aspx?DocumentUid=3be5f2ee...](http://www.ibanet.org/Document/Default.aspx?DocumentUid=3be5f2ee...) accessed on 4/08/15.

the new process had been tested only once in both the Supreme Court and High Court by the end of 2014.<sup>61</sup>

It is apparent that the construction of 'meritocracy' in judicial selection is of fundamental importance in all three jurisdictions. What attributes should a judicial appointee possess in order to be considered meritorious for judicial appointment? Some studies have even gone to the extent of suggesting that 'merit' is a constructed idea, not an objective fact and that judicial appointments based on merit are largely mythical.<sup>62</sup> Notwithstanding this, these matters are critical issues which this comparative study seeks to explore from the Mozambican, South African and Zimbabwean experiences.

All three countries have constitutionally entrenched Judicial Appointment Commissions which play varying roles in the judicial selection process. Recent studies have shown that JACs are a more acceptable method of guarding against purely political appointments.<sup>63</sup> Also, it has been suggested that the 'virtues of judicial appointment commissions lie in their apolitical character.'<sup>64</sup> However, persistent controversy in South Africa for example, have shown that the involvement of a judicial appointment commission 'does not eliminate suspicions that professional accomplishment plays second fiddle to political objectives' in the selection process.<sup>65</sup> The JAC's selection procedures are therefore critical as a safeguard against purely political appointments. Equally important is the status of the JAC within the constitutional matrix as well as its composition and appointment of its membership. The importance of these

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<sup>61</sup> Supreme Court interviews were conducted for the first time on 13<sup>th</sup> June 2014 while the High Court ones were conducted from the 26<sup>th</sup> to the 29<sup>th</sup> November, 2014.

<sup>62</sup> See Thomas, 'Judicial diversity in the UK and other jurisdictions: A review of research, policies and practices', November 2005 available at [www.ucl.ac.uk/laws/socio-legal/documents/review](http://www.ucl.ac.uk/laws/socio-legal/documents/review) accessed on 17/04/12.

<sup>63</sup> See generally Akkas, 'Appointment of Judges: A Key Issue of Judicial Independence' 2004, *Bond Law Review*, 16,2, 200; Mahomed, 'The Independence of the Judiciary' 1998, *South African Law Journal*, 115, 658.

<sup>64</sup> See Volcansek, 2009 *Missouri Law Review*, 74, 786.

<sup>65</sup> See Du Bois, 2007 University of Toronto Press, 292.

aspects become more apparent learning from the experiences of the Zimbabwean JAC under the former constitution.

Further, it must be underscored that it is not the aim of this study to prescribe uniformity or a judicial straitjacket in all three countries. Significantly, there are no blue-prints in comparative law. In fact, countries utilize a wide range of judicial selection mechanisms which basically reflect their different conceptions of judicial independence.<sup>66</sup>

## 1.2 Problem statement

Constitutional theory has long established that the process of appointing judges is an important element in promoting the independence of the judiciary.<sup>67</sup> The necessity for an independent judiciary selected on merit is of paramount importance in the African constitutional terrain, which is increasingly characterized by the judicialization of politics and other breaches of the fundamental rights of citizens. Consequently, the process through which the superior judiciary is constituted is critical in the realization of a politically independent and efficient judiciary. It is apparent that there has been persistent controversy relating to meritocracy in superior court judicial appointments in Mozambique, South Africa and Zimbabwe.<sup>68</sup> Furthermore, perceptions abound that partisan interests play a significant role in the selection of key judicial personnel in all three countries.<sup>69</sup> Given this context, the superior court judicial selection mechanisms in all

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<sup>66</sup> See generally Garoupa; Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' 2009, *The American Journal of Comparative Law*, 57, 201.

<sup>67</sup> See discussions on the background section to this study as well as Chapter 2's discussions.

<sup>68</sup> See generally UN Special Rapporteur on the Independence of Judges and Lawyers Mozambique country report available at [www.refworld.org/pdfid/50f036122.pdf](http://www.refworld.org/pdfid/50f036122.pdf) ; Matyszak, 'Creating a Compliant Judiciary in Zimbabwe' in Malleson, "Appointing judges in an age of judicial power, Critical perspectives from around the world" 2006, University of Toronto Press, 334; Mozambique News Agency AIM Reports: Report Number 452, 16 October 2012; Afrimap, 'Mozambique: Justice Sector and The Rule of Law' 2006, at 10; Andrews, 'The South African Judicial Appointments Process' 2007, *Osgoode Law Journal*, 44, 565; Bizos, 'The Abrogation And Restoration of the Rule of Law and Judicial Independence in South Africa' 1998 *Revue. quebecoise de droit int'l*, 11, 155; Corder, 'Prisoner, Partisan and Patriarch: Transforming The Law in South Africa 1985-2000' 2001, *South African Law Journal*, 118, 772.

<sup>69</sup> Ibid.

three countries are deserving of critical interrogation. Due to these persistent problems bedeviling the selection of superior court judges in all three countries, a comparative analysis provides useful lessons on how each country's judicial selection process can further enhance the independence and effectiveness of the judiciary.

### **1.3 Research question**

The central research question which this study seeks to answer is:

- How can the judicial selection processes in Mozambique, South Africa and Zimbabwe best enhance the prospects for independent and effective judiciaries?

The central question which this study attempts to answer will also require a determination of the following subsidiary questions;

- What historical and contextual factors have influenced the current judicial selection systems in all three countries?
- What are the real and potential threats posed by the current judicial selection processes to the independence and effectiveness of the judiciary?
- To what extent is the theory relating to judicial selection processes consistent with the actual state practices in all three countries?
- To what extent have judicial appointment commissions been effective in promoting openness and transparency in the selection process?
- To what extent are the judicial selection processes in all three countries consistent with emerging global trends?

### **1.4 Significance of study**

The mechanisms of judicial selection are important in modern day constitutional democracies as they have a huge bearing on whether or not the judiciary is independent. In fact, judicial selection processes are one of the key barometers for determining the prospects for judicial

independence in a polity. Given such a context, this comparative study is important in several respects.

The study seeks to reconcile the theory and practice relating to judicial selection processes in all three countries. This is necessary considering the gaps that often open between the theory and practice in judicial selection procedures.<sup>70</sup> Possible explanations for any convergences and divergences are explored, as well as lessons to be learnt from each country's experiences with this key ingredient of judicial independence. Extrapolating from the above point, the study hopes to contribute to the understanding of different approaches adopted by different African countries in the judicial appointments context.<sup>71</sup>

A comparative study of this nature also enables a cross systemic pollination of ideas about how all three countries can strengthen their institutions. Invariably, institutions such as the judiciary are strengthened by learning from the experiences of countries which share more or less the same historical background.<sup>72</sup> Reviewing how different countries have shaped their judicial selection processes provides valuable lessons for appointing authorities, policy makers, judges, lawyers and academics.<sup>73</sup> In this respect, the study explores practical ways in which all three countries can better enhance the prospects for independent and effective judiciaries through their judicial selection systems.

Further, the study seeks to lay out an agenda for the reform of the superior court judicial selection processes in all three countries particularly in relation to JACs. A 'comparative analysis has a useful contribution to make in informing' the direction of reform in this critical element of an independent judiciary.<sup>74</sup> As Malleson observed, very little comparative analysis of the forms,

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<sup>70</sup> See Malleson, 'Introduction' in Malleson; Russell, "Appointing Judges In An Age Of Judicial Power, Critical Perspectives From Around The World" 2006, University of Toronto Press, 5.

<sup>71</sup> See Fombad, 2011 *Fundamina*, 17 (1) 40.

<sup>72</sup> *Ibid.*

<sup>73</sup> See Malleson, 2006 University of Toronto Press, 9.

<sup>74</sup> *Ibid* at 10.

functions and effectiveness of JACs has been done generally.<sup>75</sup> Consequently, the comparative study hopes to contribute to the current scholarship on judicial appointments which remain a critical element of an independent judiciary.

### **1.5 Methodology**

While essentially desktop based, the study relies on a combination of comparative law methodologies. Generally, comparative constitutional law methodologies can be delineated into five classes, namely the classificatory, historical, normative, functional and contextual approaches.<sup>76</sup> The main comparative law methodology adopted in this study is the functional approach, which was utilized in the assessment of the independence and effectiveness of the superior court judicial selection processes in all three countries. The functional approach involves identifying an institution and analyzing “whether in fact the constitutional institution or doctrine believed to perform a valid function does so, or may analyze whether and how that function is performed elsewhere.”<sup>77</sup> The functional comparison adopted in this study also utilized the detailed case study analysis approach of a specific superior court judicial selection process in all three countries.<sup>78</sup> The data for the case studies was collected from multiple sources of evidence such as primary and secondary data sources, interviews with key stakeholders in the justice delivery system, and direct observations. The objective of this approach was to garner critical insights into the theory and actual state practice relating to superior court judicial appointments.

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<sup>75</sup> Ibid at 7.

<sup>76</sup> See Jackson, ‘Comparative Constitutional Law: Methodologies’ in Rosenfeld; Sajo, “The Handbook of Comparative Constitutional Law” 2012, Oxford University Press, 54. See also Venter, “Global Features of Constitutional Law” 2010, Wolf Legal Publishers, 37-51; Zweigert; Kotz, “Introduction to Comparative Law” 1998, 3<sup>rd</sup> ed, Clarendon Press, Oxford.

<sup>77</sup> Ibid at 62.

<sup>78</sup> On the importance of a case study analysis generally, see Yin, ‘Case study research: design and methods’ 2009, LA, California: Sage Publications, 2-7.

The study also utilized the historical and contextual approaches which are important in that they traced the evolution of the judicial selection mechanisms in each polity.<sup>79</sup> These approaches are critical considering that all three countries have experienced different pre and post-independence constitutional developments. Consequently, these developments impacted on each country's superior court judicial selection process.

Furthermore, the study's findings are also predicated on the outcomes of a questionnaire which was administered in all three countries.<sup>80</sup> The questionnaire was administered to 24 respondents who are key stakeholders in the justice delivery system, such as members of the judiciary, the legal profession, legal academia, Ministry of Justice officials, and civil society practitioners. Further, interviews with stakeholders in the justice delivery system complemented the data obtained through the questionnaires. Critically, the feedback from respondents in all three countries was integrated into the analysis of each country's judicial selection system. Notwithstanding the above, it is important to note that the data collection focused mainly on stakeholders in the justice delivery system. The rationale for this approach relates to the complexity of the nature of the questions posed which required in-depth knowledge of the legislative framework as well as the current debates surrounding superior court judicial appointments in each country. In any event, most of the judicial nominees emanate from the targeted respondents such that interviewing them provided critical insights into the judicial selection practices in all three countries.

## 1.6 Limitations

Comparative constitutional law studies have traditionally been bedeviled with the challenges of "time and resources, limitations of language and contextual understanding."<sup>81</sup> In relation to this study, it was anticipated that there will be some factors that could be potential but not fatal

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<sup>79</sup> See generally Jackson, 2012 Oxford University Press, 54.

<sup>80</sup> The questionnaire administered in all three countries had 17 standard questions.

<sup>81</sup> See Jackson, in Rosenfeld; Sajo, "The Handbook of Comparative Constitutional Law" 2012, Oxford University Press, 71.

limitations.<sup>82</sup> First, the topic under study is considered a ‘politically sensitive’ subject especially in Mozambique and Zimbabwe and difficulties were anticipated in collecting primary data such as JAC interview transcripts which were critical for the case studies. Second, a language barrier was also anticipated in carrying out in-country research in Mozambique which uses Portuguese as the official language.

The potential limitations identified above were however mitigated. The failure to get interview transcripts in Mozambique did not impact on the study as key members of the JAC were interviewed by the researcher. Interviews with key stakeholders in the judicial appointment process remedied any gaps occasioned by the unavailability of JAC interview transcripts. With respect to Zimbabwe, the researcher observed the JAC interviews and this addressed the unavailability of JAC transcripts which were an integral part of the case study analyses. Further, the language barrier with respect to Mozambique was remedied by the use of a translator. Importantly, most of the respondents interviewed were conversant in English, a fact which greatly assisted in the data collection exercise.

## **1.7 Chapter overview**

This study is divided into seven chapters. Chapter One introduces the study by highlighting preliminary aspects such as the background to the study, problem statement, research questions, significance of study, methodology and research limitations.

Chapter Two discusses the concept of judicial independence as well as its theoretical justifications. It analyzes the various elements of judicial independence generally including the judicial selection systems which are the focus of this study. The chapter further gives an overview of the leading judicial selection systems, that is, the American, British and French systems including other typologies of judicial selection systems in use across the world.

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<sup>82</sup> Ibid.

Chapter Three discusses the historical, politico-economic and legal developments in each of the three jurisdictions, the objective being to put the superior court judicial selection mechanisms in their proper historical contexts. The Chapter further examines the evolution of legal systems in all three countries in the context of judicial selection mechanisms.

Chapter Four examines the judicial selection mechanisms in all three countries. First, the focus of this examination is on the constitutional and legislative frameworks governing superior court judicial appointments. Second, the examination focuses on the assessment of the JAC status, composition and appointment of members, and the commission procedures. The Chapter concludes with an evaluation of the above aspects in all three countries, in light of emerging global trends.

Chapter Five examines the judicial selection criteria in the ordinary and specialized superior courts. The Chapter further discusses acting judicial appointments as a corollary to the judicial selection criteria. The Chapter concludes by an assessment of emerging trends in judicial selection criteria in all three countries.

Chapter Six analyses case studies of specific Supreme Court judicial selection processes in all three countries. The Chapter examines these case studies from the beginning of the selection process right up to the final judicial appointments. It ends with an assessment of the judicial selection practices in all three countries.

Chapter Seven concludes the study by giving a summary of issues discussed in the study as well as providing suggested recommendations and areas for further research.

## CHAPTER II

### JUDICIAL INDEPENDENCE IN PERSPECTIVE

#### 2.1 Introduction

An independent judiciary is a *sine qua non* of a democratic state.<sup>83</sup> Indeed, the independence of the judiciary has grown to be seen as a fundamental element of constitutionalism<sup>84</sup> in modern day liberal democracies.<sup>85</sup> Constitutional law theories often highlight the importance of an independent judiciary as a key element of the separation of powers and the rule of law paradigms. However, there is 'little agreement on just what this condition of judicial independence is or what kind or how much judicial independence is required'.<sup>86</sup> The exact meaning of the concept of judicial independence<sup>87</sup> has evoked a lot of debate in constitutional

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<sup>83</sup> According to Justice Kelly in 'An Independent Judiciary: The Core Of The Rule Of Law' available at [www.icclr.law.ubc.ca/Publications/Reports/An\\_Independent\\_Judiciary.pdf](http://www.icclr.law.ubc.ca/Publications/Reports/An_Independent_Judiciary.pdf) accessed on 14/11/12, 'The English philosopher, John Locke, and the French philosopher, Montesquieu, are generally considered to have the most influence on the evolution of the modern concept of judicial independence. At the end of the Eighteenth Century, Locke, who strongly influenced the English Revolution of 1688 and the American Revolution of 1776, stated that established laws with the right to appeal to independent judges are essential to a civilised society and that societies without them are still 'in a state of nature.' See also Okpaluba, 'Institutional Independence and the Constitutionality of Legislation Establishing Lower Courts and Tribunals' 2003, *Journal for Juridical Science* 28(2), 110.

<sup>84</sup> For the core elements of constitutionalism, see generally Fombad, 'The Constitution as a Source of Accountability: The Role of Constitutionalism' 2010, *Speculum Juris*, 2, 41. Fombad identifies the recognition and protection of fundamental rights and freedoms, the separation of powers, an independent judiciary, the review of the constitutionality of laws, the control of constitutional amendments and institutions that support democracy as core elements of constitutionalism.

<sup>85</sup> See generally Fombad, 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' 2007, *The American Journal of Comparative Law*, 55, 1, 5.

<sup>86</sup> See Russell in Russell; O'Brien, "Judicial Independence In The Age of Democracy: Critical Perspectives from Around the World" 2001, Charlottesville: University Press of Virginia, 1.

<sup>87</sup> *Ibid* at 6. See also Burbank; Friedman; Goldberg, 'Judicial Independence at the Crossroads. An Interdisciplinary Approach' 2002, Sage Publications, 10.

law discourse.<sup>88</sup> While acknowledging the divergent views on the meaning of judicial independence, an independent judiciary can be defined as one that ensures that judges adjudicate matters in a fair and impartial manner uninfluenced by external factors. It necessarily follows that judges must be insulated from all external factors not relevant to the case, and must perform their adjudicative functions free from ‘considerations relating to their own self-interest or the interest of the body that appointed them.’<sup>89</sup>

It is hardly surprising that judicial independence as a concept has taken centre stage in public policy discussions around the world.<sup>90</sup> This is due partly to the powers of the courts to strike down legislation on the grounds of unconstitutionality which has led to what is commonly referred to as the ‘countermajoritarian dilemma.’<sup>91</sup> An independent judiciary entails two things.<sup>92</sup> First, there must be in existence the institutional independence of the judiciary from the other branches of government. Second, the decisional independence of the members of the

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<sup>88</sup> See also Burbank, ‘The Architecture of Judicial Independence’ 1999, 72 S. California Law Review 315; Karlan ‘Two Concepts of Judicial Independence’ 1999, S.CAL.L.REV,72,535; Ferejohn, ‘The Dynamics of Judicial Independence: Independent Judges, Dependent Judiciary’ 1999, S.CAL.L.REV, 72, 353; Hensler, ‘Do We Need An Empirical Research Agenda On Judicial Independence?’ 1998-1999, S. CAL. L. REV, 72, 707.

<sup>89</sup> See McDonald; Kong, ‘Judicial Independence As A Constitutional Virtue’ in “The Oxford Handbook Of Comparative Constitutional Law” 2012, Oxford University Press, 832.

<sup>90</sup> See Levinson, ‘Identifying Independence’ 2006, Boston University Law Review, 86, 1297.

<sup>91</sup> For a discussion of the countermajoritarian dilemma see Waldron, ‘Core of the Case Against Judicial Review’ 2006, Yale Law Journal.

<sup>92</sup> See generally the case of *Van Rooyen and Others v. The State and Others* 2002 5 SA 246 wherein the basic requirements for judicial independence were discussed.

judiciary. The decisional independence of the judges has two basic elements,<sup>93</sup> that is, substantive independence and personal independence.<sup>94</sup>

An independent judiciary remains one of the three pillars of limited government which complements the principles of separation of powers and the rule of law.<sup>95</sup> The rule of law as a constitutional concept can only have meaning in a polity which has a judiciary whose members are insulated from internal and external influences or pressures. Due to the importance of an independent judiciary in modern day governance systems, several regional and international instruments trumpet the basic standards expected of an independent judiciary. However, none

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<sup>93</sup> See Shetreet, 'The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges' 2011, Boston: Martinus Nijhoff Publishers, 44. According to Shetreet, "Substantive or decisional independence means that in making judicial decisions and exercising other official duties, individual judges are subject to no other authority but the law. Independence of the judiciary implies that the judge should be removed from financial or business entanglements likely to affect or rather to seem to affect him in the exercise of his judicial functions."

<sup>94</sup> Ibid. According to Shetreet, "Personal independence means that the judicial terms of office and tenure are adequately secured. It is secured by judicial appointment during good behaviour terminated at retirement age, and by safeguarding judicial remuneration. Thus, Executive control over judges' terms of service, such as extension of term of office, remuneration, pensions or travel allowance is inconsistent with the concept of judicial independence. Still much less acceptable is any Executive control over case assignment, court scheduling or moving judges from one court to another or from one locality to another."

<sup>95</sup> See the South African Constitutional Court case of *South African Association of Personal Injury Lawyers v. Hendrik Willem Heath and Others 2001 1 SA 883 CC* paragraph 24-26 where Chaskalson P held that, "The separation of the judiciary from the other branches of government is an important aspect of separation of powers required by the Constitution. Parliament and the Provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws made, but have no law-making power other than that vested in them by the legislatures. Although Parliament has a wide power to delegate legislative authority to the executive, there are limits to that power. Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent...the separation required by the Constitution between the Legislature and Executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution will be undermined. The Constitution recognizes this and imposes a positive obligation on the State to ensure that this is done. It provides that courts are independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice. No organ of State or other person may interfere with the functioning of the courts and all organs of State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness."

of these instruments define an independent judiciary but merely outline the elements constitutive of it.<sup>96</sup>

The same indeterminacy is reflected on the African constitutional law terrain. Article 26<sup>97</sup> of the African Charter provides for an independent judiciary but falls short in giving a definition.<sup>98</sup> It is hardly surprising that a definition was omitted considering the daunting task of prescribing a universal definition at the regional level taking into account the divergent approaches to judicial independence in Africa.<sup>99</sup> Similarly, the constitutions of most African countries including those of Mozambique, South Africa and Zimbabwe proclaim the independent role of the judiciary.<sup>100</sup> It is however apparent that judicial independence is conceived differently and these differences emanate from a variety of sources including the underpinning historical contexts and political cultures in each jurisdiction.<sup>101</sup>

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<sup>96</sup> See also Article 10 of the Universal Declaration of Human Rights(1948); Article 7 of the African Charter on Human and Peoples' Rights(1981); the UN Basic Principles on the Independence of the Judiciary(1985), the Beijing Principles on the Independence of the Judiciary(1995), the Latimer House Guidelines on the Independence of the Judiciary(1998), the Universal Principles of Judicial Independence for the SADC Region(2004); the Universal Charter of the Judge(1999), the Bangalore Principles on Judicial Conduct(2002); the International Bar Association Minimum Standards of Judicial Independence(1982); the Syracuse Draft Principle on Independence of the Judiciary(1981); Montreal Universal Declaration on the Independence of Justice(1983); the International Covenant on Civil and Political Rights.

<sup>97</sup> Article 26 of the African Charter provides that, 'State Parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter'

<sup>98</sup> See also the case of *Civil Liberties Organization v. Nigeria*, Communication No. 129/94.

<sup>99</sup> See Russell; O'Brien, 3.

<sup>100</sup> See Fombad, 'The Constitution as a Source of Accountability. The Role of Constitutionalism' 2010, *Speculum Juris*, 2, 47. According to Fombad, 'From a formal perspective, all African countries have provisions which in varying degrees of effectiveness, provide for judicial independence. Determinants of such formal constitutional independence include vesting judicial functions exclusively on the judiciary, qualifications for prospective judges, the independence of the appointment process, the independence of the Judicial Service Commissions, security of tenure, judicial remuneration, promotion processes, disciplinary processes and immunity from criminal and civil suits.'

<sup>101</sup> See Shetreet, 45. According to Shetreet, "Whether and to what extent the judiciary in any country can be viewed as independent will not only depend on the law and constitution of that country, but also on the nature

This chapter is organized as follows. It begins with an examination of the concept of judicial independence generally, focusing on what it is, its theoretical underpinnings and how it can be assessed. This is followed by an analysis of the different elements of judicial independence which are generally regarded as constitutive of an independent judiciary. An overview of the three leading judicial selection systems in the world, namely the American, British and the French judicial selection systems follows thereafter. Such an overview is necessary considering that these leading systems have in one way or another influenced the development of judicial selection systems in Mozambique, South Africa and Zimbabwe. A discussion of other typologies of judicial selection systems across the world leads to the conclusion of this chapter.

## **2.2 Theoretical justifications for judicial independence**

As noted earlier, the concept of judicial independence has been the subject of intense scholarly scrutiny.<sup>102</sup> Various schools of thought have explored the theoretical justifications for the existence of an independent judiciary in a liberal democratic state. The moot point is determining the rationale for judicial independence. The various theories can broadly be categorized under the separation of powers, rule of law and 'delegative' theories which explain the rationale for politicians in promoting judicial independence.<sup>103</sup> Attempts have been made to provide the rationale for judicial independence at both the regional and international level. The 2003 Vienna Declaration on the Role of Judges attempts to capture the justification for an independent judiciary in the following terms;

*“An independent judiciary can best articulate and activate the normative framework for the protection of human rights. In doing so judges also act as catalysts for law reform and social change, defending the constitution, establishing norms and contributing to*

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and character of the people who hold office of judge, on the political structure and social climate, on the traditions prevailing in that country and on the institutional and constitutional infrastructure of judicial independence.”

<sup>102</sup> See generally Ferejohn; Rosenbluth; Shipan, 'Comparative Judicial Politics' 2004, October, available at <http://www.yale.edu/polisci/rosenbluth/Papers/comparative%20judicial%20politics.pdf> accessed on 7/01/13.

<sup>103</sup> See generally Helmke; Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' 2009, 12 Annual Review of Political Science 349.

*the progress towards the full enjoyment of human rights and sustainable human development. Judges also have a crucial role in balancing the requirements of defending society against invidious types of crime...”<sup>104</sup>*

Apparently, the rationale for the existence of an independent judiciary is deeply rooted in the separation of powers and the rule of law paradigms. The importance of not vesting governmental functions in any one body was recognized in the 1789 French Declaration of the Rights of Man and of the Citizen.<sup>105</sup> The political ramifications of the separation of powers concept were underscored by James Madison. Madison observed that, ‘the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.’<sup>106</sup>

Most of the written constitutions of many countries in different parts of the world make an attempt to clearly delineate the functions of the three organs of government.<sup>107</sup> Such constitutional prescription of the doctrine reinforces the importance and necessity of the principle as a bulwark of democracy. In a modern day liberal democracy, checks and balances are inherent in the governance structures.<sup>108</sup> These checks and balances entail that none of the three organs of state becomes a law unto itself thereby endangering the rights and welfare of citizens. Thus, the separation of powers principle has two important functions. First, it guards against the ‘abuse of public power through the concentration of power.’<sup>109</sup> Second, it promotes

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<sup>104</sup> See Vienna Declaration on the Role of Judges in the Promotion of Human Rights and Fundamental Freedoms, 24 November 2003.

<sup>105</sup> Article 16 of the Declaration of the Rights of Man and of the Citizen states that, “A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.”

<sup>106</sup> See Madison, *Federalist*, No. 47.

<sup>107</sup> For a discussion of the importance of the separation of powers generally, see Fombad, ‘The Separation of Powers and Constitutionalism in Africa: The Case of Botswana’ 2005, *Boston College Third World Law Journal* 101/139.

<sup>108</sup> On the importance of checks and balances generally, see *Executive Council, Western Cape Legislature and Others v. President of the RSA and Others* 1995 10 BCLR 1289; *SAAPIL v Heath and Others* CCT 27/00.

governmental efficiency by assigning specific functions to a government body which has the expertise and the time to attend to those specific functions.<sup>110</sup>

Several African countries have made attempts to constitutionally prescribe the mandate of the executive, the legislature and the judiciary.<sup>111</sup> In a study on constitutionalism in Francophone and Anglophone Africa, one scholar observed that ‘post-1990 constitutions in Africa generally provide for a separation of powers’ thereby enhancing the prospects for constitutionalism and democratic governance.<sup>112</sup> Whilst the formulation of the separation of powers doctrine has evolved over time, it remains a bedrock of an independent judiciary. The extent to which any country subscribes to the separation of powers principle is a matter of conjecture, to be gleaned from the prevailing political environment.

Closely intertwined with the separation of powers concept is the rule of law as opposed to rule by law.<sup>113</sup> The rule of law concept is a critical element of constitutionalism in modern day liberal democracies.<sup>114</sup> Several studies have propounded the rule of law theory. It basically provides that an independent judiciary is an essential element of the rule of law concept ‘which secures property rights and guarantees the enforcement of contracts.’<sup>115</sup> According to Dicey’s conception of the rule of law, the supremacy of the law is paramount in the same way as no man is above the law.<sup>116</sup> Governmental functions must be exercised in accordance with

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<sup>109</sup> See Saunders, 2006 *Jud. Rev.* 11, 338

<sup>110</sup> *Ibid* at 339.

<sup>111</sup> See for example the Constitutions of Mozambique, South Africa and Zimbabwe.

<sup>112</sup> See Fombad, ‘The Constitution as a Source of Accountability. The Role of Constitutionalism’ 2010, *Speculum Juris*, 2, 47.

<sup>113</sup> The rule of law was popularized in the nineteenth century by A. V. Dicey, a British jurist.

<sup>114</sup> See generally, Dicey, “Lectures Introductory to the study of the law of the Constitution” 1185, 1<sup>st</sup> edition, Macmillan, 215.

<sup>115</sup> See McDonald; Kong, 845.

<sup>116</sup> Dicey’s conception of the rule of law has three elements namely, that individuals are subject to the application of general law and not to the exercise of wide discretionary powers, both individuals and government officials are

stipulated laws and such exercise of power within the confines of the law necessarily discourages tyranny and arbitrary use of power by those in authority.<sup>117</sup> This is pertinent considering that authoritarian regimes give a semblance of ruling ‘within’ the law. The rule of law thus assures ‘standards of accountability’ in any democratic dispensation.<sup>118</sup>

A government which respects and upholds the rule of law will necessarily assure a better human rights record for its citizens.<sup>119</sup> A genuinely independent judiciary promotes a culture of legality that necessitates respect for the rule of law.<sup>120</sup> It has been suggested that ‘judicial independence does not automatically lead to respect for the rule of law or to economic progress.’<sup>121</sup> Instead, the rule of law thrives on a number of factors such as the nature of the political regime.<sup>122</sup> Without an independent judiciary which upholds the rule of law, individual rights are consequently put at risk.<sup>123</sup> Significantly, ‘most of the new democracies have relied heavily on the judiciary to realize the rule of law.’<sup>124</sup>

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subject to the ordinary law and the constitution is the result of decisions of the ordinary courts in relation to the rights of individuals.

<sup>117</sup> See Shivute, ‘The Rule of Law in Sub-Saharan Africa- An Overview’ in N Horn & A Bosl (eds) “Human rights and the rule of law in Namibia” 2009, 225. See also Ajibola; Van Zyl, “The judiciary in Africa” (1998)eds.

<sup>118</sup> See Finn, ‘The Rule of Law and Judicial Independence in Newly Democratic Regimes’ 2004, *The Good Society*, 13, 3, 12.

<sup>119</sup> See also Bellamy, ‘The Rule of Law and the Separation of Powers’ 2004ed, 254; Salzberger, ‘A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?’ 1993, *International Review of Law and Economics*, 13, 340-379.

<sup>120</sup> See Fombad, ‘Some Perspectives On The Prospects For Judicial Independence In Post-1990 African Constitutions’ 2001-2003, *Denning Law Journal* 16, 17.41.

<sup>121</sup> See Helmke; Rosenbluth, ‘Regimes and the Rule of Law: Judicial Independence in Comparative Perspective’ 2009, *Annual Review of Political Science*, 12, 347-8. See also McDonald; Kong, 845.

<sup>122</sup> See Helmke; Rosenbluth, 2009 *Annual Review of Political Science*, 12, 347.

<sup>123</sup> See Finn, ‘The Rule of Law and Judicial Independence in Newly Democratic Regimes’ 2004, *The Good Society*, 13, 3, 12.

<sup>124</sup> *Ibid.*

Delegative theorists have also put forward their own justifications for the existence of an independent judiciary. Lands and Posner have suggested an economic theory of an independent judiciary.<sup>125</sup> They propose an ‘interest group theory of government’ in which different groups compete for favourable legislation.<sup>126</sup> The price is determined by the value of legislative protection to the group.<sup>127</sup> The judiciary is an essential component because of its powers of judicial review and its ability to interpret legislation in conformity with the views of the dominant group.<sup>128</sup> Thus, the dominant group would be willing to pay the highest price for an independent judiciary which would protect its interests. Accordingly, an independent judiciary is of value to political actors and ‘judges themselves are incentivized by self-interest to enforce legislative bargains and not to interpret legislation in ways that reflect the preferences of shifting legislative majorities.’<sup>129</sup> The main weakness of this theory is that it assumes that judges do not opt for their own preferences in interpreting legislation.<sup>130</sup>

Closely linked to this theory is the political insurance justification for the existence of an independent judiciary.<sup>131</sup> According to this theory, ‘constitutional designers are motivated by their own short term interests rather than by the long term interests of their societies.’<sup>132</sup> Accordingly, there are no incentives to create an independent judiciary where one party

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<sup>125</sup> See Lands; Posner, ‘The Independent Judiciary in an Interest-group Perspective’ 1975, *Journal of Law and Economics*, 18, 3, 875. See also Klerman; Mahoney, ‘The value of judicial Independence: Evidence from Eighteenth Century England’ 2005, *American Law and Economics Review*, 7, 1, 1-27.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> See Lands; Posner, 879.

<sup>129</sup> See McDonald; Kong, 844.

<sup>130</sup> See Helmke; Rosenbluth, 2009 *Annual Review of Political Science*, 12, 350.

<sup>131</sup> For a discussion of this theory see Ramseyer; Rasmusen ‘Judicial Independence In a Civil Law Regime: The Evidence from Japan’ *J.Law.Econ.Org*, 13/2:259-287; Ginsburg, ‘Constitutional Courts in New Democracies: Understanding Variation in East Asia’ 2002, *Glob. Jurist Adv*, 2, 1, available at [www.bepress.com/gj/advances/vol2/iss1/art4/](http://www.bepress.com/gj/advances/vol2/iss1/art4/)

<sup>132</sup> *Ibid.*

dominates.<sup>133</sup> Where there are several political parties with more or less the same political influence, 'the party in power will anticipate the possibility of political reversal and will introduce institutions that limit the powers of subsequent majorities.'<sup>134</sup> One such institution is an independent judiciary which acts as a buffer against the excesses of whichever party is in power.<sup>135</sup>

Furthermore, delegative theorists explain the existence of an independent judiciary as a consequence of blame shifting by politicians.<sup>136</sup> The main argument of the proposition is that politicians opt for an independent judiciary which shoulders the blame for unpopular decisions. In this respect, the executive initiates populist policies leaving the courts with the onerous task of reversals thereby shielding the executive, and the legislature from a public backlash. A variant of this theory suggests that an independent judiciary is useful to the legislature as it keeps the executive organs of the state in check by ensuring that executive organs do not deviate from the legislative intent.<sup>137</sup> Notwithstanding this, the main weakness of this theory is that it fails in parliamentary systems which have a more unified political leadership.<sup>138</sup>

It is apparent that the variation in theories highlight the lack of consensus on the rationale for the existence of an independent judiciary. It would appear that no theory of an independent judiciary has so far provided an exhaustive explanation for its existence. From its theoretical underpinnings, it is hardly surprising that judicial independence as a concept has never been

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<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> See Ginsburg, 'Judicial Review in New Democracies: Constitutional Courts in Asian Cases', 23; Crain; Tollison, 1979, *The Journal of Legal Studies*, 8, 3, 555.

<sup>136</sup> See Salzberger, 'A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?' 1993, *International Review of Law and Economics*, 13, 349-379.

<sup>137</sup> See generally McCubbins; Schwartz, 'Congressional Oversight Overlooked: Police Patrols versus Fire Alarms' 1984, *American Journal of Political Science*, 28, 1, 165-79.

<sup>138</sup> See Helmke; Rosenbluth, 2009 *Annual Review of Political Science*, 12, 350.

fully established and is thus conceived differently in several jurisdictions.<sup>139</sup> While the differences in conception may persist, the important lesson for Africa is that the constitutional entrenchment of an independent judiciary ‘signifies a clear pre-commitment to certain minimum standards’ in promoting democratic consolidation.<sup>140</sup> Invariably, politicians bear the responsibility of ‘formulating and creating a culture of judicial independence’ which goes a long way in safeguarding the rule of law and the rights of citizens.<sup>141</sup>

In light of the above theoretical background for an independent judiciary, it is important at this juncture to analyse how judicial independence is assessed.

### **2.3 Assessing judicial independence**

Whilst acknowledging the importance of judicial independence as a bulwark of democracy, it still remains unsettled as to the formula for determining or measuring the independence of the judiciary in a polity. This indeterminacy can be ascribed to the elusive nature of the concept of judicial independence itself. The difficulty attaching to measuring judicial independence was aptly underscored by Stephenson.<sup>142</sup> Stephenson observed that most attempts to measure judicial independence in different countries have been unsuccessful due to several factors. These factors include the difficulties of data collection and of “combining the different elements of judicial independence into a composite index.”<sup>143</sup> Nevertheless, several toolkits have been crafted with the objective of aiding in the measurement of the extent to which a country upholds the independence of the judiciary.

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<sup>139</sup> See Fombad, ‘Constitutional Reforms and Constitutionalism in Africa: Reflections on some Current Challenges and Future Prospects’ 2011, *Buffalo Law Review*, 1061.

<sup>140</sup> See Fombad, ‘Some Perspectives On The Prospects For Judicial Independence In Post-1990 African Constitutions’ 2001-2003, *Denning Law Journal*, 16, 17, 41.

<sup>141</sup> See Shetreet at 20.

<sup>142</sup> See Stephenson, ‘Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs’ available at [www.siteresources.worldbank.org/INTLAWJUSTINST/Resources/Judicial\\_Independence.pdf](http://www.siteresources.worldbank.org/INTLAWJUSTINST/Resources/Judicial_Independence.pdf) accessed on 20/11/12.

<sup>143</sup> *Ibid.*

A survey of recent literature on the topic shows that there are two broad categories of assessing judicial independence, that is, *de facto* and *de jure* measures.<sup>144</sup> *De facto* measures are based purely on subjective assessments whereas *de jure* measures focus on ‘constitutional provisions that regulate institutional relationships.’<sup>145</sup> Further, it has been suggested that judicial independence can be measured through an analysis of court decisions overturning government decisions, nationalizations, and court decisions after an election.<sup>146</sup> These three factors put together serve as a useful tool in assessing the degree of independence of the courts.<sup>147</sup>

In spite of the above arguments, it must be noted that these propositions have their own weaknesses. These weaknesses emanate from the diverse political cultures across the world which makes an empirical study on judicial independence a mammoth task. Even if such a study was to be carried out, some scholars question whether such a study on judicial independence would serve any useful purpose at all.<sup>148</sup> Furthermore, formal and institutional guarantees of judicial independence are not an end in themselves. Breaches of the key elements of judicial independence have occurred in countries which have formally entrenched judicial independence in their respective constitutions.<sup>149</sup>

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<sup>144</sup> See generally Harvey, ‘Whats So Great About Independent Courts? Rethinking Cross National Studies of Judicial Independence’ 2010, Preliminary Draft, Nov 8, at 7 available at [politics.as.nyu.edu/docs/IO/2787/HarveyJI.pdf](http://politics.as.nyu.edu/docs/IO/2787/HarveyJI.pdf) accessed on 3/03/15.

<sup>145</sup> Ibid.

<sup>146</sup> See Ferejohn; Rosenbluth; Shipan, 2004(October), 17.

<sup>147</sup> Ibid. According to Ferejohn, Rosenbluth and Shipan, ‘One of the difficulties in grappling with the concept of judicial independence lies in measuring independence. We can identify various aspects of this concept...but identifying these aspects does not directly provide a measure that we could use in tests of independence. What scholars can do, however, is to rely on surrogate measures. That is, rather than directly measuring independence by taking account of, and somehow adding up, its constitutive factors, we can look for a measure that reflects the behavior we would expect to find for different levels of independence.’

<sup>148</sup> Ibid.

<sup>149</sup> See Shetreet at 20.

Notwithstanding the above criticism, studies on state adherence to judicial independence are important insofar as they determine the prospects for an independent and effective judiciary in a polity. In fact, countries with independent judiciaries capable of upholding the rule of law have better economic prospects as they are necessarily better poised to attract investment opportunities.<sup>150</sup>

## **2.4 Analysis of the different elements of judicial independence**

This section explores the basic elements constitutive of an independent judiciary in a liberal democratic state. Various regional and international instruments have been crafted which provide the key elements constitutive of an independent judiciary. However, it must be pointed out that these instruments are merely guidelines and are therefore not binding on any state. Nevertheless, it appears that the basic elements of judicial independence enunciated in these instruments have come to be accepted as a form of 'soft' law.

The basic elements constitutive of an independent judiciary have been canvassed by several regional and international instruments such as the African Charter, the UN Basic Principles on the Independence of the Judiciary, the Latimer House Guidelines, the Bangalore Principles on Judicial Conduct and the Mt. Scopus Standards of Judicial Independence.<sup>151</sup> It must be noted that these guidelines are not prescriptive. They are an attempt to formulate minimum standards which can guide countries in their formulation of policies that serve to enhance the prospects for an independent judiciary. Emerging democracies undertaking judicial reform have in one way or another had their reform processes influenced by these basic elements. The above regional and international instruments point to the following as the basic elements of an independent judiciary;

(i) institutional independence,

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<sup>150</sup> See generally Matias; Spiller; Tommasi, 'Judicial Independence in Unstable Environments: Argentina' 2002, *American Journal of Political Science*, 46, 4, 669/706.

<sup>151</sup> See also The Council of Europe's Recommendation on the Independence of Judges, the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region and the Universal Charter of the Judge.

- (ii) the judges must have security of tenure,
- (iii) the process of appointing judges must be free from political patronage,
- (iv) the judiciary must be financially autonomous, and
- (v) the judges must have some degree of accountability.

A discussion of these basic elements follows.

#### **2.4.1 Institutional independence**

The institutional autonomy of the judiciary is a critical element of an independent judiciary. Institutional autonomy entails that the independence of the judiciary must specifically be entrenched in the constitution or some other laws.<sup>152</sup> Judicial autonomy encompasses principles such as the impartiality of the judiciary, and vesting adjudicative functions exclusively in the judiciary. The importance of the judiciary's institutional autonomy is underscored in Principle 1 of the UN Basic Principles on the Independence of the Judiciary. Principle 1 states that;

*'The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.'*

Whilst constitutional prescriptions are not enough in themselves to guarantee the independence of the judiciary,<sup>153</sup> they are an important step in ensuring that the other organs of state respect the judiciary as a separate institution. The constitutional entrenchment of provisions on judicial independence has 'both legal and political value.'<sup>154</sup> This enables the

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<sup>152</sup> See Fombad, 'Some Perspectives On The Prospects For Judicial Independence In Post-1990 African Constitutions' 2001-2003, *Denning Law Journal*, 16, 17, 28.

<sup>153</sup> See Van De Vijver, "The Judicial Institution in Southern Africa: A Comparative Analysis of Common Law Jurisdictions" 2006, *SiberInk*, 4.

<sup>154</sup> See Madhuku, 'The Appointment Process of Judges in Zimbabwe and its implications for the Administration of Justice' 2006, *SAPR/PL*, 21, 357.

defense of the judiciary's independence against internal and external threats such as pressure from politicians, the legal profession as well as pressure from members of the judiciary itself.<sup>155</sup> This necessarily entails that judges must be free to adjudicate matters according to the law and their conscience without any fear of reprisals.

The impartiality of the judiciary during the whole adjudication process is critical for the institutional autonomy of the judiciary. For example, Principle 2 of the UN Basic Principles states that;

*'The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.'*

This entails that justice must not only be done but it must objectively be seen to be done. Thus, judges must free themselves from all external influences and even from internal influences within their own ranks. In this respect, the Bangalore Principles of Judicial Conduct give detailed guidelines in relation to judges maintaining impartiality in judicial proceedings.<sup>156</sup>

As a corollary to judges impartiality, Principle 3 of the UN Basic Principles states that the judiciary shall have jurisdiction over all cases of a judicial nature. The independence of the judiciary can only have real meaning if judicial functions are vested exclusively in the judiciary. Failure to do so can have the adverse effect of allowing politicians to create *quasi* judicial bodies thereby circumventing the courts.<sup>157</sup> In Zimbabwe for example, courts were stripped of

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<sup>155</sup> See Fombad, 2001-2003, Denning Law Journal, 16, 17, 29.

<sup>156</sup> See Bangalore Principles 2 and 5.

<sup>157</sup> See Russell, 'Toward a General Theory of Judicial Independence' in Russell; O'Brien, "Judicial Independence In The Age Of Democracy: Critical Perspectives from Around the World", 14. In a discussion on structural threats to judicial independence, Russell opines that, 'Court packing is by no means the only way in which political authorities may abuse the power they possess over judicial structure. Governments may strip courts of their jurisdiction to adjudicate matters in which the government of the day has a vital interest, or they may transfer jurisdiction over such matters from the regular courts to tribunals whose decision makers lack the security of tenure enjoyed by the judiciary.'

the jurisdiction to determine the constitutionality of land acquisitions by the government.<sup>158</sup> The Zimbabwean experience clearly shows that vesting judicial power in politicians is problematic and prone to abuse.<sup>159</sup>

At the regional level, several countries in Africa have in one form or another constitutionally entrenched the independent role of the judiciary in their governance systems. The constitutional entrenchment of judicial independence is evident in Anglophone, Francophone and in Lusophone African countries.<sup>160</sup> For example, the Constitution of South Africa goes much further than most Anglophone African countries in giving a detailed account of the judiciary's institutional autonomy.<sup>161</sup> By way of contrast, the Constitutions of Francophone African countries subordinate the judiciary to the executive. This is due to the fact that most of these countries have constitutions which are basically clones of the French Gaullist model. This model is rooted in the general distrust of the judiciary and does not recognize the judiciary as a separate and equal organ of state. For example, Article 127 of the Benin Constitution proclaims the President as the guarantor of the independence of the judiciary. It is clear that such provisions are meant to send a strong message that the judiciary is subordinate to the executive arm of government.<sup>162</sup>

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<sup>158</sup> See the following cases, *Commercial Farmers Union v. Minister of Lands* 2000 2 ZLR 469(S); *Commissioner of Police v CFU* 2000 1 ZLR 503 (H); *Davies and Ors v. Minister of Lands* 1996 1 ZLR 681(S); *Commercial Farmers Union and Others v. The Minister of Lands and Rural Resettlement* SC 31/10; *Mike Campbell (Pvt) Ltd and Others v. The Minister of National Security Responsible for Land, Land Reform and Resettlement and Another* SC 49/07. These cases dealt with the contentious compulsory acquisitions of land. They also reflect the shift in the court's jurisprudence in relation to the right to property occasioned by the reshuffled Supreme Court bench.

<sup>159</sup> See also the judgment by Froneman J in *Special Investigating Unit v. Ngcinwana and Another* 2001 4 SA 774 ECD which re-affirms the separation of powers doctrine in a constitutional democracy by 'attacking legislative erosion of judicial independence by purporting to vest judicial authority in a body which by its composition, competence and procedures does not fit into the judicial hierarchy'

<sup>160</sup> See generally Fombad, 'Some Perspectives On The Prospects For Judicial Independence In Post-1990 African Constitutions' 2001-2003, *Denning Law Journal*, 16, 17, 29.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid* at 30.

## 2.4.2 Security of tenure

The security of tenure for members of the judiciary is generally ‘regarded as a *sine qua non* of judicial independence.’<sup>163</sup> The importance of security of tenure for the judicial office has been underscored in several regional and international instruments on judicial independence.<sup>164</sup> Most of these instruments on judicial independence seem to point to three features which guarantee security of tenure. These are the tenure of judicial office, constitutionally entrenched grounds of removal, and the due process of removal and discipline. These features are intended to insulate judges from undue external and internal pressure. Due to the importance of the judiciary in the adjudication process, and taking into account that judges sometimes rule against the central government, the failure to provide safeguards for the judicial office can have detrimental consequences. If judges can be removed from office on flimsy grounds, the whole administration of justice is consequently jeopardized.

### 2.4.2.1 Security of judicial office

The security of judicial office is guaranteed in two ways. For example, Principle 12 of the UN Basic Principles states that:

*‘Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.’*

It is submitted that judicial tenure is at best guaranteed when judges are appointed for life or appointed for a fixed term. It remains unsettled as to which of the two mechanisms best

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<sup>163</sup>Ibid at 32.

<sup>164</sup> See also Article 10 of the Universal Declaration of Human Rights(1948); Article 7 of the African Charter on Human and Peoples’ Rights(1981); the UN Basic Principles on the Independence of the Judiciary(1985), the Beijing Principles on the Independence of the Judiciary(1995), the Latimer House Guidelines on the Independence of the Judiciary(1998), the Universal Principles of Judicial Independence for the SADC Region(2004); the Universal Charter of the Judge(1999), the Bangalore Principles on Judicial Conduct(2002); the International Bar Association Minimum Standards of Judicial Independence(1982); the Syracuse Draft Principle on Independence of the Judiciary(1981); Montreal Universal Declaration on the Independence of Justice(1983); the International Covenant on Civil and Political Rights.

guarantees judicial tenure with pros and cons attaching to each method. However, a recent study in transitional countries established that ‘judges without life tenure comply more with government preference than life tenured judges.’<sup>165</sup>

It is apparent that countries utilize a variety of tenure systems and within these systems, variations occur depending on the level of court concerned. The diversity of tenure systems is therefore indicative of the different conceptions of judicial independence. The diversity of tenure systems is also evident on the African terrain. For example, Francophone countries typically follow a career judiciary which guarantees life tenure while Anglophone countries have a non-career system with wide variations depending on each particular system.<sup>166</sup>

#### **2.4.2.2 Removal from office**

The removal of judges from office is a critical component of security of tenure. Regardless of the merits that may attach to a system of judicial appointment, its value is diminished if the political authorities can easily remove judges from office.<sup>167</sup> Russell opines that “judicial independence is less at risk at the front end of the personnel process- the appointing end- if there is a strong system of judicial tenure at the back end- the removal end.”<sup>168</sup> Once appointed into office, judges must perform their duties fully conscious that whatever decisions they render will not impact on their judicial tenure. In any event, judges can perform better when they are not worried about the security of their tenure. It is hardly surprising therefore that much scholarly attention has been given to the mechanisms of removing judges from office.<sup>169</sup>

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<sup>165</sup> See Tien Dung, ‘Judicial Independence in Transitional Countries’ 2003, UNDP, 18 available at <http://www.albacharia.ma/xmlui/bitstream/handle/123456789/30543/0291Judicial%20Independence%20in%20Tansitional%20Countries.pdf?sequence=1> accessed on 16/11/12.

<sup>166</sup> See generally Fombad, 2001-2003 Denning Law Journal, 16, 17, 32.

<sup>167</sup> See Madhuku, 2006, SAPR/PL, 21, 351.

<sup>168</sup> See Russell at 16.

<sup>169</sup> See generally Frankel, ‘Judicial Discipline and Removal’ 1965-1966, Texas Law Review, 44, 1117.

Similarly, several regional and international instruments also specifically address the grounds for removal of judges from office.<sup>170</sup>

The constitutional entrenchment of the grounds of removal is critical as it promotes transparency since judges can only be removed from office on clearly laid down grounds. Delegating removal grounds to ordinary legislation can be risky as ordinary legislation can easily be overridden by simple legislative majorities. The trend in Francophone and Lusophone African countries is to defer the details on the grounds of removal to ordinary legislation whereas most of the constitutions in Anglophone Africa constitutionally entrench these grounds.<sup>171</sup> However, an emerging trend in most countries is to complement these traditional techniques with the creation of judicial codes of conduct. These judicial codes expand the removal grounds in the constitution by providing for specific acts or conduct which are tantamount to judicial misbehavior. A case in point is Zimbabwe which recently enacted a judicial code of conduct into law.<sup>172</sup>

#### **2.4.2.3 Due process of removal and discipline**

Closely intertwined with the removal of judges is the manner in which disciplinary proceedings are conducted against judges.<sup>173</sup> It is critical that disciplinary proceedings be clearly articulated in the constitution as a safeguard against abuse of the process for political ends. Where the judicial office is prone to the capricious depredations of the executive or the legislature, the exercise of judicial office becomes a daunting one. Safeguards against undue processes of removal are best guaranteed when the disciplinary procedures and processes are constitutionally entrenched.<sup>174</sup> In addition to a transparent laid down disciplinary procedure,

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<sup>170</sup> See for example Principle 17 of the UN Basic Principles on the Independence of the Judiciary; the Latimer House Guidelines VI.1.

<sup>171</sup> See Fombad, 2001-2003 Denning Law Journal, 16, 17, 34.

<sup>172</sup> See Judicial Service (Code of Ethics) Regulations, 2012.

<sup>173</sup> See the Zimbabwean case of *Benjamin Paradza v. The Minister of Justice, Legal and Parliamentary Affairs SC46/03*.

<sup>174</sup> See Principle 19 of the UN Basic Principles on the Independence of the Judiciary.

the deliberations of such proceedings should be subject to judicial review.<sup>175</sup> The fairness of the disciplinary proceedings is also determined by the composition of the disciplinary tribunal. If the tribunal is dominated by executive appointees, this may cast serious doubt on the procedural fairness of the proceedings especially in cases where the complaint is emanating from the executive.

The critical nature of the removal provisions in African constitutional systems was aptly underscored by one scholar in the following terms:

*'The issue of disciplining and removing judges is particularly important at this critical stage of the democratic transition in Africa where judges play an important role in election disputes.'*<sup>176</sup>

We need not go very far into history to identify instances which highlight the importance of the judiciary in adjudicating election disputes.<sup>177</sup> Where politicians fear that judges will not rule in their favour, the possibility of arbitrary removals from office cannot be discounted. Furthermore, as African countries attempt to address colonial economic imbalances, issues of land reform and nationalization necessarily come to the fore. In most cases, these issues spill into the courts and the judiciary as an independent institution, is expected to play its role without any fear of reprisals. An important lesson on constitutionalism in Africa is to guard not only against real threats to the independence of the judiciary but also against likely possibilities.

The necessity for more clarity in respect of the removal mechanisms of judges from office in Africa generally is evident. The importance of removal mechanisms was underscored by the African Commission on Human and Peoples' Rights in 2002. The Commission determined that arbitrary dismissals of judges from office constituted state breaches of obligations towards upholding judicial independence.<sup>178</sup> A survey of the situations prevailing in African countries

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<sup>175</sup> See Principle 20 of the UN Basic Principles on the Independence of the Judiciary.

<sup>176</sup> See Fombad, 2001-2003 Denning Law Journal, 16, 17, 34.

<sup>177</sup> For example, since 2000, both presidential and parliamentary elections in Zimbabwe have been subject to court battles. The same applies to the 2007 Kenyan presidential election.

<sup>178</sup> See *Lawyers for Human Rights v. Swaziland*, Communication No. 251/2002.

reveals a plethora of removal mechanisms. For example, the Malawian Constitution delegates the power of removal of judges to the National Assembly.<sup>179</sup> The Malawian process basically puts judges in a precarious position as they are not sufficiently insulated from political shenanigans. Interestingly, several scholars identify the South African system as ‘the best example of a fairly transparent system.’<sup>180</sup>

A critical aspect pertaining to the due process of removal and discipline is the liability of judges to criminal and civil suits. Clearly, it is undesirable to leave judges at the mercy of lawsuits which emanate from decisions rendered whilst fulfilling their mandate. Allowing such a scenario would be tantamount to destroying the very basis of fairness and impartiality in the adjudicative process. The issue of insulating judges from civil and criminal suits has generated its fair share of controversy. There are strong arguments in favour of dealing with wayward judges through the normal judicial disciplinary procedures. At the other end of the spectrum are those who argue for equality of all before the law which means judges must not be immune from civil and criminal suits. The Zimbabwean Supreme Court had the occasion to deal with the legality of an arrest effected on a judge arising from a criminal charge.<sup>181</sup> The Supreme Court ruled that such an arrest did not violate the independence of the judiciary as envisaged in the Constitution as judges are not immune from liability for acts done outside the scope of exercising judicial authority.

### **2.4.3 Judicial selection**

The manner of selecting judges has a strong bearing on the independence of the judiciary as highlighted in several regional and international instruments.<sup>182</sup> For instance, a judiciary whose

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<sup>179</sup> See section 119 of the Malawian Constitution.

<sup>180</sup> See Fombad, 2001-2003 *Denning Law Journal*, 16, 17, 35. See also Madhuku, 2002 *Journal of African Law*, 4, 241.

<sup>181</sup> See the case of Benjamin *Paradza v. The Minister of Justice, Legal and Parliamentary Affairs* SC46/03.

<sup>182</sup> See also Article 10 of the Universal Declaration of Human Rights(1948); Article 7 of the African Charter on Human and Peoples’ Rights(1981); the UN Basic Principles on the Independence of the Judiciary(1985), the Beijing Principles on the Independence of the Judiciary(1995), the Latimer House Guidelines on the Independence of the Judiciary(1998), the Universal Principles of Judicial Independence for the SADC Region(2004); the Universal Charter

members have been appointed on the basis of political patronage cannot be expected to fulfil its adjudicative functions in a fair and impartial manner. Governments of the day usually pose the most serious threat to the independence of the judiciary. If politicians are permitted unfettered discretion in judicial selection, the whole administration of justice is more likely to be put into disrepute. Whilst it is unavoidable that the executive will have a role to play in the judicial selection process, there is a clear need for a process which champions meritocracy as a virtue. A credible system of judicial selection must also instil public confidence in the calibre of persons appointed to the bench.

Principle 10 of the UN Principles on the Independence of the Judiciary provides guidance on the essentials of a credible system of judicial selection.<sup>183</sup> An assessment of whether a judicial selection process promotes an independent and effective judiciary hinges on two paramount considerations. The first consideration relates to the criteria for judicial selection. Constitutionally entrenched criteria for judicial selection are an important safeguard against appointments motivated by other considerations outside merit. In this respect, criteria such as qualifications and legal experience must be clearly spelt out. The second consideration relates to the procedure for nominating and appointing judges.<sup>184</sup> Procedurally, the prospects for an independent judiciary are enhanced when the judicial selection mechanisms are transparent. Openness and transparency in the manner of selecting judges allows principled public debate on the merits or demerits of prospective judicial candidates. Transparency in judicial

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of the Judge(1999), the Bangalore Principles on Judicial Conduct(2002); the International Bar Association Minimum Standards of Judicial Independence(1982); the Syracuse Draft Principle on Independence of the Judiciary(1981); Montreal Universal Declaration on the Independence of Justice(1983); the International Covenant on Civil and Political Rights.

<sup>183</sup> “Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.” See also Article 9 of the Universal Charter of the Judge; Principle 11-12 of the Beijing Statements of the Independence of the Judiciary; Principle IV(a) of the Latimer House Guidelines on the Independence of the Judiciary.

<sup>184</sup> See Russell at 23.

appointments entails several processes which include publicly advertising judicial vacancies, conducting public interviews, and using a body representative of key stakeholders such as a judicial appointment commission.

Generally, judicial selection systems come in five basic configurations across the civil and common law divide namely, appointment by political institutions, judicial self-appointment, appointment by a commission or council, civil career judiciary and appointment through the electoral system.<sup>185</sup> Appointment by political institutions usually involves appointments by the executive with or without the involvement of the legislature. Judicial self-appointment involves members of the judiciary playing a pivotal role in the selection process.<sup>186</sup> Appointment by a commission is gaining popularity in emerging democracies. The commission is usually constituted by members from diverse backgrounds the paramount objective being to avoid its domination by political actors. The commission's role differs across countries with some having greater input in the selection process through recommendations which bind the appointing authorities.

On the other hand, a civil career system entails prospective judicial candidates go through specialized training before being appointed as judicial officers. This system of appointment is found predominantly in civil law countries. The electoral system of judicial selection entails appointment to judicial office through popular vote. The election can either be partisan or non-partisan. This system is utilized by several states in the United States of America.<sup>187</sup> It is also utilized in the selection of lay judges in Lusophone countries such as Mozambique.<sup>188</sup> Countries also utilize a variety of selection systems depending on the level of the court. The higher courts tend to have significantly higher levels of political influence in the appointment process compared to the lower courts.

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<sup>185</sup> See [www.constitutionmaking.org/files/jud](http://www.constitutionmaking.org/files/jud) accessed on 15/06/2012.

<sup>186</sup> For example, this scenario is evident in India.

<sup>187</sup> See later discussions on the leading judicial appointment systems in the world.

<sup>188</sup> See this study's background discussions.

The diversity of judicial selection systems is evident in Africa.<sup>189</sup> In fact, there are various variants of judicial selection systems in Africa such that it is not feasible to clearly demarcate the selection systems.<sup>190</sup> As observed earlier, countries typically utilize a wide range of judicial selection mechanisms which reflect their different conceptions of judicial independence.<sup>191</sup> This therefore suggests strongly that there is no consensus on the best manner to appoint judicial officers. Rather, legal systems are grappling with balancing judicial independence, and accountability in the judicial selection process.<sup>192</sup> As such, it remains difficult to come up with a blueprint on how a legal system ought to select its superior court judges.

#### **2.4.4 Financial independence**

The financial autonomy of the judiciary is an important element in establishing the independence of the judiciary. Ideally, judges must be guaranteed their salaries to avoid improper pressures of a financial nature being exerted on them. A judiciary without adequate financial resources is prone to corruption and underhand dealings. Due to the importance of the judicial role in modern day governance systems, the risk posed to the rule of law by an underfunded judiciary is high.<sup>193</sup> Moreover, limited budgets result in poor working conditions that undermine respect for the judiciary.<sup>194</sup> Entrusting budgetary responsibilities within the judiciary itself creates a framework that fosters judicial independence<sup>195</sup> as the courts do not have to rely on political pressure or compromise to get a fair allocation.

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<sup>189</sup> See Fombad, 2001-2003 Denning Law Journal, 16, 17, 38.

<sup>190</sup> Ibid at 37.

<sup>191</sup> See also Akkas, 'Appointment of Judges: A Key Issue of Judicial Independence' 2004, Bond Law Review, 16, 2, 201.

<sup>192</sup> See Clark, 'Advice and Consent vs Silence and Dissent? The Contrasting Roles of the Legislature in US and UK Judicial Appointments' 71 LALR, 451. See also Fombad, 2001-2003 Denning Law Journal, 16, 17, 34.

<sup>193</sup> See generally Ferguson, 'Judicial Financial Autonomy and Inherent Power' 1971-1972, Cornell Law Review, 57, 975.

<sup>194</sup> See Van De Vyver, 8.

<sup>195</sup> Ibid. See also Ferguson, 977.

The Latimer House Principles best capture the essence of judicial financial autonomy in the following terms:

*'Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary. Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary. As a matter of principle, judicial salaries and benefits should be set aside by an independent body and their value should be maintained.'*<sup>196</sup>

The judiciary's financial independence can be secured principally in two ways. The first safeguard is a constitutional provision barring the reduction of judges salaries during their tenure in office and secondly, constitutionally prescribing that judicial salaries be charged on the Consolidated Revenue Fund. This means that the executive cannot verament the funds specifically set aside for the judiciary. Charging the budget to the Consolidated Revenue Fund insulates the judges from legislative bargains during the passage of the budget in Parliament.

On the African terrain, most of the constitutions of Anglophone countries address the remuneration of judges by charging the judiciary's budget to the Consolidated Revenue Fund.<sup>197</sup> The situation is quite different in Francophone and Lusophone African countries which do not constitutionally secure the judiciary's financial independence but relegate such matters to ordinary legislation.<sup>198</sup> The judiciary's financial autonomy is not only guaranteed by mechanisms barring reduction of salaries. The judiciary's financial autonomy is also threatened when the executive can arbitrarily increase salaries when it politically suits them especially when there are politically sensitive cases pending before the courts. A case in point is Zambia. In a study on

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<sup>196</sup> See Latimer House Guidelines II)2.

<sup>197</sup> See generally section 99(3) of the Botswana Constitution; section 176(3) of the South African Constitution.

<sup>198</sup> See the Constitutions of Angola and Mali.

the accountability of courts in Tanzania and Zambia, Gloppen notes that Presidents Chiluba and Mwanawasa increased judicial salaries at a time when election petitions against both were pending before the courts.<sup>199</sup> Clearly, the independence of the judiciary is threatened when politicians can use either granting or withholding funding as a means to coerce the judiciary to decide cases in a particular manner.

While the importance of funding the judiciary is acknowledged, certain practical constraints emerge, especially in the African context. Most of the African countries are burdened by external debt coupled with stringent budgetary constraints imposed by international financial institutions.<sup>200</sup> The situation is worsened when bad governance and a lack of accountability on the part of the government comes into play. In such an economic environment, the judiciary is more than likely to receive inadequate funding depending on the priorities of the executive in distributing the national 'cake'.

#### **2.4.5 Judicial accountability**

In as much as the other organs of state are accountable to society, judges must also be democratically accountable to the general society to avoid a tyranny of judges.<sup>201</sup> The virtues of judicial office necessarily dictate that judges cannot be a law unto themselves. The judiciary must be accountable to the public for both its decisions and operations in a liberal democratic system.<sup>202</sup> Consequently, the more independent the judiciary is, the more accountable it has to be.

In Africa, the accountability of the judiciary is an especially pressing concern. The 'third wave' of democratization in Africa has necessarily resulted in the emergence of judiciaries with more

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<sup>199</sup> See Gloppen, 'The Accountability Function of the Courts in Tanzania and Zambia' 2003, *Democratization*, 10:4, 112-136 at 126.

<sup>200</sup> See generally Widner, 'Judicial Independence in Common Law Africa' in USAID "Guidance for Promoting Judicial Independence and Impartiality" 2002 available at [http://pdf.usaid.gov/pdf\\_docs/PNACM007.pdf](http://pdf.usaid.gov/pdf_docs/PNACM007.pdf) accessed on 14/11/12.

<sup>201</sup> See Shetreet at 47.

<sup>202</sup> See Van De Vyver, 9.

powers of judicial review.<sup>203</sup> The powers of the courts to strike down legislation as being *ultra vires* the constitution has led to renewed calls for greater judicial accountability.<sup>204</sup> Judicial corruption has also dominated judicial accountability debates especially in Africa.<sup>205</sup> There is a general perception that high rates of judicial corruption are prevalent in developing countries,<sup>206</sup> and this makes judicial accountability an important tool in promoting the judiciary's responsibility to society.<sup>207</sup>

Legal systems across the world have been grappling with balancing the independence of the judiciary and judicial accountability. While respecting the independence of the judiciary, a right balance must be struck between judicial independence and accountability. Invariably, the two values are not diametric opposites.<sup>208</sup> In reality they complement each other. Whilst there is no specific formula to balance these two ideals, any mechanism meant to foster judicial accountability must nevertheless not endanger judicial independence.<sup>209</sup>

A distinction is sometimes made between the individual accountability of judges and the institutional accountability of the judiciary as a whole.<sup>210</sup> A survey of the literature on judicial accountability identifies four basic elements of it, which are transparency, political accountability, personal accountability and public accountability.<sup>211</sup> These elements of judicial

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<sup>203</sup> See generally Fombad, 2007 *The American Journal of Comparative Law*, 55, 1 (Winter).

<sup>204</sup> See Russell at 19.

<sup>205</sup> See generally Widner, 'Judicial Independence in Common Law Africa' available at [www.transition.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacm007.pdf](http://www.transition.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf) accessed on 14/11/12.

<sup>206</sup> See Tien Dung, 28.

<sup>207</sup> See Handberg, 'Judicial Accountability and Independence: Balancing Incompatibles?' 1994-1995, *Miami Law Review*, 49,129.

<sup>208</sup> *Ibid.*

<sup>209</sup> See Tien Dung, 27.

<sup>210</sup> See Carpenter, 'Judiciaries in the spotlight' 2006, *CILSA XXXIX*, 382.

<sup>211</sup> See generally Van Der Vyver, 10. See also Carpenter, 381.

accountability hinge on indentifying whom judges are accountable to and the mechanism to ensure that accountability.<sup>212</sup>

Transparency appears to be the key to judicial accountability.<sup>213</sup> It necessarily follows that, transparency is the key to both judicial independence and accountability.<sup>214</sup> Transparency entails several factors. First, judicial accountability is strengthened when judges are appointed on merit using a transparent judicial appointment criteria. An open and participatory judicial selection system has better prospects of selecting more competent judges.<sup>215</sup> Invariably, judges appointed in such a manner are better placed to administer their judicial functions in a fair and impartial manner. Second, a transparent mechanism of registering complaints against judicial impropriety is an important aspect of judicial accountability.<sup>216</sup> It leads to greater public confidence in the judiciary. Where acts of misconduct by judges are subject to secretive disciplinary processes, public confidence and trust in the administration of justice is greatly diminished. Third, the open court system coupled with public access to court records increases transparency in the whole adjudicative process. In some jurisdictions, the judiciary publishes annual reports which are an important information tool which promotes public debate concerning the judiciary's activities. Another important aspect of external accountability relates to commentaries on court judgments. For example, external review of judgments by scholars tends to promote sound court decisions as the judges will be conscious of the fact that the decisions that they render will be scrutinized.

It is important to note that many countries are increasingly fostering judicial accountability through judicial codes of conduct which go a long way in promoting internal accountability. Judicial codes of conduct are primarily meant to arrest any rot within the judiciary by stipulating

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<sup>212</sup> See Carpenter, 382.

<sup>213</sup> See Fombad, 2001-2003 Denning Law Journal, 16, 17, 40.

<sup>214</sup> See Van Der Vyver, 10.

<sup>215</sup> See Tien Dung, 28.

<sup>216</sup> See Van De Vyver, 10.

standards of ethics expected of judges. These standards also serve as grounds for disciplinary action.<sup>217</sup> As earlier alluded to, a case in point is Zimbabwe which following widespread complaints from the legal fraternity against the judiciary's ineptitude, enacted a judicial code of conduct into law.<sup>218</sup>

Other mechanisms of enhancing judicial accountability have been formulated such as performance evaluations and judicial training for judges. Performance evaluations for judges are now a common feature in many states in the United States.<sup>219</sup> By their nature, performance evaluations can encourage high standards of professionalism on the part of judges. The caveat however, is that such evaluations must not be a mechanism for witch-hunting especially if judges render politically unpopular decisions. Other mechanisms of fostering internal accountability include appeal processes which ensure that the court decisions are reviewed by a higher court. This tends to promote sound judicial decisions as judges know in advance that their judgments can be taken on appeal.

With the analysis of the key elements of judicial independence undertaken, it is necessary at this point to move on to discussions on the judicial selection mechanisms in the world's leading legal traditions.

## **2.5 Overview of the leading judicial selection systems**

In order to put this comparative study into perspective, it is necessary to provide an overview of the leading judicial selection systems which have had a tremendous influence on the development of judicial selection systems across the world. Without doubt, the American, British and French judicial systems have generally influenced in one way or another, the judicial selection processes in Mozambique, South Africa and Zimbabwe. Evidently, there has been a lot

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<sup>217</sup> See generally the Bangalore Principles of Judicial Conduct.

<sup>218</sup> See Judicial Service (Code of Ethics) Regulations, 2012.

<sup>219</sup> See Russell, 19.

of constitutional borrowing across legal systems such that it becomes imperative to understand the dynamics prevailing in the source legal system of a particular norm.<sup>220</sup>

### 2.5.1 The American system

The current judicial selection framework in the United States can be traced back to Constitutional Convention of 1789.<sup>221</sup> The Judiciary Act of 1789 established a judicial system comprising the Supreme Court, the Circuit Court of Appeals and the District Courts.<sup>222</sup> Following this, and for much of America's constitutional development, the foundation laid in 1789 remained intact up to the present day at the Federal level. This has created a two tier system of courts with one tier featuring the federal courts,<sup>223</sup> and the other tier consisting of state courts.<sup>224</sup> A peculiarity of the American judicial system is the power of all state and federal courts to strike down legislation on the grounds of unconstitutionality.<sup>225</sup> Such a power invariably makes the judicial selection mechanisms which determine the caliber of judicial candidates an important political tool.

For the purposes of this study, the vastness of the mechanisms employed at the state level entails that one can only focus on the major highlights of the diverse selection mechanisms. The state and federal courts have different mechanisms of judicial selection. At the state level, American states utilize a variety of judicial selection mechanisms ranging from selection through judicial appointment commissions, the election of judges by popular vote or by the legislature and executive appointments. The methods of judicial selection vary at the state level depending on the level of the court. However, judicial selection through popular or legislative

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<sup>220</sup> For a discussion on constitutional borrowing viz a viz judicial selection, see generally Epstein; Knight "Constitutional borrowing and non-borrowing" 2003, I.CON, 1, 2, 196-223.

<sup>221</sup> See Carp; Stidham, "Judicial Process in America" 2001, 5<sup>th</sup> ed, CQ Press, 26.

<sup>222</sup> Ibid.

<sup>223</sup> The Federal courts comprise the Supreme Court, Circuit Court of Appeals and the District Courts.

<sup>224</sup> State courts comprise the state Supreme Court, Appellate Courts, District Courts and the County Courts.

<sup>225</sup> See Bailey, 'The American Judiciary' 1915, The Virginia Law Register, New Series, 1, 8, 576.

vote is the most popular selection method at the state level. Judicial elections as a method of selection owe their popularity to the Jacksonians in the 1820s and 1830s. The method was promoted as a way of ‘democratizing the government and displacing established elites.’<sup>226</sup> Judicial elections have been justified as an attempt at balancing independence and accountability. The mechanisms of judicial elections vary. Thirty one states select their judges through partisan or non-partisan elections.<sup>227</sup> In some states, the Governor makes the initial judicial appointment and thereafter the judges face a retention election in which the voters decide whether the judge will continue to serve or not.<sup>228</sup> Judicial elections as a method of appointing judges have been subjected to a lot of criticism. The most cogent of the criticisms is that judicial elections whether partisan or not necessarily inject ‘politics into judicial selection and judicial decisions.’<sup>229</sup> This does not mean to say that other selection systems do not involve political considerations. The extent to which the campaigning involved in judicial elections exposes judicial candidates to politicking is a cause for concern.<sup>230</sup>

The Federal judges or Article III judges are appointed by the President of the United States with the advice and consent of the Senate. All the Federal judges are selected in the same way and they all have life tenures. The Article III selection and tenure rules have an important impact on

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<sup>226</sup> See Tushnet, ‘The Constitution of the United States of America: A Contextual Analysis’ 2009, Hart Publishing, 125.

<sup>227</sup> See Volcansek, ‘Judicial Elections And American Exceptionalism: A Comparative Perspective’ 2011, DePaul Law Review, 805.

<sup>228</sup> See Tushnet, 2009, Hart Publishing, 126.

<sup>229</sup> See Volcansek, 2011 DePaul Law Review, 805.

<sup>230</sup> See Laski, ‘The Technique of Judicial Appointment’ 1926, Michigan Law Review, 24, 6, 531. Laski argues that, ‘Insofar as its underlying assumption is the belief that the people should choose those by whom they are to be governed, it omits to note the vital fact that the qualifications for judicial office are not such as an undifferentiated public can properly assess. The constitutional qualifications, of age, citizenship, good character and the rest, have little meaning. Knowledge of the law, the balanced mind, the ability to brush aside inessentials and drive to the heart of a case, that a candidate will possess these qualities can, at best, be known only to a few. The people do not in fact choose their judges. They decide between the candidates of opposing parties, and with rare exceptions, they merely vote for the colour they happen to prefer...’

the decisional and institutional independence of the judiciary.<sup>231</sup> The federal judges selection process entails that the President takes the initiative in making or pushing for particular appointments and the Senate's role is simply to confirm or reject the nomination.<sup>232</sup> Invariably, the selection of judges at the federal level is a highly political process<sup>233</sup> and much depends on the President's political inclinations.<sup>234</sup> According to Graves and Howard, appointments to the federal judiciary have also been a 'contentious process driven by political and ideological concerns.'<sup>235</sup> Consequently, for the greater part of American history, Supreme Court appointments<sup>236</sup> have also hinged on patronage.<sup>237</sup> It is hardly surprising therefore that the

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<sup>231</sup> See Jackson, 'Packages of Judicial Independence: The Selection and Tenure of Article III Judges' 2007, *Georgetown Law Journal*, 95, 965.

<sup>232</sup> See Tushnet, 2009 Hart Publishing, 127. See also Shapiro, 'Courts: A Comparative and Political Analysis' 1981, Chicago, University of Chicago Press.

<sup>233</sup> See Tushnet, 2009 Hart Publishing, 130. See also Tolley, 'Legal Controversies over Federal Judicial Selection in the United States: Breaking the Cycle of Obstruction and Retribution over Judicial Appointments' in Malleson, Russell, "Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World" 2006, Toronto ; Buffalo : University of Toronto Press, 8. Tolley notes that, 'when vacancies occur, presidents are expected to send their nominations to the Senate, which is in turn expected to act on the nominations in a timely fashion. Normal practice has been for the Senate to work expeditiously to get the nominee a hearing and vote from the Judiciary Committee. If the committee's vote is favourable, party leaders will work to schedule a confirmation vote by the full Senate...though the Constitution is silent on the requirement for consent, the practice from the very beginning has been for the Senate to confirm judicial nominees by a simple majority vote. Failing to obtain a majority vote means that the Senate does not consent to the President's nomination.'

<sup>234</sup> According to Tushnet, "The way the executive Branch handles the nomination process varies depending on the president's political interest in judicial appointments. The task of evaluating potential nominees is divided between the Department of Justice and the executive office of the president- that is the White House and specifically the office of the president's counsel. This produces a natural division of labor: the Department of Justice tends to concentrate its attention on nominees qualifications, including the nominees' judicial philosophy, while the White House tends to focus on the political dimensions of the appointment"

<sup>235</sup> See Graves; Howard, 'Ignoring Advice and Consent? The Uses of Judicial Recess Appointments' 2010, *Political Research Quarterly*, 63, 3, 641.

<sup>236</sup> See Choi; Gulati, 'A Tournament of Judges' 2004, *California Law Review*, 92, 301. Choi and Gulati note that; '...the present Supreme Court selection system is so abysmal that even choice by lottery might be more productive. We also believe that politics is primarily to blame. The present level of partisan bickering has not only unduly delayed judicial appointments, it has also undermined the public's confidence in the objectivity of those justices that are ultimately selected. Because it is disguised by claims about a particular candidate's merit, however, much of the politicking has escaped the public eye. The confirmation process has thus become an exercise in question-begging. Politicians claim that a candidate is qualified yet rarely tell us what that means. Our best guess is that

federal judicial selection process has been a hotbed of political battles.<sup>238</sup> This occurs where the Senate is controlled by a different political party than that of the President. This has often resulted in delayed appointments and the use of recess appointments<sup>239</sup> by the President to counter Senatorial delaying tactics.<sup>240</sup> The use of recess appointments has been criticized as it flouts the separation of powers concept by allowing the President to make judicial appointments without the advice and consent of the Senate.<sup>241</sup> Conversely, a President whose political party controls Senate will inevitably be able to constitute the federal judiciary with his

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politicians define merit in terms of ideology, and argue accordingly. We suggest that a market based system would be an improvement.'

<sup>237</sup> See Tushnet, 2009 Hart Publishing, 131. According to Tushnet, "A president would reward a political supporter or seek to secure continuing loyalty by nominating him or his preferred candidate. Some nominations were a different kind of patronage-appointments of the president's personal friends and advisers. Demographic geographic representation in nominations was the form that interest-group politics took in the appointment process. All these variations of politics continue to play a role."

<sup>238</sup> According to Graves and Howard at 641, "Republican presidents overwhelmingly appoint Republican judges, and Democratic presidents overwhelmingly appoint Democratic judges, although at least for the Supreme Court, political party matters less than ideology. On the whole, presidents are remarkably successful in pushing through their nominees and in finding ideologically similar justices, even if ideological concordance between judges and presidents varies from president to president, at least at the Supreme Court level. In short, a president seeks to increase his institutional power through the appointment process. In a separation of powers system, an ideologically compatible judiciary is far more likely than not to support presidential preferences."

<sup>239</sup> Recess appointments are appointments which are made by the President when the Senate is on recess. See Article II, section 2 of the US Constitution. See also Tolley, 'Legal Controversies over Federal Judicial Selection in the United States: Breaking the Cycle of Obstruction and Retribution over Judicial Appointments', 83.

<sup>240</sup> See Tolley, 81. There are many examples of politicking over judicial appointments. For example, Republicans thwarted President Bill Clinton's attempts to fill vacancies in the lower federal courts by placing 'holds' on over a hundreds of his nominations. Senate Democrats also resorted to the same obstructive tactics throughout President George W. Bush's first term in office.

<sup>241</sup> For example, the 2004 recess appointment of William H. Pryor Jr by President George W. Bush raised a lot of controversy and ignited debate on the constitutionality of recess appointments. See Carrier, 'When is the Senate in recess for purposes of recess appointments clause?' 1994, Michigan Law Review, 92, 2204-47; Cooper; Philip, 'By order of the president: The use and abuse of executive direct action' 2002, University Press of Kansas; Curtis, 'Recess appointments to Article III courts: The use of historical practice in constitutional interpretation' 1984, Columbia Law Review, 84,1758-1791; Epstein; Segal, 'Advice and consent: The politics of judicial appointments' 2005, Oxford University Press; Hurt; Charles, 'Bush again installs a judge at recess; defies filibuster of Democrats' 2004, Washington Times, February 21, A01.

ideological ‘clones.’<sup>242</sup> Although the strong tenure provisions in Article III have gone a long way in insulating judges from external pressures, a highly ideological or partisan selection process runs the risk of conveying ‘the expectation that decisions should be in accord with political ideology.’<sup>243</sup>

Despite these contentious issues, the political culture in America has nevertheless prevented the political battles surrounding judicial appointments from disrupting the proper functioning of the judiciary.<sup>244</sup> An important lesson that can be taken from the American experience is that there are several factors that determine judicial appointments. Chief among them are political considerations. The situation is exacerbated by the fact that the American Constitution does not stipulate the formal qualifications for judicial office. At least at the Federal level, it is apparent that any perceived weaknesses of the judicial selection processes are remedied by other robust mechanisms such as tenure rules, financial security provisions which basically guarantee the decisional and institutional independence of the judiciary.

### **2.5.2 The English System**

The English judicial system has had a tremendous influence on the development of legal systems in common law countries. The current judicial selection mechanisms in England are a culmination of various reform processes experienced over the centuries. It is not the aim of this

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<sup>242</sup> According to Tushnet, 128-29, “Federal trial-level judges, called ‘district judges’, are appointed to districts consisting of a single state or, more often, part of a single state. That gives local Senators a particularly strong political interest in influencing the nomination. Nominees are usually local lawyers who have been active in the president’s party and who are associates of party leaders in the state. In a state with one or two Senators from the president’s party, those Senators typically come up with a list of lawyers whose appointment they would support, and the president chooses from that list. Some senators imbued with good-government values appoint a committee to screen potential nominees and present the Senator with a more-merit based list, which the Senator will then evaluate and perhaps revise before sending it on to the president. Even here, though, it seems clear that the appointments have some degree of patronage about them...”

<sup>243</sup> See Jackson, ‘Packages of Judicial Independence: The Selection and Tenure of Article III Judges’ 2007, *Georgetown Law Journal*, 95, 965. See also Chemerinsky, ‘Ideology and the Selection of Federal Judges’ 2003, *U.C Davis Law Review*, 36, 619; Slotnick, ‘Prologue: Federal Judicial Selection in the New Millennium’ 2003, *U.C Davis Law Review*, 36, 583.

<sup>244</sup> See Tolley, 84.

study to get into the specifics of the different historical epochs. Rather, the focus is on the judicial selection mechanisms heralded by the Constitutional Reform Act of 2005.

An analysis of the office of the Lord Chancellor is imperative in order to unpack the factors that led to the enactment of the Constitutional Reform Act of 2005. For the greater part of the twentieth century, and before the Constitutional Reform Act of 2005, the office of the Lord Chancellor played a pivotal role in the selection of judges in England.<sup>245</sup> The Lord Chancellor was a member of the executive, the legislature and was head of the judiciary. The overlapping of functions by the Lord Chancellor's office created a constitutional paradox.<sup>246</sup> Traditionally, the Lord Chancellor was seen as a guarantor of judicial independence whose role went beyond making judicial appointments to protecting the judiciary from external influences.<sup>247</sup> The role of the Lord Chancellor has had its own defenders,<sup>248</sup> the main argument being that successive Lord Chancellors have appointed predominantly outstanding men as judges.<sup>249</sup> Sir Thomas Legg, a former Permanent Secretary in the Lord Chancellor's Office summarized the role of the Lord Chancellor in the judicial selection process as follows;

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<sup>245</sup> The Lord Chancellor's office was responsible for the Appeals Courts, High Court, Circuit Courts and the Magistrates' Courts.

<sup>246</sup> See Oliver, "Constitutional Reform In The United Kingdom" 2003, Oxford University Press, 335.

<sup>247</sup> See Woodhouse, 'United Kingdom. The Constitutional Reform Act 2005-Defending Judicial Independence the English Way' 2007, I.CON, 5, 1, 159.

<sup>248</sup> Lord Schuster, Memorandum, 31 January, 1943. LCO 2/3630. Lord Schuster wrote; "The advantages which accrue to the Cabinet from the presence of a colleague who is not only of high judicial reputation but who can represent to them the view of the judiciary; to the legislature from the presence in it of one who is both a Judge and a Minister; and to the judiciary from the fact that its President is in close touch with current political affairs, are enormous. In a Democracy, whose legislature may be advancing, or at least moving rapidly, and where the judiciary remains static, there is always present a serious risk of collision between the two elements. Where the Constitution is written and the static condition of the Judiciary is absolute, as in the United States, the danger of such a collision is very great. Even in England, with an unwritten Constitution and an unwritten common law, unless there is some link or buffer(whichever term may be preferred) between the two elements the situation would be perilous."

<sup>249</sup> See Stevens at 3.

*'For appointments at High Court level and above, the Lord Chancellor works in Collegiate consultation with the small group of top judges. However, all appointments at every level are made on the personal decision of the Lord Chancellor. The Prime Minister is the recommending authority for appointments to the Court of Appeal and above; but in these too the Lord Chancellor plays a key role.'*<sup>250</sup>

Further, Sir Thomas Legg aptly underscored shared perceptions of the English judicial selection system in the following terms:

*'Like any system, this one should be judged by its results. Many, including most of its critics, accept that it has produced a judiciary of high overall quality. There is no serious suggestion that the power of appointment has been abused for political or other improper purposes. We have experienced no crises or scandals of the kinds which have forced other Western countries to make major changes in their arrangements.'*

In spite of these seemingly positive attributes, the judicial selection process led to a barrage of criticism. It is clear that the system had several weaknesses. It was undesirable that the Prime Minister or the Lord Chancellor had unfettered discretion in the appointment of members of the judiciary. Despite the positive outcomes of this method of selecting judges,<sup>251</sup> the main drawback was that the system depended 'heavily on the judgment and integrity of the Lord Chancellor.'<sup>252</sup> Making such an important process dependent on the integrity of one man posed

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<sup>250</sup> See Legg, 'Judges for the new century' 2001, Public Law, 64.

<sup>251</sup> See Clark, 'Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments' 2011, Louisiana Law Review, 71, 467. Clark notes: 'Yet another explanation for the historic lack of Parliamentary involvement in judicial appointments is that the Lord Chancellor-controlled system was thought to produce a top-flight judiciary- the rival of the world's judicial systems. As a result, the appointment process went largely unquestioned. The perceived and actual quality of the British judiciary served as a damper, both historically and recently, on any sense of need for reform of the judicial appointment process. When the government introduced its judicial appointment reform proposals in 2003, it took great pain to underscore Britain's high quality judiciary and make clear that reform was prompted by perceptual, and not actual, concerns.'

<sup>252</sup> See Kentridge 67. Kentridge notes; 'Lords Hailsman, Elwyn-Jones, Mackay and Irvine, to name the four most recent Lord Chancellors who have made appointments to the Lords, have been impeccable in avoiding any hint of political favouritism or any basis of appointment other than merit.'

a great danger to the independence and impartiality of the judiciary. These concerns highlighted the need to have more openness and transparency in the judicial selection process.<sup>253</sup> The 2003 judicial appointment reform proposals by the government subsequently led to the promulgation of the Constitutional Reform Act of 2005. The Constitutional Reform Act fundamentally redefined the role of the Lord Chancellor in the selection of judges in England. It represents a major departure from the long established conventions which were in place during successive Lord Chancellorships.

The Constitutional Reform Act basically transferred the functions of the Lord Chancellor to the Lord Chief Justice.<sup>254</sup> Under the new arrangement, selections to the judiciary are now done by a newly created Judicial Appointment Commission which is composed of fifteen members.<sup>255</sup> The members include, a lay chairman, five other lay members, five judicial members, two legal professionals, a tribunal member, and a lay magistrate. Of the fifteen commissioners, twelve are selected through open tender while three other commissioners are selected by the Judges' Council. Nevertheless, the Lord Chancellor continues to play an important role in the selection of commissioners. In terms of Schedule 12(7)(1) of the Constitutional Reform Act, the Lord Chancellor may recommend a person for appointment as a Commissioner. The Lord Chancellor can appoint a panel which does the selection, and thereafter forwards recommendations to him.<sup>256</sup> Furthermore, the three commissioners selected by the Judges' Council must be notified to the Lord Chancellor with reasons for the selection.<sup>257</sup>

The Constitutional Reform Act also specifies the procedure to be followed by the Judicial Appointments Commission in the selection of judicial candidates. When a vacancy arises, the Commission first advertises the post(s). Depending on the number of applications received, the

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<sup>253</sup> See Oliver at 341.

<sup>254</sup> See Ingman, 'The English Legal Process' 2010, 13<sup>th</sup> edition, Oxford University Press, 7.

<sup>255</sup> See section 61 of the Constitutional Reform Act. See also Schedule 12 of the Act.

<sup>256</sup> See Schedule 12(7)(2) of the Constitutional Reform Act.

<sup>257</sup> See Schedule 12(7)(7) of the Constitutional Reform Act.

candidates are short-listed before being interviewed. The interviews are followed by a statutory consultation by the Commission concerning its selected candidates.<sup>258</sup> The Commission consults the Lord Chief Justice and another person who has held the post or has relevant experience. Following the statutory consultation, the Commission submits its recommended candidates to the Lord Chancellor and thereafter, appointments are made by the Queen on the Lord Chancellor's advice.<sup>259</sup> While the Lord Chancellor continues to play a role in the judicial selection process,<sup>260</sup> the Judicial Appointments Commission is ultimately responsible for making the selection for appointment to the superior courts.

A peculiar feature of the new system is the existence of dual commissions, one for the Supreme Court and the other for the rest of the courts.<sup>261</sup> Whether this new approach in judicial selection succeeds or not will depend on its results. Much will depend on whether the Commission is able to select the best available candidates.<sup>262</sup> Arguably, the most important aspect of this reform initiative is that it represents a vital opportunity to rebuild confidence in the way judges are selected in England.<sup>263</sup> It may be too early to judge the new judicial selection system. However, it is apparent that the success of the system will rely heavily on the composition of the commission and its judicial selection procedures. What is significant is that a nation which pioneered the executive appointment of judges finally made a drastic change to its judicial selection system 'for the first time in more than 900 years.'<sup>264</sup>

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<sup>258</sup> See Section 88(3) and 94(3) of the Constitutional Reform Act.

<sup>259</sup> See Ingman at 7.

<sup>260</sup> See section 10(2A) of the Courts Act, 2003. The Lord Chancellor continues to appoint lay justices to the Magistrates' Court.

<sup>261</sup> See Malleon, 'The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles' in Malleon, Russell "Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World" 2006, Toronto; Buffalo, University of Toronto Press, 46.

<sup>262</sup> Ibid at 52.

<sup>263</sup> Ibid.

<sup>264</sup> See Volcansek, 2011 DePaul Law Review, 60, 805.

### 2.5.3 The French System

The French judicial system is a complex one.<sup>265</sup> Its complexity is evidenced by the several judicial selection routes for the various judicial corps. Its present day manifestation is testimony to a process of refinement which began with the 1789 Revolution and which has inspired civil law judicial systems across the world.<sup>266</sup> Importantly, the judicial selection processes in France can be traced back to the general distrust of the judiciary in the aftermath of the revolution.<sup>267</sup> The modern manifestation of the French judiciary was founded on the principle ‘that judges must not directly, or indirectly through interpretation make law.’<sup>268</sup> An analysis of the judicial selection mechanisms in France necessarily begins with an understanding of the French judiciary. There are numerous classes of courts in France.<sup>269</sup> The traditional divide has always been the ordinary civil and criminal courts, the administrative courts and the Constitutional Council each with its own method of judicial selection. Due to these diverse classes of courts, judicial selection in France is largely a ‘bureaucratic affair.’<sup>270</sup>

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<sup>265</sup> France falls within the civil law tradition just like much of continental Europe.

<sup>266</sup> See Provine; Garapon, ‘The Selection of Judges In France: Searching for a New Legitimacy’ in Malleon, Russell, “Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World” 2006, Toronto; Buffalo: University of Toronto Press, 177.

<sup>267</sup> Ibid at 178. Provine and Garapon note that, ‘The French revolution sealed the fate of the courts; they never recovered from the enormous loss of prestige suffered when they took the side of the ancient regime, which the revolutionaries associated with corruption and support for the royalty. The revolutionary government rejected separation of powers, and ever since, proposals to introduce judicial review to the French appellate courts have been regularly defeated as the first step towards the dreaded government *des juges*. This position has survived various constitutional revisions, including those of 1958, that more precisely outlined individual rights and set stricter limits on government power....The rights of citizens are stated quite precisely, but people cannot litigate to protect them. French legal culture is thus paradoxical in honouring the rights of man, but opposing judicial enforcement of those rights.’

<sup>268</sup> See Stone, ‘The Birth of Judicial Politics in France. The Constitutional Council in Comparative Perspective’ 1992, Oxford University Press, 25. Stone notes that, ‘The law of 16-24 August 1790, which remains in force today explicitly precluded judicial review, as did a series of written constitutions beginning with that of 1791.’

<sup>269</sup> See generally Perroud, ‘The Organization of the Courts and the Judicial Bench in France’ 1929, Journal of Comparative Legislation and International Law, Third Series, 11, 1, 1-18.

<sup>270</sup> See Provine; Garapon at 176.

The French judiciary is regulated by the *Conseil superieur de la magistrature* (CSM), a judicial oversight body created by the 1958 fifth Republic Constitution.<sup>271</sup> The CSM is composed of twenty two members which include four lay members, six judges, six prosecutors and six prominent citizens appointed by the Presidents of the Republic, National Assembly and Senate. It is the constitutional body responsible for selecting and disciplining judges and prosecutors.<sup>272</sup>

Judicial selection in France is premised on a career service model. For one to be appointed to the ordinary judiciary, one must have been recruited through a competitive oral and written examination after a one year course immediately following graduation from university.<sup>273</sup> Successful candidates become part of the judicial corps and train for the judicial office at the *Ecole Nationale de la Magistrature*(ENM) in Bordeaux.<sup>274</sup> Student entry is not the only way to be recruited into the ENM. Service in the public sector for over five years and in the private sector for over ten years entitles one to entry to the ENM. Moreover, eight years of legal service makes one eligible to join the ENM as well as 'secondment from other public sector posts.'<sup>275</sup> Judicial candidates subsequently take a final exam and if successful, choose posts from a list prepared by the Ministry of Justice. Examination scores play a crucial role in getting first preference on available judicial posts.<sup>276</sup> By contrast, the administrative judiciary is

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<sup>271</sup> See Provine; Garapon at 184.

<sup>272</sup> See Provine; Garapon 184. Provine and Garapon note that; "The most important appointments are those at the highest levels: the *Cour de Cassation*, the first President of the Courts of Appeals, and the presidents of the *Tribunaux de grande instance*, a total of four hundred positions. Selections at this level are made not by seniority or written exam, but by oral interviews and recommendations. The process, wholly insulated from political oversight, leaves room for connections, professional repute, and received opinions about the appropriate social and educational background of judges to play a determinative role in judicial careers. The tendency towards insularity is increased by the fact that the CSM divides into two panels in its work, one dominated by judges and the other by prosecutors."

<sup>273</sup> See Bell, 'Judicial Appointments: Some European Experiences' Bell Paper, 4 October 2003, 7 available at [www.niassembly.gov.uk/globalassets/documents/raise/.../justice/6012.pdf](http://www.niassembly.gov.uk/globalassets/documents/raise/.../justice/6012.pdf) accessed on 2/03/15.

<sup>274</sup> See Provine; Garapon at 183.

<sup>275</sup> Ibid.

<sup>276</sup> See Provine; Garapon at 183.

generally considered to be more prestigious in France.<sup>277</sup> The entry requirements are basically the same as for the ordinary judiciary, the only difference being that administrative judicial candidates enroll with the *Ecole Nationale d'Administration* (ENA) in Paris and Strasbourg.

The position is different with regards to the Constitutional Council judicial appointments. The constitutionally prescribed qualifications for becoming a Constitutional Council judge are radically different from the requirements for becoming an ordinary judge. No formal qualifications are prescribed and Constitutional Council judges do not necessarily have to be lawyers. It appears political experience plays a crucial role in the selection process.<sup>278</sup> The appointment of Constitutional Council judges is a highly political process as Constitutional Council judges are nominated by the President of the Republic and the Presidents of both chambers of Parliament. Provine and Garapon note that the subordination of the judiciary to the legislature and executive 'confines French judges to the shadows' as compared to their counterparts in the Anglo-American tradition.<sup>279</sup> Consequent to this, the judicial selection 'process is much less openly political.'<sup>280</sup> The extent to which the various methods of judicial selection in France promote judicial independence is debatable. Nevertheless, the French experiences with this key ingredient of judicial independence indicate the fallacy of judging a system divorced from its historical context.<sup>281</sup>

## 2.6 Other judicial selection systems

The preceding discussions focused on the leading judicial selection systems which have impacted on the development of judicial selection systems globally. However, this is by no means an exhaustive list. A variety of other judicial selection systems designed to suit particular

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<sup>277</sup> Ibid at 189.

<sup>278</sup> See generally Stone, 'The Constitutional Council in Comparative Perspective' 1992, Oxford University Press; Guarnieri, 'Courts and marginalized Groups: Perspectives From Continental Europe' 2007 I.CON, 5, 2, 187-210; Bell, 'Judicial Cultures and judicial independence' 2002, Cambridge Yearbook of European Studies, 4, 47.

<sup>279</sup> Provine; Garapon at 176.

<sup>280</sup> Ibid.

<sup>281</sup> See Bell, "French Legal Cultures" 2001, Butterworths.

socio political contexts are in existence across the world. An analysis of Asian and Latin American countries for example clearly shows this diversity.<sup>282</sup> As observed earlier, there are various typologies of judicial selection systems globally. The same diversity with regards to judicial selection systems is evident in Africa.<sup>283</sup> African systems are mainly predicated on the traditional civil and common law divide, but there are distinct variations amongst countries within each legal tradition.

## 2.7 Conclusion

This chapter has demonstrated the critical nature of an independent judiciary in modern day governance systems. It set out to explore the theoretical foundations of judicial independence as an important element of constitutionalism. Even though the concept itself is essentially a ‘contested’ one, the virtues of an independent judiciary cannot be underestimated especially in emerging democracies in Africa. Admittedly, the protection of the fundamental rights of citizens and the rule of law fare much better in a polity which respects and entrenches an independent judiciary. Recent studies have also shown that countries which entrench an independent judiciary correspondingly have better economic prospects. These economic prospects are a direct consequence of investor confidence in the fair and impartial dispute resolution mechanisms necessitated by the existence of an independent judiciary.

It is apparent from the preceding discussions that judicial independence has been justified on several normative grounds. Judicial independence is not a one size fits all concept. It is a fluid

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<sup>282</sup> See O’Brien, ‘The Politics of Judicial Selection and Appointment in Japan and Ten South and Southeast Asian Countries’ in Malleson; Russell, “Appointing Judges In An Age Of Judicial Power, Critical Perspectives From Around The World” 2006, University of Toronto Press. See also Volcansek, ‘Judicial Selection: Looking at How Other Nations Name their Judges’ 53, *The Advoc.* (Texas) 95.

<sup>283</sup> Various scholars have proposed typologies for judicial selection systems. For example, Malleson suggests a typology of executive appointments, civil service systems, elections, judicial appointment commissions and hybrid systems. Fombad suggests a typology of appointment by the executive, civil service career and election by the people. Madhuku offers a typology of executive appointment, systems which distinguish the appointment of the Chief Justice from the rest of the judges, and systems which involve the President and Parliament in the appointment process. Volcansek suggests a typology of executive appointment, shared and parity systems, career or civil service systems and judicial appointments commissions.

concept which can only be meaningfully assessed by analysing each country's peculiar circumstances. It is hardly surprising that there is no universally accepted way of measuring judicial independence. What is currently available are models which give critical indicators as to a legal system's compliance with the generally accepted basic elements of an independent judiciary. Significantly, these judicial independence toolkits recognize the five elements generally accepted as constitutive of an independent judiciary.

In order to put the subject matter of this study into perspective, this chapter explored the judicial selection mechanisms in the leading legal traditions of the world. In a world increasingly characterized by constitutional borrowing, the preceding discussions provided useful perspectives which are critical in evaluating the judicial selection systems in Mozambique, South Africa and Zimbabwe. Furthermore, the various typologies of global judicial selection systems underscored the absence of blueprints in judicial appointments. The determination of which system of judicial selection best guarantees the independence and effectiveness of the judiciary remains largely unresolved. This is hardly surprising as the culture of judicial independence in its entirety depends on a combination of socio-economic and political variables. What is evident from the various judicial selection systems across the world, is that a worthwhile enquiry is determining the system which offers better prospects in promoting judicial independence.

With this introduction of the judicial independence concept, the next chapter provides the contextual background of the legal systems in Mozambique, South Africa and Zimbabwe. In a comparative study of this nature, it is clear that a norm in a legal system can only be meaningfully assessed if the socio-economic and political variables in which it operates are fully appreciated.

## CHAPTER III

### HISTORICAL BACKGROUND OF THE LEGAL SYSTEMS IN MOZAMBIQUE, SOUTH AFRICA AND ZIMBABWE, AND ITS IMPACT ON THE SYSTEM OF JUDICIAL SELECTION

#### 3.1 Introduction

Legal systems in Africa have generally been influenced by their historical contexts. A meaningful study of legal systems in Africa cannot ignore the historical background of the country concerned. The previous chapter discussed the elements constitutive of an independent judiciary, and the leading judicial selection systems in the world. This chapter builds on the discussions in Chapter 2. It provides an analysis of the historical, socio-political, economic and legal contexts in Mozambique, South Africa and Zimbabwe, and their corresponding influence on the mechanisms of judicial selection. A clear understanding of the context in all three polities enables one to better appreciate the nature of existing judicial selection norms. All three countries share a common colonial background even though their colonial experiences differ. Significantly, the colonial setting influenced to a great extent, the development of each country's post-colonial legal system, including the mechanisms of judicial selection.

Notwithstanding the above, it must be underscored that pre-colonial African societies had their own traditional justice systems which suited their peculiar socio-economic and political organization. While it is beyond the scope of this study to exhaustively deal with the traditional justice systems, it is critical to note that these traditional forms of justice continued into the colonial and post-colonial eras.<sup>284</sup>

It is apparent that in a comparative study of this nature, 'there is need to appreciate the general historical, sociological, economic and political environment which may directly or

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<sup>284</sup> See generally Elechi; Morris; Schauer, 'Restoring Justice (Ubuntu): An African Perspective' 2010, *International Criminal Justice Review*, 20, 1, 73-85; Crowder, 'Indirect Rule-French and British Style' 1964, *Africa*, 34, 3, 197-205; Santos, 'From Customary Law to Popular Justice' 1984, *Journal of African Law*, 28,1-2, 90-98; Dalglish, 'Pre-Colonial Criminal Justice In West Africa: Eurocentric Thought Versus Africentric Evidence' 2005, *African Journal Of Criminology and Justice Studies*, 1, 1, 55; Elechi, 'Human Rights and the African Indigenous Justice System' available at [www.isrc.org/Papers/2004/Elechi.pdf](http://www.isrc.org/Papers/2004/Elechi.pdf) accessed on 4/08/15; Penal Reform International, 'Access to justice in sub-Saharan Africa' available at [www.gsdr.org/docs/open/SSAJ4.pdf](http://www.gsdr.org/docs/open/SSAJ4.pdf) accessed on 3/08/15.

indirectly influence the specific legal solutions adapted to a particular problem.’<sup>285</sup> From a comparative law perspective, it is critical to look beyond the legal context in which a rule or institution operates.<sup>286</sup> Such an approach necessarily leads to a more objective comparison of legal norms across legal systems.<sup>287</sup>

The analysis in this chapter proceeds on a country by country basis. The chapter begins with a discussion of each country’s general background which gives an overview of the political, economic, and legal contexts. The background sections also trace the evolution of each country’s legal system with an emphasis on the development of superior court judicial selection mechanisms. An evaluation of the political, economic and legal contexts in all three countries leads to the conclusion of this chapter.

### **3.2 General background of Mozambique, and evolution of its legal system in the context of judicial selection mechanisms**

Mozambique inherited its civil law based legal system from its former colonizers the Portuguese. It is critical that the superior court judicial selection mechanisms introduced by the 1990 Constitution and further consolidated by the 2004 Constitution be put into perspective. In this respect, the following discussions provide a historical overview of the political, economic and legal developments that have influenced the political and legal cultures pertaining to judicial selection in Mozambique.

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<sup>285</sup>See Fombad, ‘Protecting Constitutional Values In Africa: A Comparison of Botswana and Cameroon’ 2003, CILSA, 36, 84. See also Jackson, ‘Comparative Constitutional Law: Methodologies’ in Rosenfeld; Sajo “The Oxford Handbook Of Comparative Constitutional Law” 2012, Oxford University Press, 67.

<sup>286</sup> See Dannemann, ‘Comparative Law: Study of Similarities Or Differences?’ in Reimann; Zimmermann, “The Oxford Handbook Of Comparative Law” 2006, Oxford University Press, 414.

<sup>287</sup> See generally Zweigert; Kotz, “Introduction to Comparative Law” 1998, 3<sup>rd</sup> ed, Clarendon Press, Oxford, 3.

### 3.2.1 General background: Mozambique

The Republic of Mozambique is a democratic unitary state.<sup>288</sup> It is a member of the Southern Africa Development Community (SADC) and shares borders with Malawi, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. Mozambique is estimated to have a population of 23 million people.<sup>289</sup> While there are more than twenty languages spoken in Mozambique,<sup>290</sup> Portuguese is the official language.<sup>291</sup> Mozambique is a former Portuguese colony and gained its independence in 1975.<sup>292</sup> The Portuguese colonization of Mozambique began in 1505,<sup>293</sup> and Portugal's right of occupation of Mozambique was recognized at the 1884-85 Berlin Conference.<sup>294</sup> Prior to the Portuguese colonization in the 15<sup>th</sup> century, present day Mozambique was governed by several independent chieftaincies.<sup>295</sup> These chiefs ruled the

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<sup>288</sup> See Article 8 of the Mozambican Constitution.

<sup>289</sup> See [www.eisa.org.za/WEP/moz2.htm](http://www.eisa.org.za/WEP/moz2.htm) accessed on 25/01/13.

<sup>290</sup> However, the 2004 Constitution has made an attempt to address the tension arising from the ethno-linguistic diversity by guaranteeing equality of all men before the law regardless of race and ethnicity. According to Lloyd, 'Ethnic tension is lower in Mozambique relative to other countries in Africa, but there nonetheless remains a regional divide between ethnolinguistic groups residing in the southern and the central and the northern regions. These regions also correspond roughly to areas of support for FRELIMO and RENAMO, and party affiliation tends to cause more tension than ethnicity.'

<sup>291</sup> See Santos, 'The Heterogeneous State and Legal Pluralism in Mozambique' 2006, *Law and Society Review*, 40, 1, 55. Boaventura de Sousa Santos describes in detail the complexities occasioned by legal pluralism in Mozambique.

<sup>292</sup> On Mozambique's history, see generally Newitt, "Portugal in Africa: The Last Hundred Years" 1981, Longman, London; Newitt, 'The Portuguese on the Zambezi: An Historical Interpretation of the *Prazzo* System' 1969, *The Journal of African History*, 10, 1, 76.

<sup>293</sup> See UN-HABITAT 'Land Tenure, Housing Rights and Gender In Mozambique' 2005, 31 available at [www.unhabitat.org/pmss/getElectronicVersion.asp?nr=2138&alt=1](http://www.unhabitat.org/pmss/getElectronicVersion.asp?nr=2138&alt=1) accessed on 25/01/13.

<sup>294</sup> See Mozambique, History and Politics available at [www.iss.co.za/af/profiles/Mozambique/Politics.html](http://www.iss.co.za/af/profiles/Mozambique/Politics.html) accessed on 27/01/13.

<sup>295</sup> See Reaud; Weimer, 'Comparative Assessment of Decentralization In Africa: Mozambique Desk Study' 2010, 1 available at [transition.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/mozambique\\_desk\\_study.pdf](http://transition.usaid.gov/our_work/democracy_and_governance/publications/pdfs/mozambique_desk_study.pdf) accessed on 15/01/13.

territory through a network of territorial chiefs. The Portuguese took advantage of this fragmented political setting to consolidate their control over the territory.<sup>296</sup> However, it is only from 1900 that the Portuguese began to establish a highly centralized government over present day Mozambique.<sup>297</sup>

Mozambique was not spared from the rise of African consciousness in the 1950's. The road to independence for Mozambique was a culmination of several factors in Mozambique and also in Portugal.<sup>298</sup> As the curtain of colonialism was closing down, the Liberation Front of Mozambique (FRELIMO) launched the war for independence in 1964 which culminated in Mozambique's independence in 1975.<sup>299</sup> The end of the struggle for independence culminated in the Lusaka Agreement of 1974<sup>300</sup> which in essence transferred power from Portugal to FRELIMO which formed a transitional government.<sup>301</sup> Due the uncertainties created by the new political dispensation which championed a Marxist socialist ideology, a massive emigration of the Portuguese ensued leaving governance structures especially the judiciary in a state of disarray.<sup>302</sup>

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<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

<sup>298</sup> See Mozambique, History and Politics available at [www.iss.co.za/af/profiles/Mozambique/Politics.html](http://www.iss.co.za/af/profiles/Mozambique/Politics.html) accessed on 27/01/13. 'From 1968 onwards FRELIMO also launched attacks against Portuguese garrisons in the Tete province. The war against Portugal ended after the dictatorship of President Marcello Caetano was overthrown during a left-wing coup in Lisbon on 25 April 1974. In a hurry to get rid of its colonies, the new Portuguese government transferred its authority in Mozambique to FRELIMO, which refused to participate in an election and suppressed its rivals for power..'

<sup>299</sup> See UN-HABITAT 'Land Tenure, Housing Rights and Gender In Mozambique' 2005, 31 available at [www.unhabitat.org/pmss/getElectronicVersion.asp?nr=2138&alt=1](http://www.unhabitat.org/pmss/getElectronicVersion.asp?nr=2138&alt=1) accessed on 25/01/13.

<sup>300</sup> The Lusaka Agreement signed on September 7, 1974 constituted the legal instrument and institutional platform which established the cease-fire and led Mozambique to independence in 1975.

<sup>301</sup> See AfriMAP, 'Mozambique, Democracy and Political Participation' 2009, 24 available at [www.afrimap.org/english/images/report/AfriMAP-Moz-PolPart-EN.pdf](http://www.afrimap.org/english/images/report/AfriMAP-Moz-PolPart-EN.pdf).

<sup>302</sup> Ibid. 'In view of the strong nationalism of FRELIMO and the lack of clarity as to what would be the future of their assets, there was a massive emigration of Portuguese, particularly of skilled workers. In the process, they took with them all they could, and much of what they could not take they destroyed..'

The history of the post-independence state in Mozambique can be divided into distinct phases each with its own peculiar characteristics.<sup>303</sup> The period 1975 to 1992 was a particularly challenging one for the FRELIMO government. In the aftermath of Portuguese rule, the new FRELIMO government imposed a one party state which was entrenched in the first post-independence Mozambican Constitution of 1975.<sup>304</sup> The imposition of a single party state was basically a reflection of the strong Marxist-Leninist ideology of the FRELIMO leadership. This politically rigid stance combined with the destabilizing forces in Rhodesia<sup>305</sup> and South Africa provided a fertile ground for internal strife. Taking advantage of this situation, the neighbouring South African government and the Smith regime in Rhodesia supported an internal rebellion by the Mozambican National Resistance (RENAMO).<sup>306</sup> Consequently, Mozambique was plunged into more than a decade of civil war.<sup>307</sup> A combination of civil war, the failure of economic policies and natural disasters further weakened the new Mozambican government.<sup>308</sup> The civil war ended with the signing of the peace agreement by FRELIMO and RENAMO in Rome on 4 October 1992. The 1990 Constitution paved the way for the multiparty elections of 1994 which were won by FRELIMO.<sup>309</sup> From 1994 onwards, Mozambique has held general elections every

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<sup>303</sup> On constitutional developments in post independent Mozambique, see generally Hall, Young 'Recent Constitutional Developments in Mozambique' 1991 *Journal of African Law*, Vol. 35, No 1 and 2, 102-115.

<sup>304</sup> See AfriMAP, 'Mozambique, Democracy and Political Participation' 24. See also Siteo; Matsimbe; Pereira, 'Parties and Political Development In Mozambique' 2005 EISA Research Report Number 22; Meneses; Santos, 'Mozambique: The Rise of a Micro Dual State' 2009 *Africa Development*, Volume 34, Nos 3 and 4, 129-166.

<sup>305</sup> Pre independence Zimbabwe was renamed Rhodesia from the time the Smith regime declared independence from Britain in 1965.

<sup>306</sup> See Reaud; Weimer, 3. It is estimated that destruction as a result of the civil war totaled \$15 billion and that 900 000 Mozambicans were affected.

<sup>307</sup> Ibid.

<sup>308</sup> See AfriMAP, 'Mozambique, Democracy and Political Participation', 25.

<sup>309</sup> See 'Mozambique, History and Politics' available at [www.iss.co.za/af/profiles/Mozambique/Politics.html](http://www.iss.co.za/af/profiles/Mozambique/Politics.html) accessed on 27/01/13. In the first multiparty elections of 1994 the ruling party, FRELIMO secured 44% of the vote and 129 seats in the 250 member assembly. The opposition RENAMO won 112 seats with 38% of the vote. The *União Democrática de Mocambique* (Udemo) took 5% of the vote and 9 seats. The remaining 13% of the vote was split among 11 other parties, none of which crossed the required threshold to secure representation in the Assembly.

five years on a multiparty basis. However, since 1994, elections in Mozambique have been dominated by FRELIMO.<sup>310</sup>

With respect to civil and political rights, the current Constitution of Mozambique which was revised in 2004 contains a bill of rights which guarantees civil and political rights of citizens.<sup>311</sup> The entrenchment of civil and political rights from the 1990 Constitution onwards was meant to consolidate the democratic pedigree of the Mozambican State. Despite constitutionally providing for civil and political liberties, there are however persistent complaints of widespread violations of these rights by the State.<sup>312</sup> Concerns have also been raised that Mozambique is increasingly sliding towards a one party state.<sup>313</sup>

On the economic front, the cost of more than a decade of civil war and failed policies took their toll on the Mozambican economy. In the aftermath of independence, the FRELIMO led government's socialist oriented economic programmes were a disaster.<sup>314</sup> The failed economic policies were exacerbated by the civil war which started at almost the time as the new post-independence government was seeking to address a battered economy left behind by the fleeing Portuguese. By the mid-1980s, it was apparent that the government's socialist oriented policies were contributing towards an economic crisis.<sup>315</sup> Faced with an unprecedented economic meltdown, the government abandoned its socialist oriented policies. The new economic policies had the effect of reducing state control through Structural Adjustment

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<sup>310</sup> See AfriMAP, 'Mozambique, Democracy and Political Participation' 2009, 26. In party political terms, since 1994 RENAMO has remained the main opposition to FRELIMO. In the general elections of 1999, its leader, Afonso Dhlakama, came close to victory, but in 2004 there was a very sharp fall in his support. Almost twenty years after the end of the civil war and having gone through four general and four municipal elections, Mozambican politics remains clearly dominated by the two former belligerents, with an increasing hegemony of FRELIMO.

<sup>311</sup> See Chapters III and IV of the Mozambican Constitution.

<sup>312</sup> See generally AfriMAP, 2009 'Mozambique, Democracy and Political Participation.'

<sup>313</sup> See Manning, 'Mozambique's Slide into One-Party Rule' 2010, *Journal of Democracy*, 21, 2, 151-165.

<sup>314</sup> Some of the policies included the nationalization of all land, the introduction of state farming, the socialization of rural areas, and nationalization of housing.

<sup>315</sup> See UN-HABITAT 'Land Tenure, Housing Rights and Gender in Mozambique' 2005, 31.

Programmes at the behest of international financial institutions.<sup>316</sup> A marked departure from the socialist oriented policies towards a market based economy is evident from the early 1990's onwards. These new economic policies coupled with peace and stability set Mozambique on a trajectory of rapid economic growth averaging 8.1 percent gross domestic product growth per annum since 1993.<sup>317</sup> Despite the proclamation of Mozambique as a success story economically,<sup>318</sup> this rapid economic growth has not improved the country's overall level of development.<sup>319</sup> This is hardly surprising considering that Mozambique is heavily dependent on foreign aid.<sup>320</sup>

### **3.2.2 Evolution of the Mozambican legal system with emphasis on judicial selection mechanisms**

The legal system in Mozambique is deeply rooted in the colonial and post-independence socio-political developments. The legal system adopted soon after independence represented a paradigm shift from the colonial judicial system. Prior to independence, the formal legal system was based on Portuguese civil law. Despite this formal application of Portuguese law, traditional customary law was tacitly accepted and widely recognized.<sup>321</sup> However, this state of affairs changed in 1975. The post-independence legal system was motivated by the dominant socialist ideology of the FRELIMO party immediately after gaining power. The ideology of

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<sup>316</sup> See Pureza; Roque; Rafael; Cravo, 'Do States Fail or Are They Pushed? Lessons Learned From Three Former Portuguese Colonies' 2007 (April), *Oficina do CES*, 273.

<sup>317</sup> *Ibid* at 32.

<sup>318</sup> According to the UN-HABITAT, Land Tenure, Housing Rights and Gender in Mozambique report, 'This is largely a result of foreign investment. The socioeconomic impact, however, has been variable. Many formal sector jobs have been lost and few ones have been created. In the urban areas in particular, there has been a rapid informalisation of the economy. Only a minority are benefitting from this economic growth, and there is a growing gap between the rich and the poor.'

<sup>319</sup> See generally Lloyd, 'Countries at the Crossroads 2011: Mozambique' available at <https://freedomhouse.org/sites/default/files/.../MozambiqueFINAL.pdf> accessed on 3/03/15.

<sup>320</sup> See generally Pureza; Roque; Rafael; Cravo, 273.

<sup>321</sup> See Rainha, 'Republic of Mozambique-Legal System and Research' available at [www.nyulawglobal.org/globalex/mozambique.htm](http://www.nyulawglobal.org/globalex/mozambique.htm) accessed on 27/01/2013.

popular justice was central in the building up of the new state structure in Mozambique. The same ideology was also extended to the legal system.<sup>322</sup>

One of the main objectives of FRELIMO was to immediately abolish all vestiges of the colonial legal system in Mozambique which were perceived as a symbol of capitalist oppression.<sup>323</sup> The goal was to construct a system of popular justice which was reflective of the aspirations of the masses.<sup>324</sup> The evolution of the colonial legal system into a new legal order is epitomized by the promulgation of the Law on the Organization of the Judiciary of Mozambique in 1978.<sup>325</sup> This law established the hierarchy of the courts and put in place a system of popular courts at all levels of the country's administrative divisions.<sup>326</sup> These popular courts were comprised of professional judges and lay judges elected by Popular Assemblies. Moreover, various procedural mechanisms were introduced in the legal system aimed at securing and widening popular participation.<sup>327</sup> An important feature of this new system of popular justice was that these lay judges participated in all the courts and were involved in determining issues of law and fact.<sup>328</sup> Furthermore, one of the fundamental changes brought about by the new judicial

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<sup>322</sup> See Gundersen, 'Popular Justice In Mozambique: Between State Law and Folk Law' 1992, *Social and Legal Studies*, 1, 259.

<sup>323</sup> See Trindade; Pedroso, 'The Judicial System: Structure, Legal Education and Legal Training' in "Law and Justice in a Multicultural Society. The Case of Mozambique" 2006, CODESRIA, 114. The Directive of the Third Frelimo Congress on Justice is particularly illustrative in this context, emphasizing urgency in the 'destruction of the existing judicial structure, as part of the destruction of the colonial-capitalist apparatus.' See also Article 4 of the 1975 Mozambique Constitution.

<sup>324</sup> *Ibid.*

<sup>325</sup> See Law no. 12/78 of 2 December. See also Trindade, 'The Judicial System: Structure, Legal Education and Legal Training' in "Law and Justice in a Multicultural Society. The Case of Mozambique" 2006, CODESRIA, 40. 'Resolution no. 3/77 of 1 September, on the Land Law, Nationalizations, and on the Popular Courts was approved, establishing '...that the organs of the state will take the necessary measures to accelerate the process of the creation of revolutionary judicial system, namely through the creation of Popular Courts, from the local to the national level, subordinate at each level to the respective people's Assembly.'

<sup>326</sup> See Trindade; Pedroso, 2006 CODESRIA, 115.

<sup>327</sup> See Trindade, 2006 CODESRIA, 41.

<sup>328</sup> See Trindade; Pedroso, 115. However, Article 71 of the 1990 Mozambican Constitution restricted lay judges to determining matters of fact only.

structure was the abolition of traditional authority which was associated with the colonial administrative and judicial apparatus.<sup>329</sup>

The failure of the socialist experiment in the late 1980's and the end of the civil war heralded a market based economy which resulted in fundamental changes in the Mozambican legal system. The new Organic Law of the Judicial Courts,<sup>330</sup> inspired by the 1990 Constitution, entrenched the constitutional and political philosophy based on the separation of powers, impartiality, and autonomy of judges.<sup>331</sup> Rainha opines that the Portuguese legal tradition ended up being revived when the country started settling in the 1990's.<sup>332</sup> Despite the fundamental changes brought about by the 1990 Constitution, clarity in respect of the Mozambican legal system was only provided by the 2004 Mozambican Constitution which recognizes the existence of legal pluralism.<sup>333</sup> Article 4 of the 2004 Mozambican Constitution states that;

*'The State recognises the different normative and dispute resolution systems that co-exist in Mozambican society, insofar as they are not contrary to the fundamental principles and values of the Constitution.'*

From the foregoing discussion, the Mozambican legal system can be classified as a civil law legal system which is based on Portuguese civil law.

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<sup>329</sup> However, the role of traditional authorities would later be revived in 2002.

<sup>330</sup> See Law no. 10/92.

<sup>331</sup> See Trindade; Pedroso, 2006 CODESRIA, 118.

<sup>332</sup> See Rainha, 'Republic of Mozambique-Legal System and Research' available at [www.nyulawglobal.org/globalex/mozambique.htm](http://www.nyulawglobal.org/globalex/mozambique.htm) accessed on 27/01/2013.

<sup>333</sup> See AfriMAP, 'Mozambique: Justice Sector and The Rule of Law' 2006, 4. 'The Community Courts are the most widespread officially recognized judicial fora in Mozambique, with more than 1500 reportedly in existence. Although the 1992 Community Courts Law provided the legal framework for community courts, with jurisdiction to deal with minor civil and criminal disputes, they have no formal links with the judicial courts, and in practice, have received no financial or material help from the government or judicial courts. Marking an important step forward, the 2004 Constitution recognized their existence, and it is now urgent that legislation be passed to provide a framework for this new integrated status.' See also Goncalves 'Finding the Chief: Political Decentralisation and Traditional Authority in Mocumbi, Southern Mozambique' 2005, Africa Insight, 35, 3.

With respect to the judiciary, the manner of judicial selection in colonial Mozambique was deeply rooted in the Portuguese racialised colonial policy.<sup>334</sup> In order to put into perspective how judicial officers were appointed, it is necessary to outline briefly the Portuguese colonial policy which was premised on the system of indirect rule.<sup>335</sup> This in essence meant that Portugal administered Mozambique through a network of local chiefs.<sup>336</sup> This system of indirect rule was manifest from the early days of Portuguese occupation and was implemented through the *Prazo* system in which feudal lords were granted judicial rights over inhabitants of their land.<sup>337</sup> The *Prazo* system evolved into the *indigenato* regime in the 1920's which was a formal entrenchment of the system of indirect rule.<sup>338</sup> The system was further consolidated by the colonial law of 1933 which provided that authority over locals would be exercised by indigenous administrative authorities.<sup>339</sup> This colonial structure had implications on the manner of judicial selection. It created a fragmented legal system wherein there were separate judicial systems for the indigenous peoples and for the Portuguese citizens. Invariably, the Portuguese

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<sup>334</sup> See Meneses, 'Traditional Authorities in Mozambique: Between Legitimisation and Legitimacy' available at <https://estudogeral.sib.uc.pt/bitstream/10316/11125/1/Traditional%20Authorities%20in%20Mozambique.pdf> accessed on 25/02/13.

<sup>335</sup> See The Organic Law of the Civil Administration of the Colonies, Law No. 277 of 1914. For a detailed discussion of the system of indirect rule in Mozambique, see generally Meneses 'Pluralism, Law and Citizenship in Mozambique: Mapping the Complexity' 2007, *Oficina Do CES*, 291.

<sup>336</sup> See Mondlane, 'The Struggle for Mozambique' 1969, Penguin African Library, 28-29. The administrative structure in Mozambique comprised the Governor-General, Provincial Governors, Administrators and the local chiefs.

<sup>337</sup> See Carlson, 'Perceptions of regime legitimacy in Mozambique legitimacy in transition?' 2006, Monterey, California, 24. For a detailed discussion of the *Prazo* system, see Newitt, 'The Portuguese on the Zambezi: An Historical Interpretation of the *Prazo* System' 1969, *The Journal of African History*, 10, 1, 67-85.

<sup>338</sup> See Meneses 3. See also Mondlane, 'The Kitwe Papers: Race Relations and Portuguese Colonial Policy, with Special Reference to Mozambique' 1968, *Africa Today*, 15, 1, 16.

<sup>339</sup> See Carlson, 25.

colonial administrators appointed local chiefs (*regulos*) who performed both adjudicative and non-adjudicative functions but remained subordinate to them.<sup>340</sup>

Due to the centralization of the Portuguese colonial administrative system, the administrators who presided over the municipal courts in various parts of Mozambique were appointed by the administration in Portugal.<sup>341</sup> These municipal courts mainly catered for Portuguese citizens and applied the Portuguese civil law. Baltazar opines that major decisions regarding the appointment, transfer and retirement of judicial officers were taken in Lisbon.<sup>342</sup> Consequently, the small bench in Mozambique was dominated by foreigners. The effect of this state of affairs on the administration of justice was the absence of judges and prosecutors in many provinces prior to independence.<sup>343</sup> It is this system of judicial organization which remained intact until Mozambican independence in 1975. However, the collapse of the colonial system resulted in the ‘flight of judges’ such that the post-independence FRELIMO led government had to begin to rebuild a new judicial order.<sup>344</sup>

As earlier alluded to, the post-independence legal developments in Mozambique also had a corresponding influence on the mechanisms of judicial selection. The 1975 Mozambican Constitution and the Law on the Organization of the Judiciary of 1978 consolidated the political ideology of popular participation in the judicial process.<sup>345</sup> The mechanisms for the selection of professional and elected lay judges were entrenched into the Mozambican legal system. The

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<sup>340</sup> See Meneses 7. The local chiefs were appointed on the basis of noble lineages and those opposed to colonial domination were replaced by compliant chiefs. Meneses notes that the *regulo* embodies different functions of power namely legislative, judicial, executive and administrative powers.

<sup>341</sup> See generally Coissoro, ‘African Customary Law in the Former Portuguese Territories, 1954-1974’ 1984, *Journal of African Law*, 28, 1- 2, 72-79.

<sup>342</sup> See Baltazar in Sachs ‘State Papers and Party Proceedings’ 1979, 9-10 Series 2, 2.

<sup>343</sup> *Ibid.*

<sup>344</sup> See Keehan, ‘The Legal System in Mozambique’ 1985, *Modern Legal Systems Cyclopedia*, 6, at 1.4(B)(1). This dire situation is evidenced by the fact that after independence, only 25 lawyers remained in the country subsequently leading to the nationalization of the legal profession.

<sup>345</sup> See Law No. 12/78.

1975 Mozambican Constitution complemented by the Law on the Organization of the Judiciary placed the judiciary under the authority of people's assemblies which were under the Ministry of Justice.<sup>346</sup> In reality, the actual judicial appointments were done by the Ministry of Justice which had the powers of appointment, transfer and removal of judges from office.<sup>347</sup>

Major changes to the judiciary were introduced by the 1990 Mozambican Constitution which for the first time championed the concept of judicial independence.<sup>348</sup> Article 167 of the 1990 constitution provided for the establishment of various courts including the Supreme Court. The Supreme Court was comprised of professional and elected judges with the professional judges being appointed by the President of the Republic after consultation with the JAC.<sup>349</sup> The lay judges were elected by the Assembly of the Republic the only qualification being that the judges had to be above 35 years of age.<sup>350</sup> The reorganization of the judiciary by the 1990 constitution was further buttressed by the 1991 Statute of the Judicial Magistracy<sup>351</sup> (*Estatuto dos Magistrados Judiciais*) and the 1992 Organic Law of the Judicial Courts<sup>352</sup> which provided for the appointment of Supreme Court, Provincial Court and District Court judges.<sup>353</sup>

An important feature of the post 1990 judicial selection mechanisms was the continued separation of the appointment of professional and elected lay judges. In terms of the 1991 Statute of the Judicial Magistracy, the JAC played a pivotal role in the nomination of professional judges with legal training in all courts.<sup>354</sup> On the other hand, elected lay judges

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<sup>346</sup> See Afrimap Report, 72.

<sup>347</sup> Ibid.

<sup>348</sup> See Article 164 of the 1990 Mozambican Constitution.

<sup>349</sup> See Article 170(2) of the 1990 Mozambican Constitution.

<sup>350</sup> See Article 170(5) of the 1990 Mozambican Constitution.

<sup>351</sup> See Law No. 10/1991.

<sup>352</sup> See Law No. 10/1992.

<sup>353</sup> See Articles 36, 49 and 57 of the Organic Law of the Judicial Courts, Law No. 10/1992.

<sup>354</sup> See Article 19(b) of the Statute of the Judicial Magistracy, Law No. 10/1991.

were nominated by social, cultural, civic and professional organizations with Parliament responsible for the election of Supreme Court judges and the government for the Provincial and District court judges.<sup>355</sup> This regime of judicial selection remained intact until 2004 when the Mozambican Constitution was revised for the second time. A detailed analysis of the post 2004 judicial selection mechanisms is dealt with later.

### **3.3 General background of South Africa, and evolution of its legal system in the context of judicial selection mechanisms**

The development of the South African legal system is nothing short of interesting in that it can be described as the mother of most of the legal systems in Southern Africa. The core of the legal systems in countries such as Botswana, Namibia and Zimbabwe has been greatly influenced by the development of the South African legal system at the Cape from the sixteenth century onwards. It is critical that a comprehensive analysis of the South African contextual background be done in order to lay a solid foundation for the following discussions on the Zimbabwean legal system which was received indirectly through South Africa.

#### **3.3.1 General background: South Africa**

South Africa is a democratic republic which gained its independence in 1994. It is one of the most developed countries in Africa with a population of approximately 50 million people.<sup>356</sup> The country has been described as a rainbow nation due to its racial and ethnic diversity. There are four major racial groups in South Africa which have been categorized as Black, White, Coloured and Asian with the Black population being the majority.<sup>357</sup> There are eleven official languages in South Africa, in itself a factual recognition of the country's ethnic diversity.<sup>358</sup>

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<sup>355</sup> See Articles 78 and 79 of the Organic Law of the Judicial Courts, Law No. 10/92.

<sup>356</sup> See [www.worldbank.org/en/country/southafrica](http://www.worldbank.org/en/country/southafrica) accessed on 3/02/13.

<sup>357</sup> See [www.indexmundi.com/south\\_africa/Economy](http://www.indexmundi.com/south_africa/Economy) accessed on 3/02/13. the main ethnic groups are distributed as follows, 79.5 Black, 9% White, 9% Coloured, 2.5% Asian.

<sup>358</sup> The official languages are Afrikaans, English, Ndebele, Northern Sotho, Southern Sotho, Swazi, Tsonga, Tswana, Venda, Xhosa and Zulu.

The historical development of present day South Africa can be traced back to the early settlement of the Dutch at the Cape in the sixteenth century under the auspices of the Dutch East India Company.<sup>359</sup> The British took over occupation of the Cape from the Dutch settlers in 1806 and the friction between the Afrikaner and the British culminated in the Anglo-Boer war of 1899 which ended with the signing of the Treaty of Vereeniging in 1902.<sup>360</sup> This was followed by a National Convention which negotiated South Africa's first constitution in 1908 finally culminating in the South Africa Act of 1909. This Act introduced government institutions of British design for the whole of South Africa.<sup>361</sup> A watershed moment in the early development of South Africa was the inauguration of The Union of South Africa on 31 May 1910. The subsequent years witnessed a decline in the British control over South Africa finally culminating in the declaration of South Africa as a Republic in 1961.<sup>362</sup> Parallel to these constitutional developments was the rise of the National Party which championed racial segregation. The National Party won the 1948 election and imposed the apartheid system<sup>363</sup> of governance which lasted till the dawn of a new democratic dispensation in 1994.<sup>364</sup> An interim constitution

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<sup>359</sup> See Rautenbach; Malherbe, "Constitutional Law" 2004, 4<sup>th</sup> ed, Butterworths, 13.

<sup>360</sup> See [www.constitutionalcourt.org.za/text/constitution/history.html](http://www.constitutionalcourt.org.za/text/constitution/history.html) accessed on 15/11/12.

<sup>361</sup> See Rautenbach; Malherbe, 2004, 4<sup>th</sup> ed, Butterworths, 14.

<sup>362</sup> See the Constitution of the Republic of South Africa Act 32 of 1961. The most significant constitutional change brought about by the 1961 Constitution was the substitution of a republic for a monarchic form of state. The British Queen was replaced as head of state by a ceremonial State President elected by an electoral college consisting of the members of the House of Assembly and the Senate.

<sup>363</sup> For a detailed discussion of the apartheid system, see Frimpong; Tiewel, 'Can Apartheid Successfully Defy The International Legal System?' 1977, *Black Law Journal*, 5, 287. On the role of the judiciary under apartheid, see generally Pitts, 'Judges in an Unjust Society: The Case of South Africa' 1986-1987, *Denv. J. Int'l L. & Pol'y*, 15, 49; Cameron 'Submission On The Role Of The Judiciary Under Apartheid' 1998, *South African Law Journal*, 115, 428; Bizo, 'The Abrogation And Restoration of the Rule of Law and Judicial Independence in South Africa' 1998, *Revue. quebecoise de droit int'l*, 11, 155; Dugard, 'Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation' 2007, *Leiden Journal of International Law*, 20, 965-981; Madala, 'Rule under Apartheid and the Fledgling Democracy in Post-Apartheid South Africa: The Role of the Judiciary' 2000-2001, *N.C.J. Int'l L. & Com.Reg.*, 26,743.

<sup>364</sup> The apartheid system collapsed as a result of the increasing isolation of South Africa by the international community coupled with internal strife. The apartheid regime was left with no option but to negotiate a peaceful transition to majority rule. According to Rautenbach and Malherbe, 'The democratization of the South African

was negotiated by twenty six political parties in 1994 and this negotiated transition to democratic rule led to the framing of a new constitution for South Africa.<sup>365</sup> The new Constitution was adopted on 10 December 1996 after being certified by the newly created Constitutional Court.<sup>366</sup>

Present day South Africa is a stable, unitary, liberal democratic state.<sup>367</sup> In fact, South Africa is considered one of the most stable democracies on the African continent. The country's apartheid past has had a tremendous influence on the development of credible institutions that support democracy.<sup>368</sup> The stability of South Africa is reflected in the political sphere. South Africa is a multiparty democracy.<sup>369</sup> By way of illustration, twenty nine political parties participated in the 2014 general elections.<sup>370</sup> Its electoral regime for national and provincial elections is based on a proportional representation voting system.<sup>371</sup> It is worth noting that despite the existence of a political environment that encourages diversity of political affiliation,

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constitutional system remained a vexing matter of growing proportions. The turning point was in 1990, with the unbanning of prohibited political organizations and the release or return to South Africa of their leaders, which dramatically accelerated the process of constitutional change. In December 1991, during multi-party negotiations(CODESA), the majority of South African political parties and organizations signed a declaration of intent in which they committed themselves to draw up a new democratic constitution for South Africa through negotiations as soon as possible.'

<sup>365</sup> See the 1996 South African Constitution. On the transformation of the law in South Africa, see generally Corder, 'Prisoner, Partisan and Patriarch: Transforming The Law in South Africa 1985-2000' 2001, South African Law Journal, 118, 772; Wesson; Du Plessis, 'Fifteen Years On: Central Issues Relating to the Transformation of the South African Judiciary' 2008, South African Journal on Human Rights, 24, 187.

<sup>366</sup> See [www.constitutionalcourt.org.za/text/constitution/history.html](http://www.constitutionalcourt.org.za/text/constitution/history.html) accessed on 15/11/12.

<sup>367</sup> See De Vries, 'Courts: The weakest link in the democratic system in South Africa; A power perspective' 2006, Politeia, 25, 1, 44.

<sup>368</sup> See Section 181(1)(a-f) of the South African Constitution.

<sup>369</sup> See [http://www.elections.org.za/content/Pages/Registered\\_Parties/Registered-Parties.aspx?name=Parties](http://www.elections.org.za/content/Pages/Registered_Parties/Registered-Parties.aspx?name=Parties) accessed on 5/02/13. As at 5 February 2013, the country had a total of 208 registered political parties.

<sup>370</sup> See <http://www.elections.org.za/content/Elections/Results/2014-National-and-Provincial-Elections--National-results/> accessed on 10/01/15.

<sup>371</sup> Ibid.

South African politics has been dominated by the African National Congress (ANC),<sup>372</sup> a liberation struggle movement formed in January 1912.<sup>373</sup> The ANC won the first general elections of 1994 resoundingly and has dominated subsequent elections held in 1999, 2004, 2009 and 2014.<sup>374</sup> For instance, in the 2009 general elections, the ANC won 65.9 percent of the vote compared with its nearest rival, the Democratic Alliance (DA) which won 16.7 percent of the vote.<sup>375</sup> In the 2014 general elections, the ANC got 62.15 percent of the vote compared to the DA's 22.23 percent, showing a slight gain on the part of the opposition party.<sup>376</sup>

On the political and civil rights landscape, the South African Constitution goes much further than most constitutions in Africa in providing fundamental guarantees for civil and political rights.<sup>377</sup> It contains a comprehensive justiciable bill of rights which is considered as one of the most progressive in Africa.<sup>378</sup> Such a progressive constitutional regime coupled with strong institutions that support democracy have ensured a general culture of legality and the rule of law. Court decisions are generally respected by the political players and this has reinforced the culture of judicial independence. This does not mean that there have been no frictions between

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<sup>372</sup> For a discussion of a dominant party system, see generally Joannou; Coetzee, 'Tendencies of a Dominant Party System in the Free State Legislature (1994-2008)' 2010 *Joernaal*/Journal, 35, 1, 139.

<sup>373</sup> See [www.constitutionalcourt.org.za/text/constitution/history.html](http://www.constitutionalcourt.org.za/text/constitution/history.html) accessed on 15/11/12. The dominance of the ANC on the South Africa political landscape is further buttressed by its alliance with the South African Communist Party (SACP) and Congress of South African Trade Unions(COSATU).

<sup>374</sup> See Breytenbach, 'The Presidencies of Nelson Mandela and Thabo Mbeki Compared. Implications for the Consolidation of Democracy in South Africa' 2006, *Africa Insight*, 36, 3- 4, 173-174.

<sup>375</sup> See <http://electionresources.org/za/provinces.php?election=2009> accessed on 23/01/13. As at February 2013, South Africa has had four Presidents since gaining independence in 1994.

<sup>376</sup> See <http://www.elections.org.za/content/Elections/Results/2014-National-and-Provincial-Elections--National-results/> accessed on 10/01/15.

<sup>377</sup> Chapter 2 of the South African Constitution guarantees the basic rights of citizens.

<sup>378</sup> See generally Fombad, 'African Bills of Rights in Comparative Perspective' 2011, *Fundamina*, 17, 1, 33-64.

the judiciary and the executive. Frictions have occurred but the executive has tended to lean more in favour of the rule of law despite serious misgivings with particular court decisions.<sup>379</sup>

On the economic front, the South African economy is the biggest on the African continent. Since 1994, South Africa has experienced an economic boom.<sup>380</sup> Sustained economic growth in the post-independence decade due to favourable macroeconomic conditions ensured a Gross Domestic Product (GDP) averaging 5.4 percent.<sup>381</sup> Despite this positive economic outlook, South Africa continues to reflect the apartheid legacy of extreme economic inequalities.<sup>382</sup>

### **3.3.2 Evolution of the South African legal system with emphasis on judicial selection mechanisms**

The colonial and post-independence South African legal system is an example of a hybrid legal system, a feature which is shared by most countries in Southern Africa. A hybrid or mixed legal

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<sup>379</sup> For the attitude of the executive towards perceived judicial encroachments, see the address by President Zuma on the occasion of the 3<sup>rd</sup> Access to Justice Conference available at [www.justice.gov.za/access-to-justice-conference-2011/20110708\\_ajc\\_zuma-speech.pdf](http://www.justice.gov.za/access-to-justice-conference-2011/20110708_ajc_zuma-speech.pdf) accessed on 23/01/13.

<sup>380</sup> In terms of a research carried out by the University of Pretoria's Centre For Microfinance in March 2010 titled 'A Review of the South African Microfinance Sector' available at [web.up.ac.za/sitefiles/file/1/3841/Volume%20II%20Section%20I%20Context.pdf](http://web.up.ac.za/sitefiles/file/1/3841/Volume%20II%20Section%20I%20Context.pdf) accessed on 5/02/13. 'Real economic growth in South Africa has tended towards an average of 3% per annum since 1994. Due to favourable macroeconomic conditions, this average was raised to 5% between 2005 and 2007, but moderated to 3.1% in 2008, in line with global economic trends. In the fourth quarter of 2008, growth of -0.7% was recorded. In the subsequent quarter, economic growth was again negative, at -7.4%, placing South Africa in its first recession since 1992.'

<sup>381</sup> See a discussion on the outline of the South African economy available at [http://www.climateriskandopportunity.co.za/downloads/Section\\_1to3/Climate\\_Change\\_&\\_SA\\_Economy\\_Economy\\_Overview\\_201005.pdf](http://www.climateriskandopportunity.co.za/downloads/Section_1to3/Climate_Change_&_SA_Economy_Economy_Overview_201005.pdf) accessed on 5/02/13. despite the effects of the global financial crisis, South Africa's economic growth was estimated to reach a moderate growth rate of 3.6 percent in 2012.

<sup>382</sup> According to the United Nations country profile available at [www.un.org/esa/agenda21/natinfor/wssd/southafrica.pdf](http://www.un.org/esa/agenda21/natinfor/wssd/southafrica.pdf) accessed on 2/02/13, 'Poverty in South Africa is primarily a feature of the historically disadvantaged population. Many households still have unsatisfactory access to clean water, energy, health care and education. It is estimated that 39% of the population is vulnerable to food insecurity...Of the population, 61% Africans, 38% Coloureds, 5% Indians and 1% Whites can be classified as poor.' One of the major challenges confronting the South African government is addressing poverty. Poverty levels are high in South Africa with an estimated 40 percent of its population living below the poverty datum line.

system is one that is constituted by a mixture of two or more distinct legal traditions. In order to fully appreciate the foundation of the South African legal system, it is critical to give a historical analysis of the development of the legal system from the time the Dutch occupied the Cape in 1652.<sup>383</sup>

When the Dutch settled at the Cape in 1652, the law in the Netherlands had been greatly influenced by Roman law from the 14<sup>th</sup> century onwards. The blending of Roman Law and Dutch law over the centuries created the foundation for the modern Roman-Dutch law. Significantly, the Dutch introduced Roman- Dutch law at the Cape in 1652.<sup>384</sup> The establishment of the *Raad Van Justitie* (Council of Justice) in 1685<sup>385</sup> further consolidated the use of Roman-Dutch law at the Cape.<sup>386</sup> Roman-Dutch law continued to be the dominant legal system at the Cape until the British occupation in 1795.<sup>387</sup> The British retained Roman-Dutch law. A major change initiated by the British to the Cape legal system was the introduction of the Charter of Justice<sup>388</sup> in 1827 which centralized the administration of justice.<sup>389</sup> During this period, English law was assimilated into the Cape legal system especially in commerce which was dominated by the British.<sup>390</sup> The unification of South Africa in 1910 further consolidated the legal systems in

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<sup>383</sup> It is worth noting at this juncture that the developments at the Cape also had a great influence on the development of the legal system in Zimbabwe.

<sup>384</sup> See Van den Bergh, 'The Remarkable Survival of Roman-Dutch Law in Nineteenth-Century South Africa' 2012, *Fundamina*, 18, 1, 71.

<sup>385</sup> *Ibid* at 74.

<sup>386</sup> See Van Nierkek; Le Roux, 'Origins of South African Law' 2000, *UNISA*, 29-31.

<sup>387</sup> *Ibid*.

<sup>388</sup> See Van der Merwe, 94.

<sup>389</sup> Corder, 'Judicial Authority in a Changing South Africa' 2004, *Legal Studies*, 24, 1-2, 254. Regarding the reception of English legal principles at the Cape during the 19<sup>th</sup> century, see generally Zimmerman; Visser 'Southern Cross: Civil law and Common law in South Africa' 1996, Clarendon Press, Oxford; Palmer, "Mixed Jurisdictions Worldwide: The Third Legal Family" 2012, 2<sup>nd</sup> ed, Cambridge University Press. See also Hahlo; Kahn, "South Africa: The Development of its Laws and Constitution" 1960, Cape Town: Juta.

<sup>390</sup> See Van Nierkek; Le Roux, 2000, *UNISA*, 142. See also Du Bois, "Wille's Principles of South African Law" 2007, 9<sup>th</sup> ed, Juta, Cape Town, 66. English law has had a significant influence on the development of the legal system in South Africa. The reception of English law at the Cape in the 19<sup>th</sup> century helped to adapt and develop the Roman-

different parts of South Africa which were developing independently of each other.<sup>391</sup> From the foregoing background, the South African legal system can be described as a mixed or hybrid system which has as its substrata, the Roman-Dutch law with a lot of English law influences.<sup>392</sup> Similarly, recent studies have confirmed that both Roman-Dutch and English law carry about equal weight in the South African legal system.<sup>393</sup>

With respect to judicial appointments, the post 1996 judicial appointment processes in South Africa represent a paradigm shift from the situation obtaining in colonial South Africa. In the early development of the South African legal system, two distinct phases are discernible in relation to judicial selection. The first phase relates to the appointment of lay judges by Dutch authorities until the British Charter of Justice of 1827.<sup>394</sup> This Charter transformed the legal system by providing for a Supreme Court staffed by legally qualified judges.<sup>395</sup> As a logical corollary to these developments in the administration of justice, the legal system necessarily reflected the British orientation throughout the nineteenth century.

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Dutch law that was in use at the Cape. The Roman-Dutch mercantile law was not sufficiently developed to meet the needs of trade. Courts supplemented and adjusted Roman-Dutch law by importing English law principles. English law principles of commerce have consequently heavily influenced the development the South African legal system. English law has also heavily influenced parliamentary laws in South Africa, the pre 1994 constitutional order in South Africa being the classical Westminster notion of parliamentary sovereignty. There are aspects of South African law that can clearly be identified as being English in origin, though they have now been absorbed into areas of law that derive their essential characteristics from other sources.

<sup>391</sup> See Van Nierkek; Le Roux, 2000 UNISA, 145. See also Church, 'The convergence of the western Legal system and the indigenous African legal system in South Africa with reference to legal development in the last five years' 1999, *Fundamina*, 8, 13; Van Niekerk, 'The convergence of legal systems in Southern Africa' 2002, *CILSA*, 308.

<sup>392</sup> See Van der Merwe, 'The Origin and Characteristics of the Mixed Legal Systems of South Africa and Scotland and their Importance in Globalisation' 2012, *Fundamina*, 18, 1, 91-102.

<sup>393</sup> See Fombad, 'Mixed Systems In Southern Africa: Divergences and Convergences' 2010, *Tulane European and Civil Law Forum*, 25, 1, 5. See also Zimmermann, Visser, 'South African Law as a Mixed System' in "SOUTHERN CROSS. CIVIL LAW AND COMMON LAW IN SOUTH AFRICA" 1996, Clarendon Press, Oxford; Fagan, 'Roman-Dutch Law in Its South African Historical Context' in "SOUTHERN CROSS. CIVIL LAW AND COMMON LAW IN SOUTH AFRICA" 1996, Clarendon Press, Oxford, 33-64.

<sup>394</sup> See also the Cape Ordinance 33 of 1827.

<sup>395</sup> See Van den Bergh, 74.

In terms of section 10(1) (a) of the Supreme Court Act of 1959,<sup>396</sup> ‘The Chief Justice, the judges of appeal, the judges president, the deputy judges president and all other judges of the Supreme Court shall be fit and proper persons appointed by the State President...’ It appears therefore that the only legal prescription was that an aspiring judicial candidate must have been a fit and proper person to hold judicial office. This necessarily entailed that a lot of subjective executive discretion dominated the judicial selection process. In practice however, the Minister of Justice had tremendous influence in selecting judicial candidates and exercised sole discretion in acting judicial appointments.<sup>397</sup> In the latter years of apartheid, the Minister of Justice acted on the recommendations of the Chief Justice or the Judge President of the relevant division in judicial selection.<sup>398</sup> Furthermore, the Republic of South Africa Constitution Act of 1983 which lasted from 1984 to 1994 did not introduce fundamental changes in the manner of selecting judges.<sup>399</sup> It basically adopted wholly the judicial selection provisions of the Supreme Court Act of 1959.

However, a number of salient features of the apartheid judicial selection processes are discernible. Firstly, judicial selection was premised on race resulting in white candidates being exclusively appointed.<sup>400</sup> Secondly, the selection process was shrouded in secrecy raising the spectre of political patronage in the selection process.<sup>401</sup> Thirdly, judicial candidates were mainly drawn from senior advocates from the bar.<sup>402</sup> Lastly, the apartheid era had as one of its hallmarks, the appointment to the Appellate Division of judges generally supportive of the

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<sup>396</sup> See Act 59 of 1959.

<sup>397</sup> See Mahomed; Van Heerden ; Chaskalson; Langa; Corbett, ‘ The Legal System in South Africa 1960-1994’ 1998 South African Law Journal, 115, 21, 32. See also Section 10(4) of the Supreme Court Act of 1959.

<sup>398</sup> Ibid.

<sup>399</sup> See Section 68 of the Republic of South Africa Constitution Act of 1983.

<sup>400</sup> See Mahomed; Van Heerden; Chaskalson; Langa; Corbett, 32.

<sup>401</sup> Ibid.

<sup>402</sup> See Wesson; Du Plessis, 190.

Nationalist Party.<sup>403</sup> Writing in 1982 in the twilight of the apartheid era, Sir Sidney Kentridge observed that:

*'...over the past thirty years political factors have been placed above merit- not only in appointments to the Bench but in promotions to the Appeal Court ... a number of appointments to the Supreme Court and a number of judicial promotions have been made which are explicable solely on the ground of the political views and connections of the appointees and on no other conceivable ground.'*<sup>404</sup>

It is this judiciary so constituted which survived the political transformation from apartheid to a liberal democratic state almost wholly intact.<sup>405</sup> The dawn of a new democratic order in 1994 ushered in fundamental changes to the manner of selecting judges. The new democratic order was set on a platform which represented a complete break with the past. A detailed analysis of the post 1996 judicial selection mechanisms is dealt with later.

### **3.4 General background of Zimbabwe, and evolution of its legal system in the context of judicial selection mechanisms**

The development of the Zimbabwean legal system is closely intertwined with the legal developments in colonial South Africa. In fact, the core of the Zimbabwean legal system was received indirectly from South Africa. Given these shared legal backgrounds, it is critical to analyse the differences in the evolution of both countries' legal systems.

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<sup>403</sup> See Dugard, 967. See also a critique of the Nationalist Party's patronage judicial appointments in Millner, 'Eclipse of a Judiciary: The South African Position' 1962, *The International and Comparative Law Quarterly*, 11, 3, 886-891; Sachs, 'Justice in South Africa' 1973, London: Chatto Heinemann; Cameron, 'Legal Chauvinism, Executive-Mindedness and Justice- LC Steyn's Impact on South African Law' 1982 *South African Law Journal*, 99, 38.

<sup>404</sup> Kentridge, 'Telling The Truth About Law' 1982, *South African Law Journal*, 99, 652.

<sup>405</sup> *Ibid* at 191.

### 3.4.1 General Background: Zimbabwe

Zimbabwe is a unitary landlocked state situated in Southern Africa.<sup>406</sup> The 2012 census estimated the total population to be approximately 13 million people.<sup>407</sup> It is a multi-ethnic country with two major groups namely, the Shona and the Ndebele speaking peoples. The Shona people constitute 82 percent whilst the Ndebele constitute 14 percent of the total population. Other minority groups constitute four percent of the total population.<sup>408</sup> The 2013 Constitution recognizes sixteen official languages.<sup>409</sup>

Present day Zimbabwe was colonized by the British South Africa Company in 1890. In 1895, the name Rhodesia was officially recognized under the British South Africa Company's administration. In 1923, Zimbabwe (Southern Rhodesia then) became a self-governing territory under the British Empire. The white settlers declared independence from Britain in 1965 and Southern Rhodesia became a sovereign state. The major highlights of the colonial regime were racial discrimination against the black majority, land segregation and segregated governance.<sup>410</sup> Political and economic rights were only accorded to the white settler community. The rise of African consciousness in the 1930's led to the struggle for self-rule which culminated in the Second *Chimurenga* (war of independence). The war for independence ultimately led to the signing of the Lancaster House Agreement in 1979 which ushered in majority rule in 1980.<sup>411</sup> The Lancaster House Agreement also provided for a new constitution which was basically a

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<sup>406</sup> Zimbabwe shares borders with Botswana, Mozambique, South Africa and Zambia.

<sup>407</sup> See the 2012 Census Preliminary Report by ZimStat available at <http://www.zimstat.co.zw/dmdocuments/CensusPreliminary2012.pdf> accessed on 3/02/13.

<sup>408</sup> See [http://www.indexmundi.com/zimbabwe/ethnic\\_groups.html](http://www.indexmundi.com/zimbabwe/ethnic_groups.html) accessed on 12/01/13.

<sup>409</sup> See section 6 of the 2013 Zimbabwean Constitution. Prior to this constitution, English was the official language while Ndebele and Shona were national languages.

<sup>410</sup> Racial segregation was so severe to the extent that the Land Apportionment Act was promulgated in 1930 under which land was divided into White Areas, Native Area, Native Purchase and Forest Areas. The Native areas were not productive by any standards.

<sup>411</sup> Two liberation movements, ZANU PF and ZAPU participated in the war that led to Zimbabwe's independence.

compromise document. The elections of 1980 were won by Zimbabwe African National Union Patriotic Front (ZANU PF) which subsequently formed the first post-colonial government.<sup>412</sup>

Since the adoption of the Lancaster House Constitution, Zimbabwe follows a multi-party democracy system despite a failed attempt to introduce a one party state in the late 1980's.<sup>413</sup> As earlier alluded to, the first democratic elections were held in 1980 and this saw the transition to majority rule.<sup>414</sup> However, internal disturbances between 1982 to 1987 fuelled by disgruntled former liberation fighters from the PF-ZAPU culminated in the signing of the 1987 Unity Accord between the Zimbabwe African Peoples Union (PF ZAPU) and ZANU PF. The Unity Accord merged the two liberation parties into one with the name ZANU PF being retained.<sup>415</sup>

The ZANU-PF party dominated Zimbabwe's political landscape and won every election from independence up until the year 2000.<sup>416</sup> With the birth of a strong opposition party in 1999 called the Movement for Democratic Change (MDC) which contested the March 2000 parliamentary elections,<sup>417</sup> ZANU-PF lost a considerable number of seats. In June 2002, presidential elections were held which also saw ZANU-PF facing stiff competition from the MDC

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<sup>412</sup> The year 1980 marked the turning point in the history of Zimbabwe with independence being attained on the 18<sup>th</sup> of April.

<sup>413</sup> See a report by the UN Special Envoy on Human Settlements Issues in Zimbabwe available at <http://ww2.unhabitat.org/documents/ZimbabweReport.pdf> accessed on 6/02/13.

<sup>414</sup> Thereafter, elections have been conducted after every 5 years.

<sup>415</sup> According to a report by the UN Special Envoy on Human Settlements Issues in Zimbabwe available at <http://ww2.unhabitat.org/documents/ZimbabweReport.pdf>, 15 accessed on 6/02/13, ' The historical relationship of ZANU-PF and the minority party ZAPU-PF during the liberation struggle and the subsequent civil war formed the basis of the ZANU-PF policy and attitude towards political opposition.'

<sup>416</sup> Ibid. More than 12 opposition parties were formed in the early 1990s but these were weak and small, poorly led and having almost no political impact.

<sup>417</sup> The MDC was formed out of an alliance of civil society organizations such as the National Constitutional Assembly, The Zimbabwe Congress of Trade Unions. The alliance was cemented by the shared abhorrence to ZANU PF's human rights violations and bad governance.

amid allegations that the elections were rigged in favour of the former.<sup>418</sup> However, the year 2000 is significant in Zimbabwe's politics in that a government led constitution reform process resulted in the proposed constitution being rejected at a referendum.<sup>419</sup> Significantly, the rejection of the proposed constitution marked the first political defeat for the ZANU PF leadership.<sup>420</sup> A backlash ensued against perceived political opponents. The judiciary was not spared and perceived compliant judges were appointed to dilute the bench while other judges were forced to resign including Chief Justice Gubbay.<sup>421</sup>

An equally significant turn in Zimbabwean politics was witnessed in the 2008 harmonised elections. Prior to the elections, there were allegations of violence and intimidation being perpetrated against opposition political party supporters.<sup>422</sup> The same concerns applied to the re-run of the 2008 elections. These disputed elections culminated in the formation of a Government of National Unity (GNU) by the three major political parties in February 2009.<sup>423</sup> The GNU subsequently collapsed as a consequence of the 2013 elections which were won by ZANU PF with a clear majority.<sup>424</sup>

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<sup>418</sup> See Makumbe, 'Zimbabwe's Hijacked Elections' 2002, *Journal of Democracy*, 13, 4, 97. See also Shumba, 'A critical reflection on the 2002 presidential election in Zimbabwe' 2002, *African Human Rights Law Journal*, 2, 327; Sachikonye, 'Political Parties and the Democratisation Process in Zimbabwe' 2005, EISA Research Report Number, 16.

<sup>419</sup> See Matyszak, 332.

<sup>420</sup> See <http://ww2.unhabitat.org/documents/ZimbabweReport.pdf>, at 18 accessed on 6/02/13.

<sup>421</sup> See Matyszak, 338. See also De Bourbon, 'Human rights litigation in Zimbabwe: Past, present and future' 2003, *African Human Rights Law Journal*, 3, 221.

<sup>422</sup> Zimbabwe Lawyers for Human Rights, 'Zimbabwe 2008 Harmonised Elections' 2008, 41, available at [www.zesn.org.zw/.../Publication\\_275.pdf](http://www.zesn.org.zw/.../Publication_275.pdf) accessed on 13/11/13.

<sup>423</sup> The Global Political Agreement was signed by the three major political parties represented in Parliament namely, ZANU PF led by President Robert Mugabe, the Morgan Tsvangirai led MDC and the MDC led by Arthur Mutambara which split from the Tsvangirai led MDC. A new cabinet was sworn in on 13 February 2009. Currently, Zimbabwe is in the process of making a new constitution which if successfully completed will bring about new elections and an end to the GNU.

<sup>424</sup> There are different accounts on whether the elections were free and fair but most of the observer missions endorsed the elections as credible.

While the Lancaster House Constitution and the 2013 Constitution which repealed it, provide for civil and political rights, Zimbabwe has over the years progressively failed to recognize and protect the fundamental rights of citizens.<sup>425</sup> This state of affairs has necessarily led to the non-observance of the rule of law.<sup>426</sup> Court orders have brazenly been ignored on numerous occasions where the government did not agree with a court decision especially in cases involving land acquisition.<sup>427</sup> While the political environment provides for multi-party democracy, Zimbabwean politics has been polarized between the two major political parties, ZANU PF and the MDC Tsvangirai (MDC T).

On the economic front, Zimbabwe has experienced mixed fortunes. At independence in 1980, the country was considered the jewel of Africa with its abundant resources.<sup>428</sup> The country had a vibrant economy based on agriculture, mining, manufacturing and tourism industries. This promising start to this new democratic dispensation was soon eroded by a combination of factors. These included bad governance, economic mismanagement and the failed Economic Structural Adjustment Programme (ESAP) of the early 1990s.<sup>429</sup> A progressive decline economically ensued up to the late 1990's.<sup>430</sup> The onset of the 'land invasions' in 2000 spelt

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<sup>425</sup> See generally De Bourbon, 'Human Rights Litigation in Zimbabwe: Past, present and future' 2003, African Human Rights Law Journal, 3, 195.

<sup>426</sup> Ibid.

<sup>427</sup> See the following cases whose judgments were largely ignored by the government; *Commercial Farmers Union v. Minister of Lands* 2000 2 ZLR 469(S); *Commissioner of Police v. CFU* 2000 1 ZLR 503 (H); *Davies & Ors v. Minister of Lands* 1996 1 ZLR 681(S).

<sup>428</sup> See 'Beyond the Enclave: Towards a Pro-Poor and Inclusive Development Strategy for Zimbabwe' 2011, Weaver Press, 2. In 1980, Zimbabwe's per capita Gross Domestic Product(GDP) was much higher than that of India and China.

<sup>429</sup> See a report by the UN Special Envoy on Human Settlements Issues in Zimbabwe available at <http://ww2.unhabitat.org/documents/ZimbabweReport.pdf> at16 accessed on 6/02/13.

<sup>430</sup> Ibid. The economic decline of the late 1990s is generally attributed to three political factors. These were the cash handouts to war veterans in 1997, Zimbabwe's unbudgeted military intervention in the Democratic Republic of Congo and the 'fast-track' land reform programme initiated in 2000.

unprecedented doom for the Zimbabwean economy.<sup>431</sup> The once promising jewel of Africa was plunged into an economic and political crisis which paralysed critical sectors of the economy.<sup>432</sup> As a result of this economic crisis which precipitated hyper-inflation,<sup>433</sup> the Zimbabwean Dollar was abandoned in 2008 in favour of other stable currencies.<sup>434</sup> However, the formation of the inclusive government by the three major political parties in 2009 had a positive impact. The country's economy stabilized with year on year inflation for December 2012 pegged at 2.91 percent compared to a peak of 1,096 percent in 2006.<sup>435</sup>

### **3.4.2 Evolution of the Zimbabwean legal system with emphasis on judicial selection mechanisms**

Zimbabwe's legal system is an example of a hybrid system. After the colonization of Zimbabwe by the British South Africa Company in 1890, a Proclamation was subsequently made to the effect that the law at the Cape as at 10 June 1891 was to be retained. The reality in fact was that the law to be administered in Southern Rhodesia as a result of the Proclamation was Roman Dutch law with substantial English law influences.<sup>436</sup> Consequently, the evolution of the

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<sup>431</sup> The mounting political and economic pressures finally forced the government to initiate the 'fast-track land reform programme' with a view to placate the disgruntled populace especially the war veterans. The 'land invasions' were basically a scenario where predominantly white farmers were chased away from their properties without any compensation being paid by the government.

<sup>432</sup> The European Union, the US and several Commonwealth countries imposed so called 'smart sanctions' which were ostensibly meant to target particular individuals and companies but ended up affecting the ordinary citizen.

<sup>433</sup> See <http://www.worldbank.org/en/country/zimbabwe> accessed on 2/02/13. According to the World Bank estimate, Zimbabwe's inflation in 2006 reached a peak of 1,096.6%.

<sup>434</sup> See the African Development Bank 2011-2013 Country Brief available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Zimbabwe%20Country%20Brief%20June%202011.pdf> accessed on 4/02/13. The adoption of the multi-currency regime, along with cash budgeting, has helped to restore and maintain price stability in Zimbabwe.

<sup>435</sup> See survey by the Zimbabwe National Statistics Agency available at [http://www.zimtreasury.gov.zw/index.php?option=com\\_content&view=article&id=121:consumer-prices-december-2012&catid=1:latest-news](http://www.zimtreasury.gov.zw/index.php?option=com_content&view=article&id=121:consumer-prices-december-2012&catid=1:latest-news) accessed on 29/01/13. For an overview of Zimbabwe's economic outlook see also <http://www.worldbank.org/en/country/zimbabwe/overview> accessed on 2/02/13.

<sup>436</sup> See Madhuku, "An Introduction to Zimbabwean Law" 2010, Weaver Press, 20. The historical development of the Roman Dutch law can be traced as way back as 1652 when Dutch settlers occupied the Cape. The Dutch

South African legal system at the Cape prior to 1891 had a tremendous influence on the development of the legal system in present day Zimbabwe. In fact, present day Zimbabwe received its legal system indirectly from South Africa.

Legal developments at the Cape paved the way for the current Roman Dutch legal system in Zimbabwe as the post-independence government inherited the colonial legal system intact. Section 89 of the Lancaster House Constitution reaffirmed the basis of the Zimbabwean legal system as being Roman Dutch law in the following terms;

*'Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10<sup>th</sup> June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law.'*

The same basis of the Zimbabwean legal system has been left intact by the 2013 Constitution.<sup>437</sup> It is apparent that Zimbabwe entrenches a dual legal system wherein African customary law operates concurrently with the general law.<sup>438</sup> The application of customary law and general law within the same legal system has often led to a conflict of laws which the courts have been called upon to resolve.<sup>439</sup> Despite the Roman Dutch underpinnings of the Zimbabwean legal system, it appears that subsequent post-independence legislative prescriptions have 'weakened the Roman Dutch legal substratum on which the legal system is built.'<sup>440</sup>

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settlers introduced Roman Dutch law which was supplemented by English law in some aspects when the British eventually took over the Cape from the Dutch.

<sup>437</sup> See section 192 of the Zimbabwean Constitution.

<sup>438</sup> Ibid at 26.

<sup>439</sup> For the determination of which law applies to a particular dispute, see generally the cases of *Lopez v. Nxumalo* SC115/85; *Chapeyama v. Matende and Another* 2000 2 ZLR 356(S).

<sup>440</sup> See Fombad, 2003 CILSA, 36, 90.

In relation to superior court judicial appointments, the evolution of the legal system also had a corresponding effect on the judiciary including on the caliber of men selected to man it. At this juncture, an analysis of the judicial selection mechanisms in Rhodesia is pertinent.<sup>441</sup> It appears that the judicial selection processes in Rhodesia were a complete departure from the British colonial tradition.<sup>442</sup> The British colonial tradition entailed advancement to the bench through the magistracy ranks and transfer of law officers from other colonies.<sup>443</sup>

Any meaningful analysis of the colonial judicial selection mechanisms cannot ignore the various constitutional designs in the colonial era. Such an analysis necessarily focuses on the 1923 Southern Rhodesia Constitution,<sup>444</sup> the 1961 Rhodesia and Nyasaland Federation Constitution, the 1966 and the 1969 Rhodesian Constitutions. The 1923 Southern Rhodesia Constitution introduced a Responsible Government in the colony and this meant that Southern Rhodesia became a self-governing colony under the British Empire. Section 38(1) of the 1923 Constitution provided that, the judges of the High Court were appointed by the Governor in Council at his sole discretion. However, a clear departure from the 1923 Constitution in so far as judicial selection is concerned is found in the 1961 Constitution. The 1961 Constitution provided for the first time, the qualifications for appointment to judicial office as well making a distinction between the appointment of the Chief Justice and the rest of the judges. The appointment of all judges with the exception of the Chief Justice, were done by the Governor on the advice of the Prime Minister, and with the agreement of the Chief Justice. In terms of section 50(3) of the 1961 Constitution, a person qualified for appointment as a judge if the person came from a country where Roman-Dutch law was the common law and English was the official language. In

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<sup>441</sup> See generally Redgment, 'Plus Ca Change...Fifty Years Of Judges In Southern Rhodesia, Rhodesia And Zimbabwe' 1985, SALJ, 102, 529. There is generally a dearth of literature on the pre independent judicial appointments in Southern Africa but John Redgment's account of judicial appointments in pre independent Zimbabwe is instructive. Redgment analyses judicial appointments from 1933 to 1984 focusing on the appointees nationality and experience prior to appointment.

<sup>442</sup> Ibid at 529.

<sup>443</sup> Ibid at 530.

<sup>444</sup> Present day Zimbabwe retained the name Southern Rhodesia until 1965.

addition, the person must have qualified to practice as an advocate for not less than ten years. It would appear that the involvement of the Chief Justice was meant to check executive manipulations of the judicial selection process.

The 1966 Rhodesian Constitution retained the same qualification requirements as its predecessor and the only change related to the appointment of the Judge President and the rest of the judges of the High Court. In terms of section 59(3) of the 1966 Constitution, the Prime Minister was obliged to 'consult' the Chief Justice in the appointment of the Judge President, and in the case of other judges of appeal, the Chief Justice and the Judge President. The 1966 judicial selection mechanisms were retained in the 1969 Rhodesian Constitution.<sup>445</sup> In essence, judges were appointed by the executive on the recommendation of the Judge President for the division concerned.<sup>446</sup> Significantly, the Judge President for the division and the Minister of Justice played pivotal roles in the judicial selection process, and the system depended heavily on their integrity.<sup>447</sup>

Several salient features are evident from an analysis of the judicial selection processes in colonial Zimbabwe which can be referred to as Rhodesian judicial selection conventions. First, most of the colonial judicial appointments were from members of the bar and experience at the bar as an advocate was an important factor in securing appointment to the bench.<sup>448</sup> This is hardly surprising considering that the bar was very small hence the heavy reliance on foreign jurists. Second, appointments were not only confined to nationals. Quite a number of foreign jurists especially South Africans were appointed to the bench. It appears there was a general orientation towards appointing candidates with a Roman Dutch law background with one

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<sup>445</sup> See sections 64 and 65 of the 1969 Rhodesian Constitution.

<sup>446</sup> See Redgment, 'Plus Ca Change...: Fifty Years Of Judges In Southern Rhodesia, Rhodesia And Zimbabwe' 1985, SALJ, 102, 529.

<sup>447</sup> See Claassen, 'Retain the Bar and Side-bar' 1970, South African Law Journal, 25.

<sup>448</sup> See Redgment, 529.

notable exception being the appointment of Justice Fieldsend from the United Kingdom.<sup>449</sup> Third, politics played little part in the motivations for judicial appointments. Redgment notes the failure by Reggie Knight, a Minister of Justice to have himself appointed to the bench as generally indicative of the fact that political persuasion did not matter much in judicial selection.<sup>450</sup>

It is also important to note that the post-independence judicial selection mechanisms especially in the immediate years after independence borrowed a lot from the Rhodesian conventions on judicial selection. However, a number of constitutional amendments soon after independence intertwined with the politico-economic developments earlier alluded to drastically changed the political culture of judicial selection in Zimbabwe.<sup>451</sup>

### **3.5 Evaluation of political, economic and legal contexts**

An evaluation of the legal and non-legal contexts in all three countries reveals several critical points in relation to the mechanisms of judicial selection. It is apparent that all three countries share a colonial past which was characterized by racial discrimination against the Black majority. Independence for these countries entailed the dawn of a new era insofar as judicial transformation is concerned. Consequently, judicial reforms including the mechanisms of appointing judges took centre stage as the post-independence states sought to ensure that their respective judiciaries reflected demographic patterns.

Closely linked to the above observation is the transition to independence in all three countries, and its effect on judicial selection including the fate of the colonial judicial appointments. Mozambique experienced a ‘forced’ transformation of the judiciary due to the flight of Portuguese judges in the aftermath of independence. By way of contrast, South Africa and

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<sup>449</sup> Ibid at 539. See also Linington, “Constitutional Law of Zimbabwe” 2001, Legal Resources Foundation, Harare, 171.

<sup>450</sup> See Redgment, 532.

<sup>451</sup> See for example Constitutional Amendment Number 7, Act 23 of 1987 which introduced fundamental changes to the manner of selecting judges *vis a vis* the powers of the executive.

Zimbabwe inherited the colonial bench almost wholly intact for the purposes of continuity without any major disruptions to their judicial orders. An equally important peculiar feature of the Mozambican post-independence judiciary is the selection of professional and elected lay judges for all courts whereas both South Africa and Zimbabwe continued with the colonial tradition of appointing only professional judges.

It is clear that the mechanisms of judicial selection in colonial South Africa and Zimbabwe were more or less the same. The processes involved the Minister of Justice acting on the recommendations of the Judge President of the Division concerned. These similarities are hardly surprising considering the shared colonial basis of the legal systems in both countries. In fact, several South African jurists were appointed to the Zimbabwean bench during the colonial era. By contrast, judicial appointments in colonial Mozambique were centralized in Lisbon which appointed administrators who performed both judicial and administrative functions. A peculiar feature of Mozambique is the racialised legal system, one for 'locals' and the other for Portuguese citizens. Compared to South Africa and Zimbabwe which had centralized judiciaries, Mozambique's legal developments lagged behind due to the fragmented Portuguese legal system.

Colonial legal developments in all three countries undisputably influenced the nature of the present day legal systems. The colonial mix of English and Roman-Dutch law has survived up to the present day in the South African legal system. Zimbabwe shared more or less the same legal system with South Africa during the colonial era but post-independence legislative interventions have substantially weakened the Roman-Dutch foundations of the Zimbabwean legal system. These post-independence divergences can be attributed to the fact that South Africa received its legal system directly from Europe whereas Zimbabwe received its legal system indirectly through South Africa.<sup>452</sup>

Significantly, both the South African and Zimbabwean legal systems have all been influenced by the civil law whilst Mozambique's legal system is entirely based on it. A point of divergence

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<sup>452</sup> See generally Fombad, 2010 Tulane European and Civil Law Forum, 25, 1.

relates to the administration of justice in both South Africa and Zimbabwe which has been influenced more by the English law than by the civil law. While Mozambique's legal system is deeply rooted in the civil law tradition compared to South Africa and Zimbabwe, the influence and recognition of legal plurality is a common feature of all three legal systems.

Moving on to the political and economic fronts, political developments in all three countries have tended to have an impact on the economic prospects as well. The three countries have experienced different post-independence political and economic transformations. Mozambique and Zimbabwe experienced post-independence internal disturbances which had detrimental economic effects, especially on the Mozambican economy. South Africa on the other hand experienced a political transition which ensured economic stability. Furthermore, Mozambique and Zimbabwe share common experiences of failed economic policies at the behest of international financial lending institutions. South Africa attained independence in the mid 1990's when these policies had already failed in its neighbours. Nevertheless, economic mismanagement in Mozambique and Zimbabwe has tended to have a greater negative impact on the economy compared to the South African position.

On the political front, a common feature is that politics in all three countries has been dominated by former liberation movements. As observed in the previous chapter, the delegative theorists see no incentive for an independent judiciary in a context where a single political party dominates. In this respect, it remains to be seen whether the political dominance of single parties on the political landscape in all three countries, has had undesirable effects on the independence of the judiciary generally.

### **3.6 Conclusion**

It is clear that any useful comparative enquiry into two or more legal systems necessarily hinges on a clear understanding of each country's peculiar circumstances. These circumstances include both the legal and non-legal contexts. In fact, a country's general background is useful in that it enables one to better appreciate the politico-economic and legal environment in which particular norms and institutions operate. Similarly, the appreciation of a country's context is extremely necessary in the assessment of a key institution such as the judiciary. The judiciary

does not operate in a vacuum. It necessarily follows that the culture of judicial independence is influenced by each country's politico-socio, economic and legal context.

The impact of country contexts is particularly evident in the development of mixed legal systems in all three countries. Despite the differences in all three countries' colonial experiences, it would appear the post-independence states inevitably adopted the colonial legal system almost wholly intact. This is so despite the Mozambican socialist 'experiment' with regards to the legal system in the post-independence aftermath. Perhaps one of the most critical perspectives emanating from this chapter's discussions, is the analysis of the evolution of judicial selection systems in all three countries in the colonial context. This background is critical in the assessment of present day superior court judicial selection procedures. Some colonial conventions on judicial appointments were inherited by the post-independence states in all three countries. As such, the desirability of these conventions in different political contexts needs to be evaluated.

In light of this chapter's background discussions, the next chapter examines the general considerations relating to superior court judicial selection in all three countries. This examination is important in that it will explore two critical aspects, which are the constitutional and legislative frameworks governing judicial selection, and JAC's as key institutions in the selection of superior court judges.

## CHAPTER IV

### AN EXAMINATION OF JUDICIAL SELECTION MECHANISMS IN MOZAMBIQUE, SOUTH AFRICA AND ZIMBABWE: GENERAL CONSIDERATIONS

#### 4.1 Introduction

The preceding chapter has provided a historical context of the systems of judicial selection in Mozambique, South Africa and Zimbabwe. Such an endeavor was necessary in order to properly situate the current judicial selection mechanisms in all three countries. The approach adopted in this chapter is primarily based on the functionality of the various mechanisms which these countries have put in place so as to create meritorious and politically independent judiciaries. In particular, this chapter examines more or less similar institutions and processes in the judicial selection systems across all three jurisdictions. A thematic comparison is critical in a multi-country comparative study of this nature in order to draw useful lessons from each country's experiences. Moreover, the choice of a particular method of judicial selection inevitably involves a comparison of what reformers perceive to be the relative strengths and weaknesses of the available alternatives.<sup>453</sup>

The analysis in this chapter is mainly predicated on the data obtained from a questionnaire which was administered in all three countries.<sup>454</sup> The questionnaire covered several themes on judicial selection and the responses were used to assess the various aspects of it. The questionnaire was administered to stakeholders in the justice delivery system, namely judges, lawyers, legal academics and civil society practitioners. Further, the questionnaire was complemented by interviews with key stakeholders in the judicial selection process. Significantly, the data collected in all three countries was integrated into the analysis of the constitutional and legislative frameworks as well as the assessment of the JACs.

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<sup>453</sup> See Dubois, 'Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections' 1986-1987, *SouthWestern Law Journal*, 40, 32.

<sup>454</sup> The questionnaire is attached as Appendix 1 at the end of this thesis. 25 questionnaires were administered in each country.

This chapter begins with a comparative analysis of the constitutional and legislative frameworks governing superior court judicial selection in all three countries. This analysis is followed by an assessment of judicial appointment commissions. The assessment of the JAC's focuses on four critical aspects characteristic of these commissions. These are the JAC status, composition and appointment of members, and the procedures utilized in judicial selection.

## **4.2 Constitutional and legislative frameworks governing judicial selection**

The constitutions of Mozambique, South Africa, and Zimbabwe entrench key provisions that form the basis for the selection of superior court judges. The Mozambican Constitution was last revised in 2004,<sup>455</sup> whereas South Africa has made minor modifications to its 1996 Constitution. Of the three countries, Zimbabwe has a relatively new constitution which was promulgated in 2013 after a major constitutional reform exercise. In this respect, the following discussions on the constitutional and legislative frameworks proceed on a country by country basis before a comparative assessment of the positions in all three countries is done.

Beginning with Mozambique, the judicial independence principle finds expression in Article 217(1) of the Constitution, and was first recognized in the 1990 Constitution.<sup>456</sup> The Mozambican Constitution also proclaims the impartiality of the judiciary which is subject only to the law.<sup>457</sup> Article 223 of the Constitution sets out the categories of courts, which are the Supreme Court, the Administrative Court, courts of justice and various specialized courts.<sup>458</sup> Article 223 is complemented by Law No. 24 of 2007 which re-organized the judicial system in

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<sup>455</sup> Mozambique embarked on a Parliamentary led constitution revision exercise in 2013 which is expected to reform several institutions including the judiciary.

<sup>456</sup> Article 217(1) provides that, [i]n the exercise of their functions, judges shall be independent and shall owe obedience only to the law.

<sup>457</sup> See Article 217(1) of the 2004 Mozambican Constitution.

<sup>458</sup> See also Article 223(2) which provides that, [t]here may be administrative courts, labour courts, fiscal courts, customs courts, admiralty courts, arbitration courts and community courts.

Mozambique by creating among other things the Court of Appeal as an intermediate court below the Supreme Court.<sup>459</sup>

The Mozambican Constitution and Law No. 24 of 2007 are the main legal instruments which govern the judicial structure and the selection of superior court judges.<sup>460</sup> The Mozambican Constitution further provides for the composition and selection of the Constitutional Council,<sup>461</sup> the Supreme Court,<sup>462</sup> and the Administrative Court judges.<sup>463</sup> All other courts with the exception of the aforementioned courts are established in terms of subsidiary legislation. The Superior Council of the Judiciary,<sup>464</sup> and the Superior Council of the Administrative Judiciary<sup>465</sup> are constitutionally entrenched and mandated with the management of the ordinary judiciary and the administrative judiciary respectively. As the following discussions will show, these commissions play an important role in the selection of superior court judges in Mozambique.

While the Mozambican Constitution specifies the general qualification requirements for superior court judges, it however lacks clarity in respect of the specific attributes expected of a prospective judge. Inasmuch as legal experience is an important consideration in judicial selection generally,<sup>466</sup> it is critical that the constitution entrenches the key attributes expected of superior court judges. Invariably, the constitutional entrenchment of these attributes goes a long way in safeguarding the constitutional text from subjective evaluations. Furthermore, the

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<sup>459</sup> See Article 29 of Law 24/2007 which provides for the establishment of the Supreme Court (*Tribunal Supremo*), Court of Appeal (*Tribunais Superiores de Recurso*), Provincial Courts (*Tribunais Judiciais de Provincia*) and District Courts (*Tribunais Judiciais de Distrito*).

<sup>460</sup> Other important pieces of legislation relating to the judiciary in Mozambique include Law No. 10 of 1991 which was modified by Law No. 7 of 2009 especially relating to the composition of the Supreme Court.

<sup>461</sup> See Article 242 of the Mozambican Constitution.

<sup>462</sup> *Ibid.* Article 226.

<sup>463</sup> *Ibid.* Article 229.

<sup>464</sup> *Ibid.* Articles 220-222.

<sup>465</sup> *Ibid.* Article 232.

<sup>466</sup> *Ibid.* See Articles 226(4) and 229(4).

lack of clear constitutional criteria beyond the general qualification requirements has done little to encourage a robust public debate on the qualities expected of a Mozambican superior court judge.

An important feature of the Mozambican legal framework pertaining to the judiciary is the existence of a career judiciary from the District Court level up to the Court of Appeal. The Constitutional Council and the Supreme Court are distinct from the career judiciary as they are open to legal practitioners who are appointed from outside the judiciary.<sup>467</sup> In keeping with its civilian tradition, the Mozambican Constitution establishes a Constitutional Council which is a quasi-judicial body responsible for constitutional matters.<sup>468</sup> The Council has its own separate competencies which are distinct from the competences of other courts with the Supreme Court remaining the final court of appeal in non-constitutional matters. An important peculiarity of the Mozambican judicial system is the participation of elected lay judges in first instance trials. The role of lay judges is however limited to matters of fact not law.<sup>469</sup> As the previous chapter showed, the constitutional entrenchment of these lay judges emanated from the socialist ideology of popular justice and citizen participation in the justice system. This socialist orientation has however remained a dominant feature of Mozambique's post-independence judicial landscape.<sup>470</sup>

Like Mozambique, South Africa also constitutionally entrenches the judicial selection framework for its superior courts. The main legal instruments governing judicial selection in the country are the Constitution,<sup>471</sup> the Judicial Service Commission Act,<sup>472</sup> the Superior Courts

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<sup>467</sup> Ibid. Article 226(4).

<sup>468</sup> Ibid. Article 241.

<sup>469</sup> See Article 17 of Law 24 of 2007 as well as Article 216 of the Mozambican Constitution.

<sup>470</sup> See generally Santos; Trindade; Meneses, 'Law and Justice in a Multicultural Society' 2006, CODESRIA.

<sup>471</sup> Act No. 108 of 1996.

<sup>472</sup> Act No. 9 of 1994.

Act,<sup>473</sup> and the Judicial Service Commission Regulation No. 423 of 2003. The South African Constitution also affirms the judicial independence principle. Section 165 of the South African Constitution vests judicial authority in the courts which are independent and subject only to the Constitution and the law.<sup>474</sup> Furthermore, the Constitution establishes a court structure with the Constitutional Court being the apex court. The Constitution further regulates the competences of the judicial courts, namely the Constitutional Court,<sup>475</sup> the Supreme Court of Appeal,<sup>476</sup> the High Courts,<sup>477</sup> Magistrates Courts, and other courts.<sup>478</sup> Clarity in respect of which courts constitute what can be termed ‘superior courts’ is found in the Superior Courts Act.<sup>479</sup> The term ‘superior court’ is defined as meaning, [t]he Constitutional Court, the Supreme Court of Appeal, the High Court and any court of a status similar to the High Court.<sup>480</sup>

Section 178 of the South African Constitution establishes a 23 member JAC, which is a key institution in the selection of superior court judges.<sup>481</sup> The JAC is headed by the Chief Justice and its functions are as prescribed in the Constitution and subsidiary legislation.<sup>482</sup> A detailed

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<sup>473</sup> Act No. 10 of 2013.

<sup>474</sup> For a detailed discussion of the importance of an independent judiciary in South Africa, see *In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC). See also the case of *South African Association of Personal Injury Lawyers v. Heath and Others 2001* (1) SA 883 (CC).

<sup>475</sup> Section 167 of the South African Constitution

<sup>476</sup> *Ibid.* Section 168.

<sup>477</sup> *Ibid.* Section 169.

<sup>478</sup> *Ibid.* Section 170. For a detailed discussion of the South African court structure, see also Van De Vijver, “The Judicial Institution in Southern Africa: A Comparative Study of Common Law Jurisdictions” 2006, University of Cape Town. Democratic Governance and Rights Unit, Cape Town: Siber Ink.

<sup>479</sup> See Act No. 10 of 2013. See also Van de Vyver, 117. See also Corder, 2004 Legal Studies, 261-262.

<sup>480</sup> The Superior Courts Act, 10 of 2013 contains detailed provisions on the operations of the superior courts in South Africa. A significant change it introduced is that the Constitutional Court is now the final appeal court on all matters including those of a non-constitutional nature. See section 29(2) of the Superior Courts Act, 10/2013.

<sup>481</sup> The South African Magistrates Courts fall under the ambit of the Magistrates Commission which is a distinct organ from the Judicial Service Commission.

<sup>482</sup> See Section 178(4) of the South African Constitution.

discussion of the JAC follows later on in this chapter but the most important provision insofar as judicial selection in South Africa is concerned is section 174(1) of the Constitution. This section establishes three key criteria which should guide the selection of judicial officers as follows;<sup>483</sup>

*'Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.'*

The above section is complemented by Section 174(2) which provides supplementary criteria on judicial selection as follows;

*'The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.'*

A detailed analysis of the constitutionally entrenched judicial selection criteria follows later in this chapter under the discussion on the judicial appointment commission procedures. Nevertheless, a significant point to note at this juncture is that the Constitution entrenches the broad judicial selection framework which is then complemented by subsidiary legislation.<sup>484</sup> This subsidiary legislation which is in the form of JAC regulations sets out the judicial selection process in detail.<sup>485</sup>

Possibly inspired by the South African Constitution, the 2013 Zimbabwean Constitution introduced fundamental changes to the legal framework governing the judiciary. These fundamental changes are hardly surprising considering the serious concerns which existed regarding the independence of the Zimbabwean judiciary.<sup>486</sup> Unlike the position under the

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<sup>483</sup> The South African Judicial Service Commission published supplementary judicial selection criteria in 2010 in response to calls for more transparency and clarity in respect of the criteria used in selecting judges.

<sup>484</sup> Sections 174(3-6) of the South African Constitution.

<sup>485</sup> See Regulation No. R. 423.

<sup>486</sup> For a detailed analysis of the problems which bedeviled the Zimbabwean judiciary in the past decade, see Matyszak, 'Creating a Compliant Judiciary in Zimbabwe' in Malleson; Russell, "Appointing Judges in an Age of Judicial Power, Critical Perspectives from Around the World" (2006) University of Toronto Press 334. See also Van

former constitution, the judicial independence principle is constitutionally entrenched in detail in section 164 of the 2013 Constitution.<sup>487</sup> Judicial authority is vested in the courts with the newly created Constitutional Court being the apex court.<sup>488</sup> The detailed constitutionally entrenched judicial selection processes are a complete departure from the provisions in the former constitution.<sup>489</sup>

The Judicial Service Act operationalized the JAC,<sup>490</sup> but the main document insofar as judicial selection is concerned is the Zimbabwean Constitution of 2013. It sets out the qualifications for the different categories of judges as well as the establishment of the thirteen member JAC,<sup>491</sup> and the detailed procedures for judicial selection.<sup>492</sup> In addition to the general qualification requirements for the superior courts, the Zimbabwean Constitution sets out the critical judicial selection criteria as follows;

*'To be appointed as a judge of the[Constitutional Court, Supreme Court, High Court, Labour Court, Administrative Court] a person must be a fit and proper person to hold office as a judge'*<sup>493</sup>

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de Vijver, "The Judicial Institution in Southern Africa: A Comparative Study of Common Law Jurisdictions" 2006, University of Cape Town, Democratic Governance and Rights Unit, Cape Town: Siber Ink.

<sup>487</sup> Section 164 and 165 of the Zimbabwean Constitution.

<sup>488</sup> The Supreme Court is the final court of appeal in non-constitutional matters.

<sup>489</sup> The Lancaster House Constitution was the first post-independence Zimbabwean Constitution and it was amended 19 times before it was repealed by the current constitution. For an analysis of the judicial selection mechanisms under the Lancaster House Constitution, see generally Madhuku, 'The Appointment Process of Judges in Zimbabwe and its Implications for the Administration of Justice' 2006, Volume 21 SAPL 345. See also Linington, "Constitutional Law of Zimbabwe" 2001, Legal Resources Foundation, Harare, 170-178.

<sup>490</sup> Act No. 10 of 2006. The Judicial Service Act was however operationalized in 2010 with the establishment of the Judicial Service Commission Secretariat.

<sup>491</sup> Section 177-179 of the Zimbabwean Constitution.

<sup>492</sup> Ibid. Sections 180, 189-191.

<sup>493</sup> See sections 177(2), 178(2) and 179(2) of the Zimbabwean Constitution.

While the Zimbabwean process is relatively new, it is anticipated that the lack of clarity in respect of what a ‘fit and proper person’ entails can subject the whole process to subjective interpretations. As the following discussions will show, it would appear that the South African quagmire in respect of the same vague criteria can easily manifest itself in the Zimbabwean context. It is therefore critical for the JAC to come up with regulations on judicial selection which would address the gaps in the constitutional text.

It is apparent from the preceding discussions that the constitutions of Mozambique, South Africa and Zimbabwe have all provided a basis for legislation in relation to judicial selection. Significantly, the South African judicial selection criteria are peculiar in that the same requirements apply to all the judges of the superior courts. This position differs remarkably from the constitutional framework in Mozambique and Zimbabwe which clearly establishes different criteria for the different levels of superior courts. The Zimbabwean constitutional framework perhaps provides greater clarity in respect of the mechanisms of judicial selection. As noted above, it appears the Zimbabwean constitutional framework was modeled more or less on the South African constitutional text on judicial selection. The constitutional borrowing evident between the two countries constitutional texts is hardly surprising considering the favourable pedigree of the South African judicial selection framework generally.<sup>494</sup>

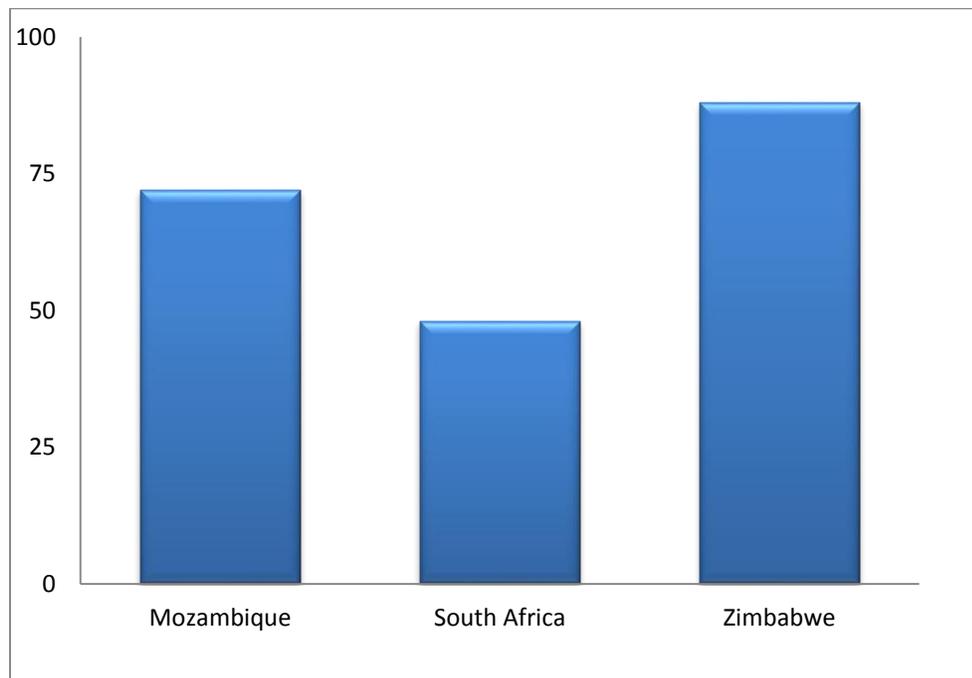
Of all three jurisdictions, the Mozambican constitutional and legislative text provides the least clarity in respect of the judicial selection framework for the superior courts, despite it being an improvement on the 1990 Constitution which left issues concerning judicial selection for subsidiary legislation. The above observation is in tandem with this study’s findings, in which a significant majority (72 percent) of respondents in Mozambique agreed that the constitutional and legislative framework had weaknesses on the law on judicial selection. On the other hand, the South African survey results reveal a slight majority (52 percent) of the respondents disagreeing that the laws on judicial selection had weaknesses. Paradoxically, an overwhelming

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<sup>494</sup> See generally Fombad, ‘A Preliminary Assessment of the Prospects for Judicial Independence in Post -1990 African Constitutions’ 2007, Public Law, Sum, 233-257. See also Malleson, ‘Assessing the Performance of the Judicial Service Commission’ 1999, South African Law Journal, 116, 36.

majority (88 percent) of respondents in Zimbabwe agreed that the laws on judicial selection had weaknesses (Figure 1).

**Figure 1** Percentages of respondents agreeing that the law on judicial selection had weaknesses



Source: Stakeholder opinion survey 2013.

These perceptions are clearly an indication of the distrust by stakeholders in the justice delivery system of the Zimbabwean judicial selection framework generally. Despite the progressive nature of the 2013 Zimbabwean constitutional framework on judicial selection, it is most probable that these negative perceptions are deeply embedded in the former constitution's judicial selection framework. As an evolving process, it can be anticipated that these negative perceptions will change over time once the new process is implemented fully as per the constitutional text.

Having analysed the key constitutional and legislative provisions governing superior court judicial selection in all three countries, the following discussions focus on a comparative assessment of the JAC's. Importantly, these commissions will be benchmarked against the

internationally recognized standards for an effective and independent judicial appointment commission.

### **4.3 Assessment of judicial appointment commissions**

As pointed out in the discussions in Chapter 2, there are a myriad of methods for selecting judges but judicial appointment commissions are perhaps one of the most popular methods utilized across the world.<sup>495</sup> The popularity of the commission model cuts across the common and civil law divide. A recent study opines that judicial appointment commissions appear to be the most popular method of judicial recruitment in new democracies as well as in established democracies undergoing reform.<sup>496</sup> An independent judicial appointment commission has better prospects for appointing judges in a fair and transparent manner than one which is merely an appendage of the executive.

The approach adopted in this section relies on the functional approach of comparative law wherein each of the identified JAC elements will be analysed concurrently in all three countries. The analysis will focus on the commission's status, composition and appointment of members, and the procedures utilized in the selection of judges. Such an approach in assessing the judicial appointment commissions will necessarily bring out the distinctive features of each of the three systems of judicial selection thereby making the comparison richer and more meaningful.

#### **4.3.1 Status of judicial appointment commissions**

The 2004 Mozambican Constitution entrenches the JAC (Superior Council of the Judiciary) which is a body responsible for managing the judiciary. The JAC also plays an important role in relation to the selection of judges for the Supreme Court as well as managing recruitment and

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<sup>495</sup> See Tiede, 'Judicial Independence: Often Cited, Rarely Understood' 2006, *Journal of Contemporary Legal Studies*, 15, 129, 136. See also Shetreet, 'Who will Judge: Reflections on the Process and Standards of Judicial Selection' 1987, *Australian Law Journal*, 61, 766.

<sup>496</sup> See Volcansek, 'Judicial Selection: Looking at how other nations name their judges' 2010(Winter), *The Advocate*(Texas). See also Baar, 'Comparative Perspectives in Judicial Selection Processes in Appointing Judges: Philosophy, Politics and Practice' 1991, *Ontario Law Commission*, Ontario, 46.

promotion in the career judiciary.<sup>497</sup> The powers of the JAC are spelt out in detail in the 2004 Constitution compared to the position under the 1990 Mozambican Constitution which relegated the establishment of the JAC to subsidiary legislation.<sup>498</sup> Theoretically, the constitutional entrenchment as well as the recognition of the independence of judges in the Mozambican Constitution is a positive step insofar as strengthening the functioning of the judiciary is concerned.<sup>499</sup> Furthermore, the Mozambican Constitution also creates another parallel commission of similar status to the Superior Council of the Judiciary, the Superior Council of the Administrative Judiciary which is responsible for the administrative, fiscal and the customs courts.<sup>500</sup> However, the major drawback of the administrative judiciary is that important provisions relating to its commission's composition and functioning are relegated to subsidiary legislation. This state of affairs is indicative of the diminished status which is attached to the administrative judiciary in which the executive has a relatively free hand.<sup>501</sup>

Like Mozambique, South Africa also constitutionally entrenches its judicial appointment commission. Of critical importance, is the fact that the JAC is the advisor to government on matters relating to the administration of justice.<sup>502</sup> Moreover, the JAC is given authority constitutionally to determine its own procedures. In order to operationalize the commission, the Judicial Service Commission Act,<sup>503</sup> was promulgated under which regulations governing the procedures of the JAC are made.<sup>504</sup> The constitutional vesting of such powers in the JAC clearly

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<sup>497</sup> See Articles 220 and 222 of the Mozambican Constitution.

<sup>498</sup> See Article 170(2) of the 1990 Mozambican Constitution as well as the Statute of the Judicial Magistracy, Law No. 10/91.

<sup>499</sup> See Article 217 of the Mozambican Constitution.

<sup>500</sup> Ibid. Article 232.

<sup>501</sup> Interview with Administrative Court Judge conducted in Maputo on 8 July 2013.

<sup>502</sup> See section 178(5).

<sup>503</sup> Act No. 9 of 1994.

<sup>504</sup> See Government Notice No. R. 423 of 27 March 2003 which provides for the procedures of the Commission in the appointment of judges.

shows the intention of the drafters to create an independent commission which is beyond the reach of legislative interference. As shown in Chapter 3, the constitutional entrenchment of the JAC represents a departure from the position obtaining in apartheid South Africa where the executive dominated the judicial selection system due to the absence of an independent institution overseeing judicial appointments.<sup>505</sup>

Moving on to the Zimbabwean position, the 2013 Zimbabwean Constitution for its part establishes a JAC which is an improvement on the commission previously established under the repealed Lancaster House Constitution.<sup>506</sup> The JAC is constitutionally mandated with promoting and facilitating the independence and accountability of the judiciary.<sup>507</sup> Furthermore, the JAC is also required to conduct its proceedings in a fair and transparent manner.<sup>508</sup> The commission advises the government on matters relating to the administration of justice and the government is constitutionally obliged to pay due regard to any such advice.<sup>509</sup> However, this progressive stance is watered down by section 190(3) of the Constitution which provides that the JAC requires the approval of the Minister responsible for justice in making its own regulations. This position contrasts sharply to the provisions in the South African Constitution highlighted above which clearly demarcate the functions of the commission from the executive domain.

From the above discussions, the following observations are apparent in respect of the status of judicial appointment commissions in all three countries. Despite the differences in the legal

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<sup>505</sup> For a discussion of the apartheid judiciary generally, see Kentridge, 'Telling the Truth about the Law' 1982, South African Law Journal, 99,652; Corder, 'Judicial Authority in Changing South Africa', 255; Gordon; Bruce, 'Transformation and the Independence of the Judiciary in South Africa', available at [www.csvr.org.za](http://www.csvr.org.za) accessed on 10/04/13.

<sup>506</sup> See sections 189 and 190 of the 2013 Zimbabwean Constitution. For a discussion of the flaws of the Judicial Service Commission under the Lancaster House Constitution, see generally Madhuku, 'The Appointment Process of Judges in Zimbabwe and its Implications for the Administration of Justice'; Saller, "The Judicial Institution In Zimbabwe" 2004, Cape Town: Siber Ink in association with the Faculty of Law, University of Cape Town.

<sup>507</sup> See section 190(2) of the Zimbabwean Constitution.

<sup>508</sup> Ibid. Section 191.

<sup>509</sup> See section 190(1) of the Zimbabwean Constitution.

traditions between Mozambique on one hand and South Africa and Zimbabwe on the other, it appears the constitutional recognition of JACs is a common trend among all three countries. In fact, the differences in the constitutional status of these commissions relate much more to the detail than the substance. Critically, the constitutional text in all three countries attempts as far as possible to demarcate the functions of the JAC from the executive and legislative spheres of influence. While constitutional prescriptions alone are not enough to secure the independence of the judiciary, the fact that the JAC in each polity is given recognition in the Constitution goes a long way in insulating it from unnecessary external pressures since it is much more difficult to tamper with a constitutionally entrenched body.

#### **4.3.2 Composition and appointment of members**

Closely intertwined with the composition of the commissions is the question of how the commission members are appointed and by whom.<sup>510</sup> It is important that the appointment of commission members be insulated as much as possible from purely political choices. There are various typologies of judicial appointment commission membership across jurisdictions. As such, there is no accepted blue print which completely eliminates the risks of political manipulation of the appointment of JAC members. Generally, typologies of JAC membership include selection by political bodies (executive and legislature), *ex officio* members, and nominating bodies representative of key stakeholders in the justice delivery system.<sup>511</sup>

##### **4.3.2.i Mozambique**

The composition of the JAC is provided for in Article 221 of the Mozambican Constitution.<sup>512</sup> Article 221(1) establishes a 16 member JAC headed by the President of the Supreme Court.<sup>513</sup>

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<sup>510</sup> See Malleson, 'The New Judicial Appointments Commission in England and Wales' in Malleson; Russell, "Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World" 2006, Toronto; Buffalo, University of Toronto Press, 50.

<sup>511</sup> See judicial appointments commission consultation paper for New Zealand available at [www.justice.govt.nz/publications/global-publications/a/...](http://www.justice.govt.nz/publications/global-publications/a/...) accessed on 29 April 2013.

<sup>512</sup> The composition of the Judicial Council under the 1990 constitutional regime is established under Article 9 of Statute of Judges, Law No. 10/1991. The Council under the 1990 constitutional regime was composed of the

The only difference which the 2004 Constitution introduced in relation to the composition of the JAC, is the addition of one more seat in the commission for a member of the legislature.<sup>514</sup> The JAC under the post 2004 constitutional regime is composed of the President and Vice President of the Supreme Court, two members appointed by the President, five members elected by Parliament according to the principles of proportional representation, and seven members of the judiciary in different categories elected by their peers in terms of the Statute of Judges.<sup>515</sup> The terms of the JAC members with the exception of the President and Vice President of the Supreme Court are limited to single periods of three years.<sup>516</sup>

From the above JAC composition, it is clear that the executive directly or indirectly appoints nine members of the JAC with the remainder of the members coming from the different categories of the career judiciary. While the five members appointed by Parliament do not necessarily owe allegiance to the executive, the reality is that the FRELIMO party has dominated Mozambique's political landscape and is always assured of the majority of the five seats in the commission.<sup>517</sup> Furthermore, vast powers are vested in the President of the Supreme Court, a direct executive appointee who also chairs the JAC.<sup>518</sup> Concerns have been raised over the open association of the President of the Supreme Court with the ruling FRELIMO party, and this has cast doubt over the independence and impartiality of the commission's

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President and Vice President of the Supreme Court; two person appointed by the President of which one had to be a judge; four members elected by Parliament and seven members of the judiciary elected by their peers.

<sup>513</sup> Article 221(2) of the Mozambican Constitution. It appears Mozambique's Judicial Council was heavily influenced by Portugal's Judicial Council which consists of 17 members as follows; 7 judges elected by the judiciary, 1 Judge nominated by the executive, 7 non-judges nominated by Parliament, and the President of the Supreme Court.

<sup>514</sup> See Article 9 of Statute of Judges, Law No. 10/1991.

<sup>515</sup> Article 221(1) (a-e) of the Mozambican Constitution.

<sup>516</sup> See Article 10 of Law No. 10/1991.

<sup>517</sup> As of July 2013, the five Parliament members were constituted as follows; 3 FRELIMO members and 2 RENAMO members.

<sup>518</sup> See Law No. 24/2007.

deliberations in relation to the selection of judges.<sup>519</sup> A recent study on the Mozambican justice sector concludes that perceptions abound that through the composition of its members, the JAC is closely linked to the executive.<sup>520</sup> The above point is supported by this study's findings which show that almost 50 percent of the respondents interviewed were of the view that the composition of the JAC did not instill confidence in the judicial selection processes in Mozambique.<sup>521</sup> This balanced perception among stakeholders in the justice delivery system can be interpreted to be indicative of a system which needs to be revamped so as to instill greater stakeholder confidence in its processes and outcomes.

Overall, the Mozambican JAC is composed of nine members drawn from the judiciary while the remaining seven members do not necessarily have to be legal practitioners. The bias in favour of the judiciary is hardly surprising due to the influence of the civil law tradition which entrenches a career judiciary. Consequently, the interests of each of the various categories of judges are represented in the JAC. A related concern emanating from this state of affairs is perhaps the under-representation of other key stakeholders such as the legal profession, and legal academics in the composition of the JAC. In fact, an overwhelming majority of respondents interviewed (88 percent) felt that there was need to have all critical stakeholders participating in the selection of judges in order to ensure greater scrutiny of prospective judicial candidates.<sup>522</sup> It augurs well for participatory democracy if the JAC is representative of key stakeholders in the justice delivery system. The input from such key stakeholders is important in determining the caliber of persons to be appointed as judges in the Mozambican superior courts.

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<sup>519</sup> Interviews with members of the Mozambican Bar Association and legal academics conducted in Maputo from 7-14 July 2013.

<sup>520</sup> See Afrimap, 'Mozambique: Justice Sector and the Rule of Law', 77 available at [www.afrimap.org/.../Mozambique%20Justice%20report%20\(Eng\).pdf](http://www.afrimap.org/.../Mozambique%20Justice%20report%20(Eng).pdf) accessed on 17/11/13. A significant number of respondents interviewed clearly expressed lack of confidence in the impartiality of the Council due to its membership connections with the ruling FRELIMO party.

<sup>521</sup> Question 13 questionnaire responses.

<sup>522</sup> Question 14 questionnaire responses.

#### 4.3.2.ii South Africa

On the other hand, the composition of the South African JAC is provided for in section 178 (1)(a-k) of the Constitution. The 23 member commission is composed of members of the judiciary, the legal profession, legal academia, politicians and presidential appointees.<sup>523</sup> However, when considering appointments to the High Court, the membership of the commission increases to 25 members due to the inclusion of the Judge President of the specific court where the vacancy would have arisen and the Premier of the province concerned.<sup>524</sup> The South African JAC is a relatively large body which differs remarkably from the model imposed on all former British colonies in Africa which gained independence after the 1960s.<sup>525</sup> As a product of a negotiated democratic transitional settlement, it is hardly surprising that the JAC's composition is inclusive of as many interest groups as possible.<sup>526</sup> An analysis of the JAC's composition clearly points to a preponderance of lawyers compared to other interest groups. In fact, of the 23 members of the JAC, at least 15 members are qualified lawyers as the members of the legislature and those appointed by the President tend to have qualifications in law.<sup>527</sup> Du Bois opines that, the proportion of politicians and legal professionals on the JAC goes a long way in precluding the commission's decision-making powers from being the exclusive domain of either political or professional interests.<sup>528</sup> It is hardly surprising therefore that a significant

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<sup>523</sup> The South African Judicial Service Commission is composed of; the Chief Justice; the President of the Supreme Court of Appeal; one Judge President; the Minister of Justice; two practising advocates nominated by the profession, two practising attorneys nominated by the profession; a member of the legal academia designated by teachers of law at South African Universities; six members of the National Assembly, at least three of whom must be members of opposition parties represented in the Assembly; four members of the National Council of Provinces designated with a supporting vote of at least six provinces; and four presidential appointees designated by the President after consulting the leaders of all parties in the National Assembly.

<sup>524</sup> See section 178(1)(k) of the South African Constitution.

<sup>525</sup> See Corder, 'Judicial Authority in a Changing South Africa', 262.

<sup>526</sup> Ibid.

<sup>527</sup> See Corder, 'Seeking Social Justice? Judicial Independence and Responsiveness in a Changing in South Africa', in Russell; O'Brien, "Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World" 2001, University Press of Virginia, (Charlottesville and London), 197.

<sup>528</sup> See Du Bois, 'Judicial Selection in Post-Apartheid South Africa', in Malleon; Russell, "Appointing Judges in An Age of Judicial Power, Critical Perspectives from Around the World" 2007, University of Toronto Press, 285.

majority of respondents interviewed (83 percent) were basically satisfied with the current composition of the JAC insofar as the commission's representativity of stakeholders was concerned.<sup>529</sup> As one scholar observed, the composition of the South African JAC 'shows how a carefully structured mechanism for judicial appointment can combine transparency and pluralism in a manner that may totally preclude all the negative aspects of executive interference, but could certainly limit the possibilities of such interference.'<sup>530</sup>

Despite these progressive attributes, concerns have been raised over the South African JAC's composition. Reservations have been expressed over the significant component of politicians or political appointees on the Commission.<sup>531</sup> Despite being generally touted as a 'model' commission, a significant majority of respondents (76 percent) interviewed in this study expressed serious misgivings over the appointment of the JAC commissioners.<sup>532</sup> Particularly prominent was a general concern over a significant proportion of political input in the appointment of the commissioners compared to other issues such as gender representation on the JAC. In fact, 15 members of the JAC are politicians. The challenge of restricting the executive from influencing judicial appointments directly or indirectly through 'decoys' was aptly underscored by Gordon and Bruce as follows;

*'The domination of politicians and political appointees in the JSC has driven allegations that the judicial appointment process gives too much power to the executive and legislature and infringes on the separation of powers. Additionally, because the ANC currently controls the executive, the National Assembly and the National Council of*

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<sup>529</sup> Question 14 questionnaire responses.

<sup>530</sup> See Fombad, 'Some Perspectives on the Prospects for Judicial Independence in Post-1990 African Constitutions', 39.

<sup>531</sup> See Legal Brief, 'Zuma powers, JSC loading to stay- Radebe', Issue No. 3285, 30 May 2013. See also Van de Vyver, "The Judiciary in South Africa", 125.

<sup>532</sup> Question 13 questionnaire responses.

*Provinces, it is possible that the ANC would have control over the appointment of a majority of the commissioners.*<sup>533</sup>

Notwithstanding the above reservations, the case of *In re: Certification of the Constitution of the Republic of South Africa*<sup>534</sup> is instructive in relation to some of the criticisms of the JAC composition. It was contended in this case that Parliament and the executive were over-represented on the JAC.<sup>535</sup> In dismissing this contention, the Constitutional Court unanimously held that;

*'The JSC contains a significant representation from the judiciary, the legal professions and political parties of the opposition. It participates in the appointment of the Chief Justice, the President of the Constitutional Court and the Constitutional Court judges, and it selects the judges of all other courts. As an institution it provides a broadly based selection panel for appointments to the judiciary and it provides a check and balance to the power of the executive to make such appointments. In the absence of any obligation to establish such a body, the fact that it could have been constituted differently, with greater representation being given to the legal profession and the judiciary, is irrelevant. Its composition was a political choice which has been made by the Constitutional Assembly within the framework of the Constitutional Principles. We cannot interfere with that decision, and in the circumstances the objection to section 178 must be rejected.'*<sup>536</sup>

#### **4.3.2.iii Zimbabwe**

Moving on to the Zimbabwean position, it appears the composition of the JAC entrenched in the 2013 Zimbabwean Constitution borrowed heavily from the South African Constitution.

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<sup>533</sup> Gordon; Bruce, 'Transformation And the Independence of the Judiciary in South Africa' at 50 available at [www.csvr.org.za/docs/transition/3.pdf](http://www.csvr.org.za/docs/transition/3.pdf) accessed on 5/8/15.

<sup>534</sup> 1996 (4) SA 744 (CC).

<sup>535</sup> See Motlala; Ramaphosa, 'Constitutional Law, Analysis and Cases' 2002, Oxford University Press, 79.

<sup>536</sup> *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at [124].

Section 189 of the Constitution establishes a 13 member JAC whose members' tenure, with the exception of the *ex officio* members, is limited to single non-renewable period of six years.<sup>537</sup> The Commission is made up of three types of members, namely judges, lawyers and others chosen for their professional competences.<sup>538</sup> It is not without any practical significance that the new commission is a departure from the commission in the repealed Lancaster House Constitution which had 6 members directly or indirectly appointed by the executive.<sup>539</sup> The lack of confidence in the former JAC is shown by the fact that 80 percent of respondents interviewed in this study expressed reservations over its composition which was heavily dominated by the executive.<sup>540</sup>

It appears that the composition of the 2013 JAC was intended to represent a complete break with the past judicial selection processes in which the JAC was not representative of key stakeholders in the justice delivery system and merely performed a perfunctory role of rubber-stamping executive preferences. The JAC is composed of a minimum of ten members with legal qualifications, that is, five judges, five lawyers, one *ex-officio* member and two lay persons.<sup>541</sup> The above composition shows a careful balance between members of the judiciary, and those from the legal profession. Of critical importance is the fact that the composition of the JAC is now representative of the legal fraternity compared to the position under the former constitution. The legal fraternity which provides a significant pool of judicial candidates, is represented by three practising legal practitioners designated by the bar association. The legal academia is also represented on the JAC. Overall, such a composition might perhaps augur well

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<sup>537</sup> See section 189(3) of the Zimbabwean Constitution.

<sup>538</sup> The Judicial Service Commission is composed of the Chief Justice, the Deputy Chief Justice, the Judge President of the High Court, one judge nominated by all the judges of the superior courts, the Attorney General, the Chief Magistrate, the Chairperson of the Civil Service Commission, three legal practitioners of at least seven years experience nominated by the Law Society of Zimbabwe, a professor or senior lecturer of law, one person qualified as an auditor or public accountant and one person with at least seven years experience in human resources management.

<sup>539</sup> See Van der Vyver, "The Judiciary in Zimbabwe", 246.

<sup>540</sup> Question 13 questionnaire responses.

<sup>541</sup> See section 189 of the Zimbabwean Constitution.

for the assessment of judicial candidates as most of the commission members are well placed to critically scrutinize the suitability or otherwise of potential judicial candidates.<sup>542</sup> In tandem with the above observation, an overwhelming majority of the respondents (100 percent) interviewed in this study supported the inclusion of key stakeholders in the justice delivery system in constituting the JAC.<sup>543</sup> A logical analysis of this trend is that the composition and manner of appointing the JAC commissioners post 2013 is most likely to instill more confidence in the selection of judges compared to the previous regime of judicial selection.

A noticeable difference with the South African and Mozambican commissions is the absence of politicians on the Zimbabwean JAC. While politicians indirectly appoint the *ex officio* members of the commission, it is noteworthy in the Zimbabwean context that the commission has been insulated theoretically from direct political influences since the President only makes a single direct appointment.<sup>544</sup> Further, only two JAC members owe their appointments indirectly to the President.<sup>545</sup> This effectively means the President has a direct and indirect influence on 23 percent of the JAC membership. In the premises, the possibility of caucusing to adopt common positions over particular judicial candidates is theoretically reduced. However, much depends on the integrity of the commission members in discharging their constitutional mandate.

#### **4.3.2.iv Points of Convergence and Departure with Global Practice**

It is necessary at this point to determine the extent to which all three countries depart or converge from the emerging global trends in relation to the composition of judicial appointment commissions generally. As noted earlier, there are various typologies of the

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<sup>542</sup> See Manyatera; Fombad, 'An assessment of the Judicial Service Commission in Zimbabwe's new Constitution' 2014, CILSA Vol XLVII, No 1, 89.

<sup>543</sup> Question 14 questionnaire responses.

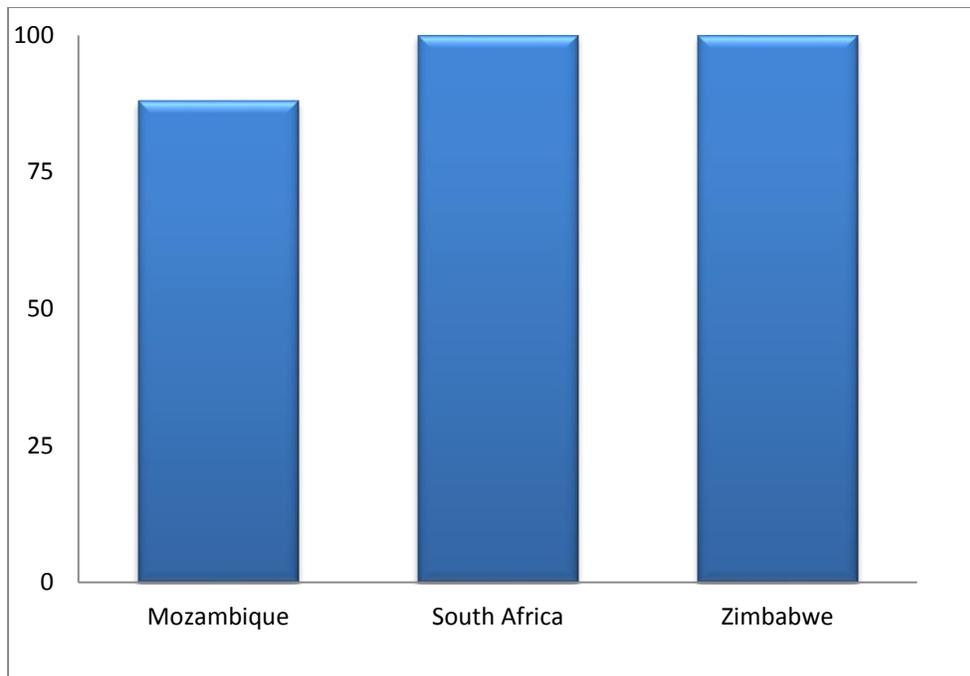
<sup>544</sup> Section 189(1)(f) of the Zimbabwean Constitution. For a contrast with the former constitution, see 'Matyszak, 'Creating a Compliant Judiciary in Zimbabwe' in Malleon; Russell, "Appointing Judges in an Age of Judicial Power, Critical Perspectives from Around the World" 2006, University of Toronto Press, 334; Saller, "The Judicial Institution in Zimbabwe" 2004, University of Cape Town.

<sup>545</sup> These are the Chairperson of the Civil Service Commission and the Attorney General. See section 89 (e)(g) of the Zimbabwean Constitution.

composition of judicial appointment commissions but these generally tend to include stakeholders in the justice delivery system. It would appear that the composition of the commissions in South Africa and Zimbabwe despite their varying sizes, is inclined more towards the emerging trends on the composition of judicial appointment commissions since the commissions are inclusive of key stakeholders in the justice delivery system. Significantly, an overwhelming majority of respondents interviewed in all three countries supported the participation of stakeholders in judicial selection (Figure 2 below).

On the other hand, Mozambique is a complete departure from the South African and Zimbabwean positions in that its JAC is composed of only judges and politicians with judges being the majority. This departure is hardly surprising due to the entrenchment of the career judiciary in the Mozambican legal system coupled with its civil law tradition. Notwithstanding this, a recent emerging trend in Mozambique has been the inclusion of key stakeholders such as the bar association and legal academia via the 'back door' in the selection of judges as will be shown in the following section. This observation on its own is evidence of the dichotomy that can exist between the law on one hand and the actual state practice on the other.

**Figure 2** Percentages of respondents agreeing with the participation of stakeholders in the justice delivery system in judicial selection processes



Source: Stakeholder opinion survey 2013.

### 4.3.3 Judicial appointment commission procedures

#### 4.3.3.i Mozambique

A notable peculiarity of the Mozambican judicial selection procedures relates to the JAC's role in the selection of judges for the career judiciary as well as for the Supreme Court. Advancement through the career judiciary is through competitive exams which are administered by the JAC. The Supreme Court and the Constitutional Council are different propositions in that they are open to candidates outside the judiciary who meet the requisite qualification criteria. It is in relation to the Supreme Court that the JAC plays an important role which is more or less similar to the role played by the JAC's in South Africa and Zimbabwe.

Article 226 of the Mozambican Constitution regulates the selection process for the judges of the Supreme Court. The President of the Republic appoints the President and Vice President of

the Supreme Court after consultation with the JAC.<sup>546</sup> Article 226(3) provides for the appointment of the rest of the Supreme Court judges in the following terms;

*'Judges of the Supreme Court shall be nominated by the President of the Republic on the recommendation of the Superior Council of the Judiciary, on the basis of their curricula, after a public tender open to judges and other national citizens of reputed merit, all of whom shall hold degrees in law and be in full possession of their civil and political rights.'*

Besides this constitutional provision, no piece of legislation provides any further clarification on the specific details of the process to be followed by the JAC in selecting the judges. Accordingly, the JAC has come up with its own procedures as a matter of practice in fulfilling its constitutional mandate. As a closed institution which is not subject to public scrutiny,<sup>547</sup> the deliberations of the commission are confidential and insights into how the judicial selection system operates were gained through interviews with stakeholders in the justice delivery system.<sup>548</sup>

From the interviews, it emerges that the JAC convenes and selects a special panel made up of representatives of key stakeholders in the justice delivery system.<sup>549</sup> For example, the last panel in 2011 was composed of two retired judges, a Dean of a law faculty, the President of the Bar Association, the Attorney General and the President of the Administrative Court.<sup>550</sup> This panel was an *ad hoc* committee whose mandate was only limited to the specific judicial vacancies it was intended to fill. Once selected, the members of the panel elect their own President at their first sitting. The panel thereafter advertises the judicial vacancies in the public media inviting applications. Upon receipt of the formal applications, the panel studies the applications and

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<sup>546</sup> See Article 226(2) of the Mozambican Constitution.

<sup>547</sup> See AfriMap report, 81.

<sup>548</sup> Transcripts of interviews available on file with the author.

<sup>549</sup> The quorum for the Council is two thirds of the total membership. See Article 22 of the Statute of Judges.

<sup>550</sup> Interview with the Vice President of the Supreme Court who is also the Deputy Chairperson of the Judicial Council held in Maputo on 11 July 2013.

comes up with a shortlist which is then submitted to the JAC which is at liberty to reject the shortlist. The shortlisted candidates are subsequently invited for interviews which are conducted by the panel. The candidates are scored on a scale of 0-20 and the final grading is published in the Government Gazette. The JAC thereafter proposes that the President make the appointments from the list submitted. It is important to note that the results of the interviews are valid for three years from the date of publication. What this means is that if a vacancy arises in the future and within the three year period, the JAC simply nominates a candidate from the list of those already interviewed but not yet appointed to office.<sup>551</sup> These procedures are discussed in detail later on in Chapter 6.

Nevertheless, a number of observations can be made in respect of the Mozambican judicial selection process. It is worth noting that the above process has been implemented only once in 2011 and is the first post 2004 experience of openness in the selection of Supreme Court judges. Judging from past experiences, the 2011 selection process represents a paradigm shift insofar as the openness and transparency of the process is concerned. This openness and transparency is evidenced by the public advertisement of vacancies as well as the publication of the shortlisted candidates and the final results. Further, the JAC's involvement of stakeholders such as the bar association and legal academia is worth noting in relation to opening the judicial selection process to stakeholder participation, albeit through the 'back door'. A distinctive feature of the Mozambican judicial selection process is the publication of results for all judicial candidates. While the propriety of such publication is debatable, the most important element of this feature, is the extent it goes in publicly disclosing the performance of the judicial candidates in the interviews.

Despite these seemingly progressive aspects of the Mozambican judicial selection process, concerns have been raised on the independence of the judicial selection process from negative external influences.<sup>552</sup> First, the fact that the deliberations of the panel are *in camera* militates against the complete openness of the selection process. Second, while the use of a panel

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<sup>551</sup> *Ibid.*

<sup>552</sup> Roundtable interview at the Mozambican Bar Association held on 7 July 2013.

composed of stakeholders in the legal fraternity is commendable, it is important that information regarding the nomination of panel members be made publicly accessible. The secrecy of this process has been justified on the grounds that it avoids negative pressures on the panel members,<sup>553</sup> but such secrecy casts doubt on the fairness of subsequent panel deliberations.<sup>554</sup> In any event, the fact that the public does not know who the panel members are is not a strong safeguard against unwarranted external influences on panel members. In fact, making the panel public can have a positive impact with regards to accountability on the panel members' part.

While it can be argued that the JAC itself has the final say on the panel's deliberations, the most critical aspects of judicial selection are performed by the panel. Consequently, there is need to open the panel's activities to public scrutiny in order to instill more public confidence in the fairness and impartiality of the whole judicial selection process. Overall, it is important therefore that the law clearly outlines the judicial selection process in detail in order to promote greater transparency on the part of the JAC. As the following discussions on the JAC procedures in South Africa and Zimbabwe will show, there is more to be gained from a process which is transparent and subject to public scrutiny.

#### **4.3.3.ii South Africa**

The South African Constitution perhaps in principle, entrenches one of the most transparent judicial selection processes.<sup>555</sup> Section 174 of the South African Constitution provides for the appointment of judicial officers. To complement the constitutionally entrenched judicial selection process, Government Regulation No. R. 423<sup>556</sup> provides in detail the procedures to be

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<sup>553</sup> Interview with the Vice President of the Supreme Court who is also the Deputy Chairperson of the Judicial Council held in Maputo on 11 July 2013.

<sup>554</sup> Roundtable interview at the Mozambican Bar Association held on 7 July 2013.

<sup>555</sup> See Fombad, 'Some Perspectives on the Prospects for Judicial Independence in Post-1990 African Constitutions', 38. See also Malleson, 'Assessing the Performance of the Judicial Service Commission' 1999, *South African Law Journal*, 116, 36.

<sup>556</sup> Dated 27 March, 2003.

followed by the JAC in the selection of the various categories of superior court judges. The Constitution makes a distinction between the appointment of the Chief Justice and the Deputy Chief Justice, Constitutional Court judges, the President and Deputy President of the Supreme Court of Appeal and the rest of the judges.<sup>557</sup> However, these distinctions are hardly surprising considering the political significance of the apex court judges.

The South African JAC's procedure in the selection of judges can be summarized as follows. When a vacancy arises on the Constitutional Court, the Chief Justice informs the JAC of the vacancy. The commission publicly announces the vacancy calling for nominations.<sup>558</sup> Each of the nominations contains a letter of nomination which identifies the person making the nomination as well as the potential candidate's written acceptance of the nomination, a detailed curriculum vitae of the candidate together with a completed questionnaire prepared by the Commission and any other relevant information.<sup>559</sup> Subsequently, all members of the Commission are provided with a list of candidates nominated with an invitation to make additional nominations, and to inform the screening committee of the candidates, if any, they feel should be included on the shortlist of candidates to be interviewed.<sup>560</sup> The screening committee is composed of seven members representative of the commission membership and the input from the head of the court where a vacancy has arisen is important in this process.<sup>561</sup> The screening committee prepares the final shortlist of the interviewees who have a real prospect of recommendation for appointment and this list is then submitted to the members of the Commission who can still propose further additions to the list.<sup>562</sup> The shortlist is thereafter published, and distributed to various interest institutions such as the General Council of the Bar and various law societies calling for their input on the shortlisted candidates. The feedback from these institutions is

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<sup>557</sup> See sections 174(3) (4)(6) of the South African Constitution.

<sup>558</sup> See section 2(b) of Government Regulation 423 of 2003.

<sup>559</sup> Ibid. Section 2(c) (i-iv).

<sup>560</sup> Ibid. Section 2(d) (i-ii).

<sup>561</sup> Interview with JSC Secretariat, Johannesburg 12 September 2013.

<sup>562</sup> Section 2(f)(i-iii).

distributed to all the members of the Commission.<sup>563</sup> The Commission subsequently interviews all short-listed candidates and these interviews are open to the public and the media.<sup>564</sup>

After the completion of the interviews, the Commission deliberates in camera and selects the candidate to be recommended for appointment by consensus and in the absence of such consensus, by majority vote.<sup>565</sup> The final stage of the process involves publication of the names of candidates recommended for appointment as well as advising the President of the candidates selected with reasons thereof.<sup>566</sup> The above procedures are followed in the selection of Supreme Court of Appeal, High Court and specialized court judges. However, the regulations do not require the JAC to give reasons for its recommendations.<sup>567</sup>

The Commission has justified the deliberations in camera on the basis of confidentiality on two grounds. Firstly, non-disclosure enables the Commissioners to have frank and robust debate around the suitability of candidates. Secondly, it protects the integrity and dignity of the candidates without impeding or undermining the ability of the Commissioners to submit them to robust assessment.<sup>568</sup> It is worth noting at this juncture that the failure by the JAC to provide reasons for recommending or not recommending candidates for judicial appointment has been challenged in court. In *The Helen Suzman Foundation v. The Judicial Service Commission and Others*,<sup>569</sup> the Commission's non disclosure of reasons as well as making public the post interview deliberations transcript was challenged. However, the court dismissed the challenge on the strength of comparative JAC practices in other jurisdictions.

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<sup>563</sup> Section 2(g-h).

<sup>564</sup> Section 2(i-j).

<sup>565</sup> Section 2(k-l).

<sup>566</sup> Section 2(m-o).

<sup>567</sup> Section 3(l).

<sup>568</sup> See <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=670774&sn=Detail> accessed on 6/08/14. See also the previous discussion on the Mozambican JAC procedures for a contrast in ideology.

<sup>569</sup> HC 8647/13 (WCD).

Notwithstanding the above issues, a number of observations can be made in respect of the South African judicial selection process. First, the process generally promotes openness and transparency in judicial selection. Second, the use of public nominations, open interviews and input from stakeholders such as the bar associations and civil society fosters the prospects for an independent judiciary through the judicial selection process. Despite being generally touted as a progressive judicial selection process, concerns have however been raised over the lack of clear standards for assessing the suitability and competence of potential candidates especially taking into account the transformation imperatives.<sup>570</sup> While a detailed analysis of the criteria follows in the next chapter, some cursory observations are pertinent at this juncture.

It is apparent from the constitutional text that the Constitution uses obscure language on its judicial selection criteria which then opens these criteria to various interpretive evaluations.<sup>571</sup> It is hardly surprising that the South African constitutional text on judicial selection has been a subject of rigorous public debate. These debates emanate from the attempt at constructing what an ‘appropriately qualified’ and ‘fit and proper person’ means.<sup>572</sup> In a recent study, Cowen argues for a broader interpretation of an ‘appropriately qualified person’ which refers not only to academic legal qualifications but also to legal skill and experience.<sup>573</sup> Furthermore, the ‘fit and proper person’ requirement is given meaning by an assessment of the express constitutional requirements of independence, impartiality and fairness, integrity, judicial temperament and commitment to constitutional values.<sup>574</sup> To what extent each of these values holds sway over others is debatable considering the little guidance the constitutional text provides in interpreting these criteria. In light of these observations, it cannot be stated with

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<sup>570</sup> See Gordon; Bruce, 50. See also Courting Justice, ‘Judicial Selection Process’ available at <http://www.courtingjustice.com/JudicialSelection.html>

<sup>571</sup> See Cowen, ‘Judicial Selection in South Africa’, 10 available at [www.dgru.uct.ac.za/print/.../researchreports/](http://www.dgru.uct.ac.za/print/.../researchreports/) accessed on 10/10/13.

<sup>572</sup> See section 174(1) of the South African Constitution.

<sup>573</sup> See Cowen, 21.

<sup>574</sup> See Cowen, 34; Van der Vyver, 122. See also *S v. Makwanyane and Another* 1995 (3) SA 391 (CC); *Shabalala v. Attorney General, Transvaal* 1996 (1) SA 741 at paragraph 25.

certainty what the term ‘fit and proper person’ means. As Cowen observes, there is no correct way to categorize the qualities that relate to fitness and propriety for judicial office.<sup>575</sup>

The bias of the JAC in favor of persons who have served as acting judges, whilst having its advantages, tends to be discriminatory against members of the legal profession who would not have had the opportunity to act as judges.<sup>576</sup> As the following chapter will show, the Minister of Justice determines who gets appointed as an acting judge. This aspect of the judicial selection process only serves to fuel perceptions that background political gerrymandering plays an important part in the judicial selection process.<sup>577</sup>

Furthermore, the South African constitutional goal of transformation of the judiciary has inevitably been the source of a lot of controversy.<sup>578</sup> While the JAC has in practice equated merit and transformation in judicial selection, the constitutional text does not however support such an interpretation.<sup>579</sup> In fact, the constitutional text appears to provide for a two-step process in judicial selection. The first is a determination of whether a candidate is ‘appropriately qualified’ and a ‘fit and proper’ person to hold judicial office. Once that hurdle is overcome, the second step is a determination of whether the transformation goals are enhanced by a particular judicial appointment.<sup>580</sup> The JAC has also been criticized as having a built-in bias in practice which has resulted in it overlooking meritorious candidates under the pretext of advancing the transformation of the judiciary.<sup>581</sup> While judicial transformation is a necessity in the South African socio-political context in light of the discussion in the previous

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<sup>575</sup> See Cowen, 34.

<sup>576</sup> See later discussion on acting judicial appointments.

<sup>577</sup> See Gordon; Bruce, 50.

<sup>578</sup> Legal Brief, ‘JSC told to come clean on white judges’, Issue No. 3248, 8 April 2013. See also Legal Brief, ‘Why the JSC rejected Gauntlett’, Issue No. 3158, 7 November 2013; Legal Brief, ‘Race and transformation dominate JSC hearing’, Issue No. 3143, 17 October 2012.

<sup>579</sup> Legal Brief, ‘Judges’ appointments not all about merit-CJ’, Issue No. 3250, 10 April, 2013.

<sup>580</sup> See Legal Brief, ‘Smuts strikes back...’ Issue Number 3258, 22/04/13.

<sup>581</sup> Legal Brief, ‘Former Judge President backs JSC on transformation’, Issue No. 3256, 18 April 2013.

chapter, it is also equally important that these transformative goals be achieved in an objective manner without necessarily overlooking merit as a pre-requisite.

Important insights into the JAC's judicial selection processes can be gleaned from the case of *Cape Bar Council v. The Judicial Service Commission and Others*.<sup>582</sup> The case concerned the validity of proceedings of the JAC at its meeting of 12 April 2011 when it convened to interview and select candidates for three vacancies which had arisen on the Western Cape High Court. The JAC shortlisted seven candidates and interviewed them for the vacancies. Subsequently, only one candidate was recommended for appointment, with the remaining two vacancies remaining open. This case is highly significant in relation to the voting procedures of the JAC. The voting procedure employed by the JAC was that each member had one vote per vacancy and not per candidate. Since there were three vacancies in this case, it meant that each member had three votes in total to cast in respect of the selection of candidates for the Western Cape High Court.<sup>583</sup> The court found the voting procedure which subsequently denied the interviewees the chance of being appointed was arbitrary, and irrational, and invalidated the proceedings.<sup>584</sup> Koen J said:

*'Simply advancing as justification that the remaining two vacancies were not filled because none of the unsuccessful candidates were able to achieve the required majority, where the voting procedure adopted resulted in the failure to obtain such majority because votes per vacancy were spread over more candidates than the number of vacancies for which they compete, was irrational and failed to provide the opportunity to the majority of the members of the JSC to make a decision.'*<sup>585</sup>

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<sup>582</sup> [2012] 2 All SA 143 (WCC).

<sup>583</sup> Ibid. Paragraph 133.

<sup>584</sup> Ibid. Paragraph 145. In its opposing papers, the JSC had said it could not give reasons why the unsuccessful candidates were not selected, other than that they did not secure the required majority vote.

<sup>585</sup> Ibid. paragraph 141.

The critical point which the court made in respect of the voting procedure adopted was that spreading the votes over seven candidates when there were three vacancies was prejudicial to the judicial candidates. Where the votes are evenly spread among the candidates, it meant that none of the candidates would get the requisite majority vote. Perhaps the most significant aspect of this judgment relates to the fact that, the JAC's proceedings are not beyond scrutiny and this promotes greater public accountability in its deliberations.

#### **4.3.3.iii Zimbabwe**

Moving on to the Zimbabwean position, it appears the Zimbabwean JAC and its judicial selection procedures have been heavily influenced by the South African approach. Unlike the former commission under the Lancaster House Constitution whose selection processes were shrouded in secrecy,<sup>586</sup> the judicial selection procedures for the 2013 JAC are constitutionally entrenched in detail. Section 180 of the Zimbabwean Constitution governs the selection procedures for all judges of the superior courts as follows. In the event of a vacancy, the JAC is constitutionally obliged to advertise the position inviting the President and the public to make nominations.<sup>587</sup> The JAC subsequently conducts public interviews and submits a list of three nominees for a single vacancy from which list the President makes the appointment.<sup>588</sup> If the President considers that none of the nominees submitted to him or her are suitable for judicial appointment, the JAC is obliged to submit a further list of three qualified persons and the President has to appoint one of the nominees submitted.<sup>589</sup>

The Zimbabwean Constitution directs that judicial appointments must reflect broadly the diversity and gender composition of Zimbabwe.<sup>590</sup> While it is not clear how this constitutional goal in respect of judicial selection can be met in practice, important lessons on diversity and gender transformation can be learnt from the manner in which the South African JAC has had

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<sup>586</sup> See Madhuku, 'The Appointment Process of Judges in Zimbabwe and its Implications for the Administration of Justice', 345.

<sup>587</sup> See sections 180(2) (a)(b) of the Zimbabwean Constitution.

<sup>588</sup> Ibid. Section 180(2)(c-d).

<sup>589</sup> Ibid. Section 180(3).

<sup>590</sup> Ibid. Section 184.

to grapple with judicial transformation issues.<sup>591</sup> The critical lesson is the extent to which ‘merit’ in judicial selection can be overridden by transformative goals and considerations. Whilst judicial transformation is a major theme in the South African context more than it is in Zimbabwe due to the different historical contexts, it remains to be seen how the Zimbabwean JAC will implement these transformation goals in practice.

It is apparent that the judicial selection procedures entrenched in the Zimbabwean Constitution are intended to ensure greater transparency and accountability in the selection of judges. This is underscored by the fact that the JAC is constitutionally required to conduct its business in a just, fair and transparent manner.<sup>592</sup> The 2013 judicial selection process represents a paradigm shift insofar as the legal culture of judicial selection is concerned. The extent to which the judicial selection process will achieve its constitutional promise will depend on how these constitutional provisions will be implemented in practice. Theoretically, the new judicial selection procedures will go a long way towards enhancing public confidence in the selection of judges as the processes are now subject to public scrutiny. It augurs well for a participatory democracy to have as many stakeholders in the justice delivery system having an input in the processes leading to the appointment of judges. Since the JAC is empowered to make regulations to govern its procedures,<sup>593</sup> there is a clear need to go beyond the constitutional text and clarify the judicial selection processes in detail in the subsidiary legislation. Just like the South African process, there is need to clarify a number of issues. These include: determining how public the interview proceedings are, clarity in respect of the deliberations of the JAC, and whether or not they are held in camera.<sup>594</sup> While it is too early to judge the Zimbabwean

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<sup>591</sup> See generally Andrews, ‘The South African Judicial Appointments Process’ 2007, *Osgoode Law Journal*, 44(565); Wesson; Du Plessis, ‘Fifteen Years On: Central Issues Relating to the Transformation of the South African Judiciary’ 2008, *South African Journal on Human Rights*, 24, 188; Gordon; Bruce, ‘Transformation and the Independence of the Judiciary in South Africa’; Corder, ‘Judicial Authority in a Changing South Africa’.

<sup>592</sup> See section 191 of the Zimbabwean Constitution.

<sup>593</sup> *Ibid.* Section 190(3).

<sup>594</sup> As of January 2014, the JSC had not yet been constituted in terms of the 2013 Constitution and accordingly, no appointments had been made in terms of the new judicial selection mechanisms.

process, important lessons can be taken from the issues which the South African process has had to grapple with. These lessons will then inform the salient details of the JAC's procedures which will be incorporated into the JAC regulations on judicial selection.

#### **4.3.3.iv Revelations arising out of the comparison**

A comparison of the judicial selection features in all three countries reveals some important points. First, all three countries publicly advertise judicial vacancies. While the Zimbabwean process is still to be tested in practice, the Mozambican and South African commissions utilize panels to shortlist judicial candidates. The major point of departure between the Mozambican and South African processes is that the Mozambican one uses a panel composed of members who are not part of the JAC to shortlist candidates while the South African process utilizes a screening committee composed of JAC members. Second, the South African and Zimbabwean commissions utilize public interviews in judicial selection unlike the Mozambican JAC whose proceedings are in camera. The use of public interviews by the South African and Zimbabwean commissions is perhaps the strongest claim to openness by any system of judicial selection.<sup>595</sup> Moreover, the use of public interviews by the South African process has significantly improved the quality of information about potential candidates thereby enhancing the prospects of appointing the best candidates for judicial office.<sup>596</sup> For example, institutions such as the Democratic Governance and Rights Unit (DGRU) provide useful background information on judicial candidates. This information greatly assists the JAC and the public at large in appreciating the judicial philosophy of each candidate.

It is critical to note that while the pre-interview and the post-interview deliberations take place in camera in South Africa and Zimbabwe, the JAC procedures in these two countries are generally more transparent than the Mozambican JAC procedures which are completely 'behind closed doors'. In relation to public interviews, a significant majority of respondents

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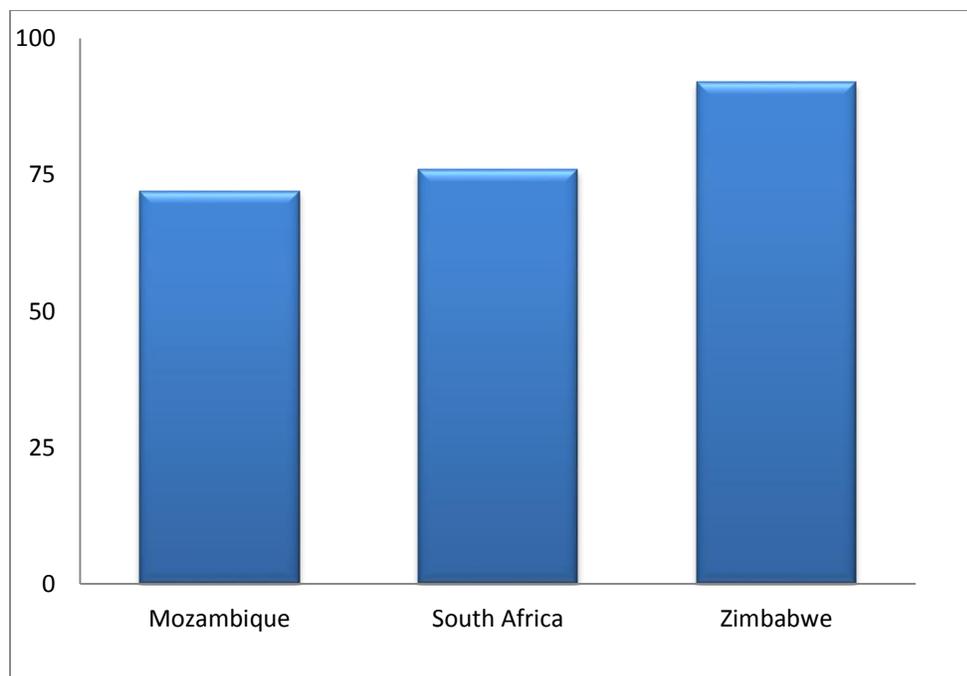
<sup>595</sup> See Malleson, 'Assessing the Performance of the Judicial Service Commission', 41. See also Mokgoro, 'Judicial Appointments' 2010 (December), *Advocate*, 43-48.

<sup>596</sup> *Ibid*, 44.

interviewed in all three countries felt that prospective judges should be interviewed publicly (Figure 3). According to one respondent,

*“All prospective judges should be interviewed publicly and each candidate must be asked probing questions concerning their jurisprudence. In the recent past, the selection process in South Africa has been criticized in that while other candidates were subjected to rigorous questioning concerning their jurisprudence, others were not asked such questions. This creates a perception of bias towards some candidates.”<sup>597</sup>*

**Figure 3** Percentages of respondents agreeing with public interviews for prospective judges



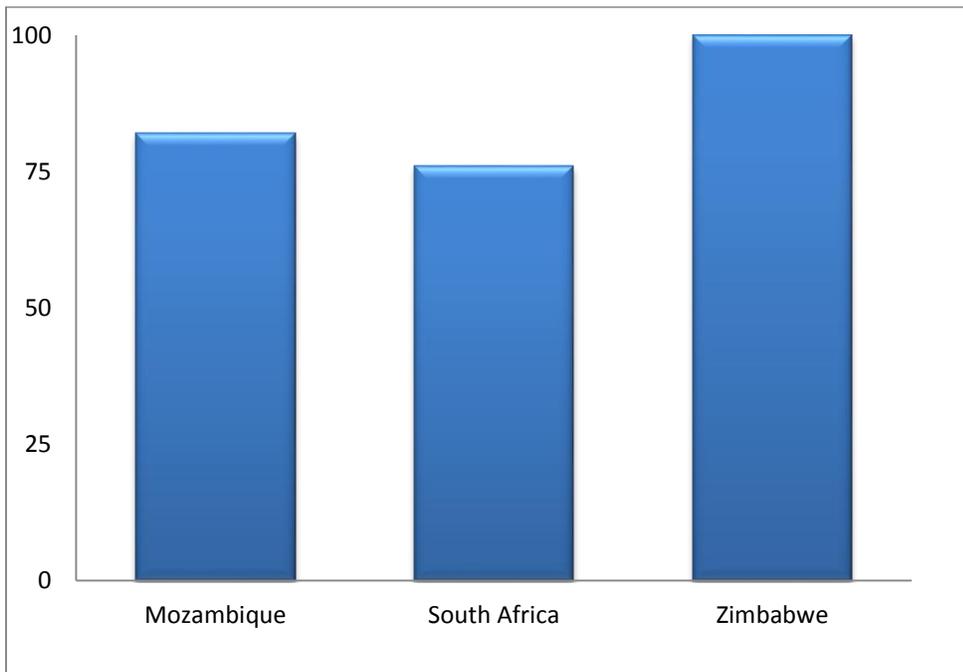
Source: Stakeholder opinion survey 2013.

By their nature, public interviews are a medium for promoting the openness and transparency of the judicial selection process. A distinctive feature of the Mozambican judicial selection

<sup>597</sup> Respondent Number 3, Question 10, South Africa.

process is the publication of the judicial candidates’ performance in the interviews compared to South Africa and Zimbabwe. While the propriety of such publication is debatable, it can be argued that the Mozambican process has gone a step further than its counterparts in promoting the transparency of the judicial selection process. With regards to transparency of the judicial selection process, an overwhelming majority of respondents interviewed in all three countries agreed that there were measures which could be taken to further enhance the transparency of the judicial selection processes (Figure 4).

**Figure 4** Percentages of respondents agreeing with the need for further measures to enhance transparency in judicial selection processes



Source: Stakeholder opinion survey 2013.

While JACs by their nature are designed to insulate the functions of judicial selection from purely political considerations, the majority of respondents interviewed in all three countries felt that political considerations and legal practice experience dominated judicial selection

processes.<sup>598</sup> Significantly, the majority of respondents identified political considerations as a dominant factor compared to other considerations (Figure 5). There was also consistent evidence from the data for all three countries that there was need to limit the influence of political patronage in the judicial selection processes. The main threat of political patronage was identified as the creation of a politically dependent bench or an executive minded bench which in reality would negate the separation of powers principle. The problem of a politically dependent bench was summed up by one respondent as follows;

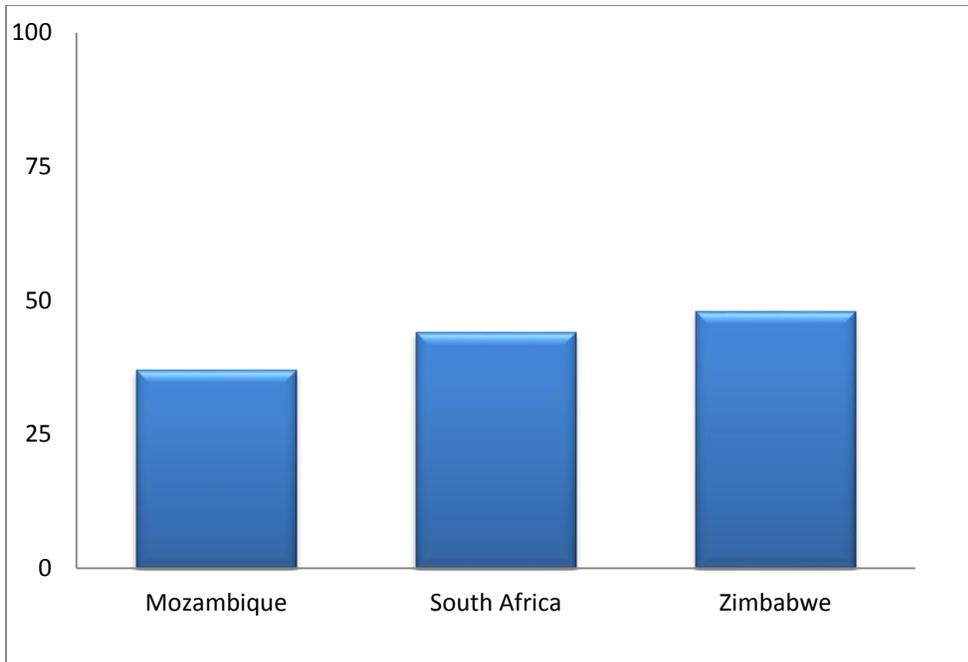
*“In Africa, if you have an executive for a long time, it is wishful thinking to expect an independent judge. The bench is pliable not by choice but because they are overwhelmed by an executive which is there forever. It is difficult to be independent in such an environment. Even a good judge will bend.”<sup>599</sup>*

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<sup>598</sup> The proportion of respondents identifying a combination of political considerations and legal practice experience in all three countries was as follows. Mozambique- 33%, South Africa- 24% and Zimbabwe 28%.

<sup>599</sup> Interview with retired judge Moses Chinhengo, co-principal drafter of the 2013 Zimbabwean Constitution, Harare, 8 August 2013.

Figure 5 Percentages of respondents agreeing that political considerations dominate judicial selection processes in all three countries



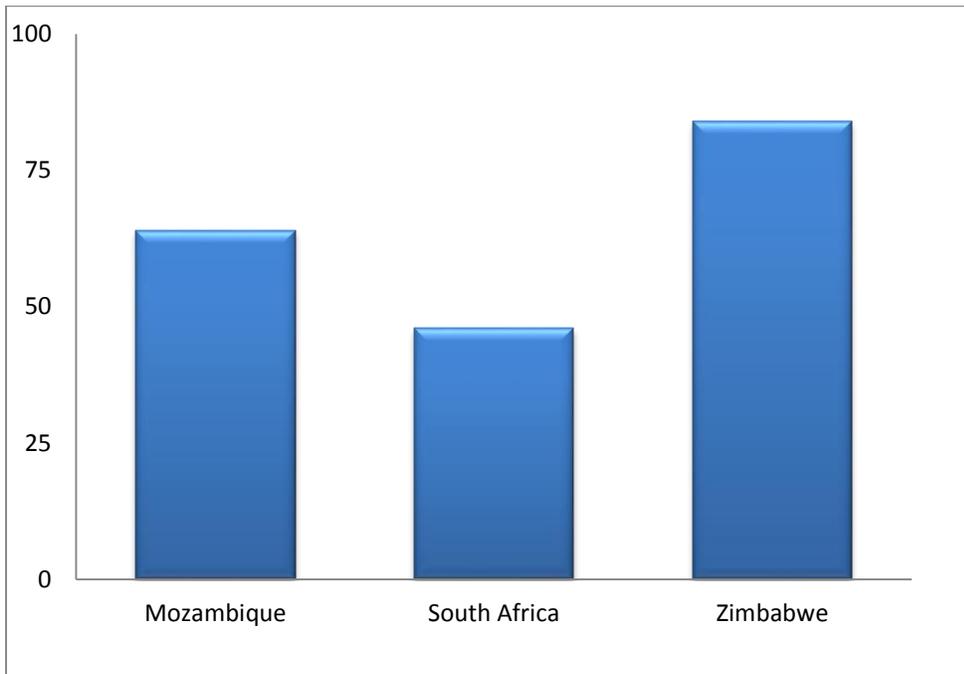
Source: Stakeholder opinion survey 2013.

Furthermore, there was an almost balanced perception among respondents interviewed, of the caliber of judges appointed to the superior courts in South Africa compared to the positions in Mozambique and Zimbabwe. A significant percentage of respondents in Mozambique and Zimbabwe evidently had no confidence in the caliber of judges appointed to the superior courts (Figure 6). The negative perceptions for Zimbabwe were buttressed more by the judicial appointments which were made in July 2013 just before the judicial selection mechanisms in the new 2013 Constitution became operational. The President appointed six new judges to the High Court and these ‘eleventh-hour’ judicial appointments were widely viewed as being purely political and an example of court-packing by the executive.<sup>600</sup>

<sup>600</sup> These judges were appointed 2 weeks before the 31 July 2013 elections which ended the government of national unity. Interview with retired judge Moses Chinhengo, co-principal drafter of the 2013 Zimbabwean Constitution, Harare, 8 August 2013. See also <http://www.dailynews.co.zw/articles/2013/07/18/judges-appointments-mugabe-did-not-consult-tsvangirai> accessed on 7/04/2014.

**Figure 6** Respondents’ perceptions on the caliber of appointed judges – Are they the best available candidates - yes or no

**Percentages of negative responses per country**



Source: Stakeholder opinion survey 2013.

An equally important factor impacting on the caliber of judges appointed to the superior courts are the conditions of service. Compared to Mozambique and South Africa, respondents in Zimbabwe identified judges’ conditions of service as an important determinant of the caliber of judges appointed. As highlighted in the socio-economic country background in chapter three of this study, it appears the Zimbabwean system has not been conducive enough to attract senior lawyers to the bench. According to a former JAC commissioner;

*“The main problem is that our senior lawyers are not interested in the bench because of the poor conditions of service on the bench. The economic situation has had an impact on the*

*recruitment of competent lawyers as judges, hence the reliance on appointing regional magistrates to the higher courts which is seen as a promotion rather than a downgrade.”<sup>601</sup>*

South African on the other hand represents a complete departure from the Zimbabwean position outlined above. It appears the failure to attract senior lawyers in the South African system has more to do with the judicial selection processes themselves rather than purely financial matters. This problem was aptly underscored by one respondent as follows;

*“The selection process can make good judges look bad due to unequal treatment of candidates during the interview process. Candidates are not subjected to the same rigorous questioning. There is no doubt that good candidates are deterred from putting in their names. There is a general decrease in applicants in the top courts, for example the Constitutional Court between 2009- 2013. Last interviews were postponed due to lack of candidates.”<sup>602</sup>*

Lastly, it is important to note that all three countries provide for judicial review mechanisms of the judicial selection process. A prospective judicial candidate aggrieved with the selection process can approach the courts for a remedy. As shown in the South African case of *Cape Bar Council v. The Judicial Service Commission and Others*,<sup>603</sup> judicial review mechanisms are an important safeguard insofar as making the JAC accountable in its processes. The fact that the courts can scrutinize the JAC processes guarantees to some extent that the commissions discharge their constitutional mandates in a fair and impartial manner. It must be noted however that making the JAC accountable requires a strong and well-resourced civil society such as the one South Africa has, compared to Mozambique and Zimbabwe.

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<sup>601</sup> Interview with former Zimbabwean JSC commissioner, Nyanga, 10/11/13.

<sup>602</sup> Interview with Chris Oxtoby, DGRU senior researcher, 17/09/13.

<sup>603</sup> [2012] 2 All SA 143 (WCC).

#### 4.4 Conclusion

This chapter emphasized the importance of a clear constitutional and legislative framework for the selection of superior court judges. Paramount to this is the constitutional entrenchment of judicial appointment commissions which play a key role in judicial selection. The powers and competences of JACs need to be clearly spelt out in the constitutional text in order to safeguard them from unwarranted external pressures. The constitutional entrenchment of JACs necessarily brings into perspective three important attributes characteristic of JACs generally. These are the status which is given to the commission within the constitutional matrix, the composition and appointment of JAC members and the procedures utilized in the selection of judges. These elements are important in determining the extent to which a judicial selection process can be expected to produce a meritorious and politically independent bench.

An important point emerging from the preceding discussions is that the South African and Zimbabwean commissions are more representative of stakeholders in the justice delivery system compared to the Mozambican JAC. It has been observed that the Mozambican JAC is closely linked to the executive; a situation which is undesirable for the impartiality of its judicial selection process. The composition of the South African and Zimbabwean commissions is consistent with emerging global trends in the composition of judicial appointment commissions. On the other hand, it appears that the Mozambican judicial selection process places more emphasis on accountability at the expense of independence at the appointments stage compared to the South African and Zimbabwean processes.

Overall, the underpinning political cultures in all three countries correlate with the degree of influence by the executive in the judicial selection process. It is clear that all three systems of judicial selection are by their nature designed to insulate the functions of judicial selection from the political domain. The critical point is the extent to which each country puts in place mechanisms that limit the possibilities of pure political appointments. While there are other factors that impact on the caliber of judges appointed such as the conditions of service, it is important to underscore the fact that political considerations and legal practice experience have remained dominant influences on judicial selection processes in all three countries.

The analysis in this chapter underscored the fact that there are no judicial selection blueprints. In fact, no mechanism of judicial selection can be evaluated in the abstract without regard to the performance of alternatives.<sup>604</sup> The preceding discussions have shown that each of the three systems of judicial selection have their own relative strengths and weaknesses. The critical point to emerge from the data analysis is that all three judicial selection systems share more or less similar concerns in the mechanisms of judicial selection from a stakeholder perspective. These common concerns invariably become important in informing the policy choices for any law reform agenda as the 2013 Zimbabwean constitutional reform experience demonstrates.

The next chapter provides a detailed comparative analysis of the judicial selection criteria for specific superior courts in all three countries. These discussions will not only be based on the contextual analysis given in this chapter. They will further explore the judicial selection criteria for the ordinary and specialized superior courts in each polity.

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<sup>604</sup> See Gunderson, 'Merit Selection: The Report and Appraisal of a Participant Observer' 1979, PAC.L.J. 10, 683.

## CHAPTER V

### AN ASSESSMENT OF JUDICIAL SELECTION CRITERIA IN THE SUPERIOR COURTS OF MOZAMBIQUE, SOUTH AFRICA AND ZIMBABWE

#### 5.1 Introduction

The previous chapter outlined the general considerations pertaining to judicial selection processes in Mozambique, South Africa and Zimbabwe. This chapter builds on chapter four's discussions by focusing on a functional assessment of the superior courts' judicial selection criteria in all three countries. This functional analysis will enable this comparative assessment to bring out the distinctive features of each system of judicial selection at every superior court level.

This chapter is organized as follows. It begins with an assessment of the judicial selection criteria in the ordinary superior courts in each country. This assessment is followed by an analysis of the judicial selection criteria in the specialized superior courts which have a status more or less similar to that of the ordinary superior courts. A discussion of acting judicial appointments in all three countries follows thereafter. This discussion is important in that acting judgeships tend to give an advantage to judicial candidates in the selection process and have in practice, become an important qualification criteria. An assessment of emerging trends in judicial selection criteria for the superior courts leads to the conclusion of this chapter.

#### 5.2. Assessment of judicial selection criteria: ordinary superior courts

The following sections focus on a country by country analysis of the judicial selection criteria for the ordinary superior courts. The sections begin with a discussion of the Mozambican position followed by the South African and Zimbabwean positions. The analysis in each country specifically focuses on the Constitutional Courts, the Supreme Courts and the High Courts.

### 5.2.1 The position in Mozambique

The Mozambican constitutional and legislative framework establishes three ordinary superior courts of record namely, the Constitutional Council, the Supreme Court, and the Court of Appeal.<sup>605</sup> Each court has its own distinctive judicial selection criteria. It is important to note at this juncture that the Supreme Court is the highest court of appeal for the ordinary courts in Mozambique. The Constitutional Council on the other hand is a quasi-judicial body with its own peculiar functions within the judicial order.<sup>606</sup>

The 2004 Mozambican Constitution provides more clarity in respect of the selection of judges of the Constitutional Council unlike the former Constitution which relegated these matters to ordinary legislation.<sup>607</sup> Moreover, the designation of the Constitutional Council as an integral organ of the administration of justice system is made clearer by the 2004 Constitution which vests judicial functions of a legal and constitutional nature in the Council.<sup>608</sup> While the ‘judges’ of the Constitutional Council had previously been termed ‘members’, the first Organic Law of the Constitutional Council of 2003,<sup>609</sup> introduced changes with the term ‘Counsellor Judges’ being adopted.<sup>610</sup> The significance of this legislative change lies in that, this was a tacit recognition of the judicial nature of the functions of the Council more than being merely a politico-administrative organ of state.

Article 242 of the Mozambican Constitution provides for the qualifications and appointment of judges of the Constitutional Council. The Constitutional Council is composed of seven judges of

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<sup>605</sup> See Articles 223 and 241 of the Mozambican Constitution. See also Article 36 of the Statute of Judges, Law 24/2007.

<sup>606</sup> See Article 224 of the Mozambican Constitution.

<sup>607</sup> Ibid. Article 184.

<sup>608</sup> See Article 180 of the 1990 Constitution and Article 241 of the 2004 Constitution. The 2004 Constitution resulted in the passing of a new Organic Law, Law No. 6/2006 dated 2 August which adapted the regulatory framework of the Council to the new constitution.

<sup>609</sup> Law No. 9/2003 dated 22 October.

<sup>610</sup> See [www.venice.coe.int/WCCJ/Rio/Papers/Moz](http://www.venice.coe.int/WCCJ/Rio/Papers/Moz) accessed on 31/12/11.

appeal. The President of the Constitutional Council is appointed directly by the President of the Republic subject to parliamentary ratification.<sup>611</sup> Five judges of the Constitutional Council are appointed by Parliament according to the principles of proportional representation,<sup>612</sup> and one judge is appointed by the JAC.<sup>613</sup> The Constitution entrenches two qualification criteria for the Constitutional Council. The first is that at the time of appointment, judges of the Constitutional Council must be at least thirty-five years of age, and secondly, the prospective judge must have at least ten years experience in the judiciary, the bar or as a teacher of law.<sup>614</sup> Professional experience is an important eligibility element for the Constitutional Council and judges who have been appointed to the court in the past had vast legal experience.<sup>615</sup> It is hardly surprising that the qualification bar in terms of professional experience has been set so high taking into account the political significance of the Council in Mozambique's legal-political landscape. The heightened political significance of the Constitutional Council is further evidenced by the fact that six of the judges of the court are directly nominated by political establishments.

Moving on to the Supreme Court, the Mozambican Constitution entrenches the process leading to the appointment of the twelve Supreme Court judges as well as their qualifications.<sup>616</sup> The President of the Republic nominates the President and Vice President of the Supreme Court after consultation with the JAC.<sup>617</sup> However, the President's nominations are subject to parliamentary ratification.<sup>618</sup> From the interviews, it emerges that the process takes place as

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<sup>611</sup> See Article 242(1)(a) of the Mozambican Constitution.

<sup>612</sup> Ibid. Article 242(1)(b).

<sup>613</sup> Ibid. Article 242(1)(c).

<sup>614</sup> Ibid. Article 242(3). The 2004 Constitution raised the bar in relation to experience from eight years under Law 9/2003 to ten years.

<sup>615</sup> Interview with Professor of administrative and constitutional law at Eduardo Mondlane Law Faculty, Maputo, 4 July 2013.

<sup>616</sup> See Article 226 of the Mozambican Constitution.

<sup>617</sup> Ibid. Article 226(2).

<sup>618</sup> Article 53 of Law No. 24/2007.

follows. Parliamentary ratification involves the setting up of a parliamentary committee which interviews the nominees and questions asked during this process cover broad areas.<sup>619</sup> The parliamentary committee thereafter produces a report which is presented to Parliament.<sup>620</sup> The nominees subsequently attend the parliamentary reporting session but do not answer any questions. Voting by secret ballot follows thereafter and a majority of those present and voting suffices for the appointments to be made.<sup>621</sup>

It is apparent that the selection of the President and Vice President of the Supreme Court is largely a political process with the President of the Republic having an unfettered discretion in nominating candidates for these positions. As observed earlier in Chapter 3, the fact that Mozambique is increasingly sliding into a one party state effectively means that there is little scope for Parliament blocking executive preferences. It is also important to note that the Constitution does not state that to be appointed as the President or Vice President of the Supreme Court, one must previously have been a judge. This effectively means that persons outside the judiciary can be appointed to these positions.<sup>622</sup> On the other hand, the rest of the Supreme Court judges are appointed by the President on the recommendation of the JAC.<sup>623</sup> The use of the word 'recommendation' in the constitutional text is not without any practical significance. It means that the President's choices are limited to the list submitted by the JAC. However, a serious drawback in the Mozambican Supreme Court judicial selection process, is that the constitutional framework is silent on addressing disagreements between the President and the JAC on the recommended candidate list. This apparent *lacuna* can easily lead to subversion by the executive in cases where the executive disapproves of the submitted candidate list.

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<sup>619</sup> Interview with the Vice President of the Mozambican Supreme Court conducted in Maputo on 11 July 2013.

<sup>620</sup> For example, the objection to the nomination of Adelino Muchanga, the Vice President of the Supreme Court during the Parliamentary confirmation session was that he was not previously a career judge.

<sup>621</sup> Interview with Vice President of the Mozambican Supreme Court conducted in Maputo on 11 July 2013.

<sup>622</sup> For example, Judge Muchanga was appointed Vice President of the Supreme Court even though he was not previously a career judge.

<sup>623</sup> See Article 226(3) of the Mozambican Constitution.

The Mozambican Constitution entrenches the judicial selection criteria for the Supreme Court judges. For a person to be eligible for appointment to the Supreme Court, the person must be at least thirty five years of age, and have at least ten years of professional experience in the judiciary, in practice at the bar, or in teaching law.<sup>624</sup> Supplementary criteria include the requirements that potential candidates be Mozambican nationals of repute recommended on the basis of their curricula, and being in full possession of their civil and political rights.<sup>625</sup> The age and professional experience threshold for the Supreme Court is the same as the Constitutional Council requirements. It would appear that the juxtaposition of the same qualification requirements for these two courts is a clear sign of the importance attaching to both courts in the Mozambican legal system. While the constitutional text is silent on the specific educational qualifications, it would appear that a degree in law generally suffices for the purposes of appointment to the Supreme Court.

In order to cater for the judicial career system as well as the legal profession generally, the Statute of Judges stipulates that fifty percent of the Supreme Court judges must be drawn from the judiciary. It would appear this legislative intervention was necessitated by the need to create a balance between candidates from the judiciary and those from other legal professional backgrounds.<sup>626</sup> Justifying this balance, two respondents commented as follows.

*“Lawyers with vast experience traditionally make it to the Supreme Court resulting in a lot of judges with over 20 years experience remaining stuck at the Court of Appeal.”*<sup>627</sup> Another respondent commented as follows,

*“At the Supreme Court, one needs to have more qualifications and experience. The career judiciary has limitations despite years in the system. In the Supreme Court tenders, career judges are mostly weak in their curricula compared to other candidates.”*<sup>628</sup>

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<sup>624</sup> Ibid. Article 226(4).

<sup>625</sup> Ibid. Article 226(3).

<sup>626</sup> Interview with Vice President of the Supreme Court, Maputo 11 July 2013.

<sup>627</sup> Interview with Court of Appeal judge, Maputo 8 July 2013.

The careful balancing of the Supreme Court composition in terms of legal background and professional experience is evidenced by the 2011 Supreme Court interviews in which four career judges and three non-career judges were appointed to the Supreme Court.<sup>629</sup>

It is important to note that courts below the Supreme Court are predicated on a judicial career system with the Court of Appeal being the apex court.<sup>630</sup> The Court of Appeal was a recent addition to the Mozambican judicial structure as an intermediate court below the Supreme Court.<sup>631</sup> Judges of the Mozambican Court of Appeal are appointed by the JAC after a public advertisement of vacancies to members of the judiciary.<sup>632</sup> From the interviews, it emerges that the criteria for appointment to the Court of Appeal is based on a grading system. Judges in the career system are graded from category A to D, with category A being the most senior and experienced judges. Promotions within the career system are based on a system of competitive exams and the judicial track record of the candidates. For a judge to be eligible for appointment to the Court of Appeal, he or she must have been a category A judge for at least three years at the time of appointment in addition to passing the exams. The Judge Presidents of the three Courts of Appeal are appointed by the President of the Supreme Court after consultation with the JAC as well as the representatives of the Court of Appeal judges in the JAC.<sup>633</sup> Paradoxically, the President of the Supreme Court is the head of the JAC so this effectively means that the

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<sup>628</sup> Interview with Director of School of Judicial Magistracy and candidate for the 2011 Supreme Court vacancies, Maputo 11 July 2013.

<sup>629</sup> Interview with Vice President of the Supreme Court, Maputo 11 July 2013.

<sup>630</sup> Article 29 of Law No. 24/2007.

<sup>631</sup> Interview with Court of Appeal Judge, Maputo, 8 July 2013. See also Article 36 of the Statute of Judges, Law No. 24/2007.

<sup>632</sup> The significance of this analysis is that it will bring out the distinctive features of the career judiciary in Mozambique especially taking into account the role of the Judicial Council in judicial appointments to the Court of Appeal. The inclusion of the Court of Appeal becomes more pertinent considering the fact that the 1990 constitutional regime created a career judiciary all the way up to the Supreme Court which position was however changed by the 2004 Constitution.

<sup>633</sup> Article 64 of Law No. 24/2007.

President of the Supreme Court recommends to himself the candidates for appointment as Judge Presidents.

The institutional links between the Supreme Court and the JAC were questioned by the Administrative Court in the case of *Luis Timoteo Matsinhe v. President of the Supreme Court of Mocambique*,<sup>634</sup> where the court highlighted the difficulties of maintaining checks and balances in the judicial system due to the close links between the JAC and the Supreme Court.<sup>635</sup> Significantly, the President of the Supreme Court is not bound by the opinion of the JAC in making these appointments. Inevitably, such a system of judicial selection is prone to patronage and abuse. While a self-selecting judiciary could be desirable taking a cue from the Indian self-selecting judiciary,<sup>636</sup> the Mozambican system leaves a lot of room for subjective evaluations as a basis for judicial selection.

### 5.2.2 The position in South Africa

The South African Constitution establishes a judicial structure for the ordinary courts in section 166. The Constitutional Court is the highest court followed by the Supreme Court of Appeal and the various divisions of the High Court. The Constitutional Court used to deal exclusively with

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<sup>634</sup> See Proc. No. 78, ruling No. 5/2002. See also Afrimap, 'Mozambique: Justice Sector and the Rule of Law', 81. In this case, [a] judge from a judicial court in Maputo city had been subject to disciplinary action by the Council, which had ruled that he should be suspended from his position. Article 28 of the Statute of the Judicial Magistracy provides that appeals against decisions taken by the Higher Council should be referred to the Supreme Court. However, the dismissed judge decided to take his case directly to the Administrative Court, questioning amongst other legal matters, the role that the President of the Higher Council, as President of the Supreme Court, would play in his case if it went to the Supreme Court. He argued that it was unconstitutional to be dismissed by the Higher Council and then ruled on appeal in the Supreme Court by the same individual. The Administrative Court accepted the case and ruled in favour of the judge, reinstating him to his former position. In its ruling, the Administrative Court stated that the Supreme Court could not fulfil its role out-lined in Article 28 as: 1) the Higher Council was an interested party in the case; 2) the Supreme Court and its members were, in organisational terms, subordinate to the Higher Council; 3) the President of the Supreme Court was also President of the Higher Council; 4) the impartiality and independence of a ruling by judges whose positions were dependent on the body that had passed the initial ruling was bound to be difficult to attain.

<sup>635</sup> See Afrimap, 'Mozambique: Justice Sector and the Rule of Law', 81.

<sup>636</sup> See the Indian National Commission to Review the Working of the Constitution Consultation Paper available at <http://lawmin.nic.in/ncrcw/finalreport/v2b1-14.htm> accessed on 14/11/11.

constitutional matters with the Supreme Court of Appeal being the apex court in non-constitutional matters. A recent amendment to the Superior Courts Act has however changed this position and the Constitutional Court is now the final court of appeal in all matters.<sup>637</sup> The South African Constitution provides for the same qualification criteria for all superior court judges.<sup>638</sup> This discussion will focus specifically on what is referred to as supplementary JAC criteria which gives the broad considerations taken into account in judicial selection. The published 2010 JAC supplementary criteria is largely an extension of the constitutional criteria. Furthermore and in the South African context, past JAC practices provide important insights on the judicial selection criteria.

The JAC published its supplementary judicial selection criteria as a result of serious concerns which stakeholders in the justice delivery system had raised over the lack of clarity in the constitutional criteria.<sup>639</sup> While the JAC conducted public interviews for judges, there was nevertheless little transparency exhibited in the judicial selection criteria.<sup>640</sup> In fact, the JAC had in 2009 commented as follows in respect of its judicial selection criteria,

*“There are a wide variety of factors that are taken into account by the Screening Committee before deciding to include or exclude a particular nominee. These include but are not limited to the recommendation of the Judge President, the support of the candidate’s professional body, the need to fulfil the constitutional mandate of the Judicial Service Commission (JSC) so as to ensure transformation of the Bench to reflect the ethnic and gender composition of the population, the particular judicial needs of the division concerned, the candidate’s age and range of expertise, including whether he or*

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<sup>637</sup> See Section 29(3) of the Superior Courts Act, Act 10 of 2013.

<sup>638</sup> See section 174(1) of the South African Constitution.

<sup>639</sup> See generally Cowen, ‘Judicial Selection in South Africa’ available at <http://www.dgru.uct.ac.za/dgru/reports/researchreports> accessed on 12/07/14.

<sup>640</sup> See Davis, ‘Judicial Appointments in South Africa’ 2010 (December), Advocate, 41.

*she has served as an Acting Judge in the division or at all, and the relative strength and merits of the various candidates in relation to one another.”<sup>641</sup>*

The 2010 published JAC supplementary criteria provides as follows.

1. *Is the proposed appointee a person of integrity?*
2. *Is the proposed appointee a person with the necessary energy and motivation?*
3. *Is the proposed appointee a competent person?*
  - (a) *Technically competent*
  - (b) *Capacity to give expression to the values of the Constitution*
4. *Is the proposed appointee an experienced person?*
  - (a) *Technically experienced*
  - (b) *Experienced in regard to values and needs of the community*
5. *Does the proposed appointee possess appropriate potential?*
6. *Symbolism. What message is given to the community at large by a particular appointment?*

It is apparent that the published criteria points to a determination of an ‘appropriately qualified’ and ‘fit and proper’ person to hold judicial office. The criteria relating to ‘integrity’ clearly feeds into the fit and proper person requirement. On the other hand, the criteria relating to ‘competence and experience’ necessarily aim to determine if a candidate is appropriately qualified. Furthermore, the criteria on symbolism addresses representativity issues as envisaged by section 174(2) of the Constitution. It must be noted however that the criteria relating to a candidate possessing the necessary ‘energy and motivation’ and the one on ‘appropriate potential’ are prone to subjective evaluations. While the publication of the supplementary criteria was a positive step insofar as the transparency of the JAC procedures is concerned, a residual concern that the published criteria is vague and open-ended still remains.<sup>642</sup> A recent report on the JAC supplementary criteria opines that,

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<sup>641</sup> See Cowen, 8.

<sup>642</sup> See a report by the Democratic Governance and Rights Unit on the JSC interviews in Cape Town, October 2010 available at

*“Whilst acknowledging that the JSC’s criteria will continue to be elaborated on and developed, they do appear to be in general a sound basis on which to continue to develop clear, transparent principles in which judicial appointments may be based. An analysis of the questions asked during the October 2010 interviews suggest that the criteria have contributed to more relevant and focused questions being asked than has tended to be the case in previous interviews.”*

Following the above contextual outline, this discussion now turns its focus to an analysis of the judicial selection process and criteria for each ordinary superior court in South Africa. The South African Constitution establishes an eleven member Constitutional Court which is the highest court in constitutional and non-constitutional matters.<sup>643</sup> While the qualification criteria is the same for all Constitutional Court judges, the South African Constitution however, makes a distinction between the appointment of the Chief Justice and the Deputy Chief Justice and the appointment of the rest of the Constitutional Court judges. The President appoints the Chief Justice and the Deputy Chief Justice after consultation with the JAC and the leaders of parties represented in the National Assembly.<sup>644</sup> The other judges of the Constitutional Court are appointed by the President from a list of nominees prepared by the JAC, after consulting the Chief Justice and the leaders of parties represented in the National Assembly.<sup>645</sup> Potential appointees to the Constitutional Court must also be South African citizens.<sup>646</sup> Significantly, at least four members of the Constitutional Court must be persons who were judges at the time

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[http://www.dgru.uct.ac.za/sites/default/files/image\\_tool/images/103/AnalysisOctober2010%20%20.pdf](http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/AnalysisOctober2010%20%20.pdf) accessed on 13/06/14.

<sup>643</sup> See section 167(3) of the South African Constitution. See generally Devenish, ‘The Independence and Effectiveness of Constitutional Courts in Sub-Saharan Africa: The South Africa Experience’ 2007(December), University of Botswana Law Journal, 3-25.

<sup>644</sup> Ibid. Section 174(3).

<sup>645</sup> Ibid. Section 174(4). See also section 2 of JSC Regulation No. 423 of 2003. See also Mokgoro, ‘Judicial Appointments’ 2010(Dec), Advocate, 45.

<sup>646</sup> Ibid. Section 174(1).

they were appointed to the court.<sup>647</sup> It would appear this constitutional provision was intended to create a balance in the composition of the Constitutional Court by establishing a bench with diverse jurisprudential perspectives.

It is apparent that the executive is given a lot of leeway in the appointment of Constitutional Court judges.<sup>648</sup> In fact, the appointment of the Chief Justice and the Deputy Chief Justice is a highly political process with the nominations emanating directly from the executive as the controversial appointment of Chief Justice Mogoeng Mogoeng in 2011 would show.<sup>649</sup> This state of affairs is hardly surprising considering the heightened political role of the court especially taking into account the apartheid past which the country is still grappling with.<sup>650</sup> Furthermore, the 'consultation' requirement does not mean the President is bound by the views of the political party leaders. The only limitation placed on the executive in respect of the appointment of Constitutional Court judges is that the President of the Republic is restricted to the list of nominees prepared by the JAC.<sup>651</sup> It would appear that the requirement for consultation is primarily designed to inform the President's decision on a particular judicial appointment. Insights into the South African consultation process can be gleaned from the protests by political party leaders over the appointment of former Chief Justice Sandile Ngcobo in 2009. Leaders of four political parties issued a joint statement protesting the casual manner of consultation adopted by President Zuma.<sup>652</sup> In this case, the President had written to the

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<sup>647</sup> Ibid. Section 174(5).

<sup>648</sup> See Van der Vyver, 'The Judiciary in South Africa', 123.

<sup>649</sup> See generally 'Is the Appointment of Justice Mogoeng Mogoeng as Chief Justice in the Interest of the People?' available at <https://www.issafrica.org/.../is-the-appointment-of-justice-mogoeng-mog...> accessed on 5/08/15. See also 'The law vs. religion: Let's try that again' available at <http://constitutionallyspeaking.co.za/category/mogoeng-mogoeng/> accessed on 5/08/15.

<sup>650</sup> See Corder, 'Judicial Authority in a Changing South Africa', 263

<sup>651</sup> See generally See Murray, 'Who Chooses Constitutional Court Judges?' 1999, South African Law Journal, 116, 865.

<sup>652</sup> The political parties were the Democratic Alliance, Inkatha Freedom Party, Congress of the People and the Independent Democrats.

political party leaders seeking their opinions when he had already publicly announced his preferred candidate for the judicial vacancy.<sup>653</sup>

In relation to the Supreme Court of Appeal, the South African approach separates the appointment of the President and Vice President of the Supreme Court of Appeal from the rest of the judges. The President of the Republic appoints the President and Deputy President of the Supreme Court of Appeal after consulting the JAC.<sup>654</sup> The rest of the Supreme Court judges are appointed by the President on the 'advice' of the JAC.<sup>655</sup> It is noteworthy that the President's executive discretion in making Supreme Court judicial appointments is curtailed (with the exception of the President and Vice President) since the President's discretion is limited to the short-list submitted by the JAC.<sup>656</sup> It is axiomatic therefore, that the use of the phrase, on the 'advice' of the JAC, necessarily entails that the commission plays a critical role in respect of the South African Supreme Court judicial appointments. Judging from past JAC practices in relation to the Supreme Court judicial appointments, it would appear that the Supreme Court is an elevation court for judges in the lower superior courts.<sup>657</sup> This variance between the letter of the law and the JAC practices is clearly indicative of the need for a legislative framework which provides clarity in respect of the criteria for Supreme Court judicial appointments. It is paradoxical that the Supreme Court is exclusively for career judges whereas the highest court, the Constitutional Court is not subject to the same 'positive discrimination'.

The above considerations in respect of the Supreme Court judicial selection process equally apply to the High Court. Perhaps an important point of departure in respect of the High Court is

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<sup>653</sup> See <http://www.ifp.org.za/Archives/Releases/100809pr.htm> accessed on 4 April 2014. Perhaps guidance in relation to the interpretation of the word 'consult' in making judicial appointments can be taken from the Indian case of *S.P. Gupta v. Union of India* AIR 1982 SC 149 wherein the Indian Supreme Court held that 'consultation' does not necessarily mean 'concurrence'.

<sup>654</sup> Section 174(3) of the South African Constitution.

<sup>655</sup> Section 174(6). See also section 3 of the JSC Regulation No. 423 of 2003.

<sup>656</sup> See Du Bois, 292. See also Van der Vyver, 123; Corder, 'Seeking Social Justice? Judicial Independence and Responsiveness in a Changing in South Africa', 197.

<sup>657</sup> Interview with JSC secretariat, Johannesburg 12 September 2013.

that nominations are open to those within the lower echelons of the judiciary and those from other legal professional backgrounds. Significantly for the High Court, it would appear judging from past JAC practices that candidates who have previously acted as judges stand a better chance of getting appointed. From the interviews, it appears that experience as an acting judge has become an important element in the selection criteria for the High Court. While a detailed discussion of acting judicial appointments follows later in this chapter, it is important to note that the constitutional and legislative framework entrenches acting judgeships.<sup>658</sup>

### 5.2.3 The position in Zimbabwe

The Zimbabwean Constitution establishes the court structure in section 162. The ordinary superior courts comprise the Constitutional Court, the Supreme Court and the High Court.<sup>659</sup> As indicated in the previous chapter, the Constitution entrenches a common judicial selection process for all superior court judges. The point of departure among the various superior courts relates to the qualification criteria for each court which is the focus of this discussion. It is important to note that the Constitutional Court was established by the 2013 Constitution as a separate court. Significantly, the Constitution's transitional provisions provide that the old Supreme Court bench will double as the Constitutional Court for seven years from the Constitution's effective date.<sup>660</sup> This observation is critical as it impacts on new Constitutional Court judicial appointments which are stalled for seven years. Furthermore, the transitional provisions impact on acting judicial appointments which have to be resorted to due to the anticipated problem of recusals in matters referred to the Constitutional Court from the Supreme Court.

The Constitution entrenches the qualification criteria for judicial appointments to the Constitutional Court. To be appointed as a Constitutional Court judge, a prospective candidate

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<sup>658</sup> Section 175 of the South African Constitution.

<sup>659</sup> Section 162(a-c) of the Zimbabwean Constitution.

<sup>660</sup> See the section 18(2) of the 6<sup>th</sup> Schedule to the Zimbabwean Constitution.

must satisfy six constitutional requirements.<sup>661</sup> The person must be a Zimbabwean citizen, be at least forty years old, and have a ‘sound knowledge’ of constitutional law.<sup>662</sup> Additionally, the person must have been either a judge in a Roman-Dutch or English law jurisdiction, or had qualified as a legal practitioner in Zimbabwe, or in any Roman-Dutch or English law jurisdiction for at least twelve years.<sup>663</sup> Finally, to be appointed a Constitutional Court judge, a person must be a ‘fit and proper person’ to hold judicial office.<sup>664</sup>

It is apparent that the Constitutional Court criteria was intended to ensure that candidates with vast legal experience qualify for appointment to the apex court. While the criteria is yet to be tested in practice, it would appear that the key criteria for appointment to the Constitutional Court relates to a candidate’s ability to demonstrate firstly, ‘sound knowledge’ of constitutional law and secondly, the ‘fit and proper person’ requirement. The other criteria relating to citizenship, age and years of experience in a Roman Dutch or English law jurisdiction are rather straightforward and therefore not contentious. The point of concern however is in relation to the key criteria highlighted above. The constitutional text itself does not provide clarity in respect of what ‘sound knowledge of constitutional law’ and a ‘fit and proper person’ entail. The wording of the constitutional text necessarily opens these criteria to different interpretive evaluations. It is anticipated that controversies can arise as a result of the criteria’s subjective overtones. It is not clear whether a law degree suffices for the purposes of ‘sound knowledge’ of constitutional law or there is need for a candidate to have specialized in constitutional law either in practice or in academia. It is also not clear if superior court judges who ordinarily do not deal with constitutional matters are automatically ineligible for appointment to the Constitutional Court. This point is pertinent considering that courts such as the High Court have specialized divisions in various aspects of the law and this specialization in other areas of the law can be a disadvantage as per the constitutional criteria.

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<sup>661</sup> See section 177 of the Zimbabwean Constitution.

<sup>662</sup> Ibid. Section 177(1).

<sup>663</sup> Ibid. Section 177(1)(b).

<sup>664</sup> Ibid. Section 177(2).

While the ‘fit and proper person’ criteria can be given meaning by the infusion of constitutional values in it, it is again important for the JAC to come up with supplementary criteria which further clarifies the constitutional criteria. In fact, one of the major criticisms of the judicial selection process under the former constitution was the lack of clear criteria on judicial selection which resulted in questionable appointments.<sup>665</sup> Since the Zimbabwean judicial selection process is relatively new, there are opportunities which the JAC can take advantage of in coming up with more clear guidelines on judicial selection. The gazetting of judicial appointments supplementary criteria will necessarily instill greater public confidence in the judicial selection process.

The Constitution also entrenches the qualification criteria for judicial appointments to the Supreme Court. To be eligible for appointment, a person must be a Zimbabwean citizen, and be at least forty years old.<sup>666</sup> Furthermore, the person must either, have been a judge in a Roman-Dutch or English law jurisdiction, or had qualified to practice as a legal practitioner for at least 10 years.<sup>667</sup> The final requirement is that the person must be a ‘fit and proper person’ to hold judicial office.<sup>668</sup> While the other criteria are rather straightforward, it appears the key criteria for the Supreme Court judicial appointments relates to the ‘fit and proper person’ requirement which as noted above is prone to subjective interpretations. It is anticipated that the same problems in giving meaning to these potentially subjective constitutional criteria experienced in South Africa are likely to arise in the Zimbabwean context.<sup>669</sup> As noted under the Constitutional Court discussion, it is pertinent for the JAC to come up with clear supplementary criteria which would give guidance on the interpretation of the constitutional criteria. It is critical to note that the JAC has traditionally nominated sitting High Court judges for Supreme Court positions.

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<sup>665</sup> Interview with Law Society of Zimbabwe Secretariat, Harare, 9/08/2013.

<sup>666</sup> See section 178(1) of the Zimbabwean Constitution.

<sup>667</sup> Ibid. Section 178(1)(b).

<sup>668</sup> Ibid. Section 178(2).

<sup>669</sup> For a comprehensive discussion of what constitutes a ‘fit and proper person’ in the South African context, see generally Cowen, ‘Judicial Selection in South Africa’.

While the criteria in the 2013 Constitution opens up the Supreme Court judgeships to lawyers outside the judiciary, it remains to be seen if the JAC will depart in practice from its long established tradition. The first Supreme Court judicial appointments under the 2013 Constitution surprisingly had only judges as candidates.<sup>670</sup> Perhaps important insights into the Supreme Court criteria can be extrapolated from the July 2014 Supreme Court interview questionnaire.<sup>671</sup> The questionnaire had ten standard set of questions which encompassed several themes and all candidates were assessed on the basis of these questions. The themes included work background, leadership skills, collaboration, team-work and co-operation, planning and organization, decisiveness, independence, work standards, motivational fitness and lastly integrity.

Regarding the High Court, the Constitution entrenches four qualification criteria for appointment to the High Court. Prospective High Court judges must be at least forty years of age. In addition, prospective candidates must have been judges in a Roman-Dutch law or English law jurisdiction, and/or have legal practice experience of at least seven years.<sup>672</sup> Lastly, the prospective candidates must be 'fit and proper persons' to hold judicial office.<sup>673</sup> It is apparent that the constitutional text entrenches more or less the same judicial selection criteria for all superior courts. The only differences in the criteria in the three ordinary superior courts relates to professional experience threshold as well as the peculiar requirement for 'sound knowledge' in constitutional law for the Constitutional Court. The commonality of the judicial selection criteria albeit with minor differences makes the need for more clarity all the more compelling. It is prudent for the JAC to pre-empt some of the potential problems that can arise in the determination of the constitutional criteria on judicial selection by further de-constructing it.

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<sup>670</sup> Supreme Court interviews attended by the researcher on 15 July 2014. Ten candidates were shortlisted and all of them were judges.

<sup>671</sup> The researcher attended and observed the July 2014 Supreme Court interviews.

<sup>672</sup> See section 179 of the Zimbabwean Constitution.

<sup>673</sup> Ibid.

### 5.3 Assessment of judicial selection criteria: specialized superior courts

The preceding analysis has so far focused on the judicial selection process and criteria for the ordinary superior courts in all three countries. Any meaningful discussion of the superior courts necessarily includes the judicial selection criteria for the various specialized superior courts. Significantly, some of these specialized courts have their own peculiar qualification criteria which goes beyond the general judicial selection criteria. Furthermore, specialized courts are not uniformly established in all three countries and the following discussions will analyse each country's position particularly the emerging realities emanating from the peculiarities of each jurisdiction.

#### 5.3.1 The position in Mozambique

The Mozambican Constitution establishes an Administrative Court which is the highest court in the hierarchy of administrative, customs and fiscal courts, and which is a superior court of record.<sup>674</sup> Prior to 2009, the Administrative Court did not follow a career system as there existed only a single Administrative Court for the whole country.<sup>675</sup> The President of the Administrative Court is nominated by the President of the Republic after consultation with the JAC (Superior Council of the Administrative Judiciary). However, this nomination requires parliamentary ratification in the same manner as the appointment of the President of the Constitutional Council, the President and Vice President of the Supreme Court. The rest of the Administrative Court judges are appointed by the President on the 'recommendation' of the JAC.<sup>676</sup> Effectively, the President of the Republic has an unfettered discretion in the appointment of the President of the Administrative Court. However, this discretion is limited in respect of the Administrative Court judges as the President makes these appointments on the basis of a recommendatory list prepared by the JAC. Critically, the JAC does not conduct any

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<sup>674</sup> Article 228(1) of the Mozambican Constitution. There are nine Provincial Administrative Courts in Mozambique.

<sup>675</sup> Interview with Professor of administrative and constitutional law at Eduardo Mondlane Law Faculty, Maputo, 4 July 2013.

<sup>676</sup> Article 229(3).

interviews for prospective judges. Paradoxically, the same JAC advertises vacancies in the Provincial Administrative Courts followed by interviews of shortlisted candidates.<sup>677</sup> These inconsistencies in judicial selection procedures necessarily bring political patronage into the selection of Administrative Court judges. From the interviews, perceptions abound that political gerrymandering plays a key role in Administrative Court judicial appointments.<sup>678</sup>

In relation to the criteria for Administrative Court judicial appointments, the Constitution provides as follows;

*“At the time of their appointment, judges of the Administrative Court shall be of at least thirty-five years of age and shall meet all other requirements established by law.”<sup>679</sup>*

It is apparent that the Constitution does not provide clarity in respect of the criteria for the appointment of Administrative Court judges, delegating these matters to subsidiary legislation. It is also worth noting that as of 2013, there was no subsidiary legislation which governed the appointment of Administrative Court judges.<sup>680</sup> This lack of legislative clarity is hardly surprising considering the traditional dominance of the executive over Administrative Court judicial appointments. The most significant gap is the failure to specify the minimum professional experience threshold which is critical in limiting executive discretion in the judicial selection process. As one respondent observed,

*“The executive has traditionally dominated the Administrative Court judicial appointments. The gaps in the enabling legislative framework have resulted in the current situation where there is no clear objective criteria for appointment to the Administrative Court. In fact, this is one of the main reasons the Administrative Court is a*

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<sup>677</sup> Ibid.

<sup>678</sup> Transcripts available on file.

<sup>679</sup> Article 229(4) of the Mozambican Constitution.

<sup>680</sup> Ibid.

*target of the constitution revision exercise which started in 2013 and is yet to be completed.”<sup>681</sup>*

Judging from past JAC practices, two qualification requirements are key in the selection of Administrative Court judges, namely, a qualification in law and a good public service record.<sup>682</sup> Critically, experience as a judge is not necessary for appointment to the Administrative Court. Due to the establishment of the provincial administrative courts in 2010, the administrative judiciary now follows a career path for judges.<sup>683</sup> Consequent to this fundamental change in the structure of the administrative judiciary, it is probable that the pre-2010 executive domination of Administrative Court judicial appointments will weaken as more judges from the career judiciary get elevated to the apex court.

### **5.3.2 The position in South Africa**

The South African legislative framework establishes four specialized superior courts namely, the Labour Court, the Electoral Court, the Competition Appeal Court and the Land Claims Court. It is also critical to note that the South African subsidiary legislation establishing the specialized superior courts also entrenches the judicial selection process for each court. A significant distinction in the South African context relates to the selection criteria for the specialized superior courts which goes beyond the general selection criteria for the ordinary superior courts. It is perhaps this additional criteria in terms of expertise in a particular field of law which explains the decrease in the number of applicants to the specialized superior courts in South Africa generally. For example, in the April 2013 JAC interviews, only one candidate was

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<sup>681</sup> Interview with Professor of administrative and constitutional law at Eduardo Mondlane Law Faculty, Maputo, 4 July 2013.

<sup>682</sup> Ibid.

<sup>683</sup> Ibid.

interviewed for the Competition Appeal Court and two candidates for the Electoral Court.<sup>684</sup>  
The April 2014 JAC interviews also had only one candidate for the Electoral Court.<sup>685</sup>

The appointment of Labour Court judges in South Africa is governed by the Constitution and the Labour Relations Act.<sup>686</sup> While the Constitution lays down the general judicial selection criteria for all judges, the Labour Relations Act goes much further in listing the specific requirements peculiar to this court. The President of the Republic appoints judges of the Labour Court acting on the 'advice' of the National Economic Development and Labour Council (NEDLAC), and the JAC, and after consultation with the Minister of Justice and the Judge President of the Labour Court.<sup>687</sup> Furthermore, the President also appoints the Judge President of the Labour Court acting on the 'advice' of NEDLAC and the JAC, and after consultation with the Minister of Justice.<sup>688</sup> With respect to the Deputy Judge President of the Labour Court, the President of the Republic must also consult the Judge President of the Labour Court.<sup>689</sup> To be eligible for appointment as a judge of the Labour Court, a person must be either, a judge of the High Court or a legal practitioner with knowledge, experience, and expertise in labour law.<sup>690</sup> The requirements for appointment as a Judge President and Deputy Judge President are a notch higher than the rest of the Labour Court judges. To be appointed as such, a person must be a judge of the Supreme Court in addition to having vast expertise in labour law.<sup>691</sup>

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<sup>684</sup> See Democratic Governance and Rights Unit report available at <http://www.dgru.uct.ac.za/dgru/reports/researchreports> accessed on 12/07/14.

<sup>685</sup> Ibid.

<sup>686</sup> Act 66 of 1995.

<sup>687</sup> See section 153 of the Labour Relations Act 66/1995.

<sup>688</sup> Ibid. Section 153(1)(a).

<sup>689</sup> Ibid. Section 153(1)(b).

<sup>690</sup> Ibid. Section 153(6).

<sup>691</sup> Ibid. Section 153(2)(a-b).

It is clear that expertise in labour law is an important attribute which prospective Labour Court judges must possess. However, the legislative text is silent on what level of expertise is required for appointment purposes. Judging from past JAC practices, it would appear that vast experience specializing in labour law on an objective basis would suffice for the purposes of appointment.<sup>692</sup> Critically, the involvement of many stakeholders is crucial in the process of selecting a meritorious bench, but it is apparent that the appointment of Labour Court judges in South Africa is strangely, a bureaucratic affair. Significantly, the executive's role is undoubtedly limited in the appointment of Labour Court judges. However, it is not clear from the legislative text how differences of opinion between the JAC and the NEDLAC are resolved in practice, especially taking into account the fact that the JAC conducts public interviews for Labour Court judges as contemplated by section 166(e) of the South African Constitution.

The Labour Relations Act also creates the Labour Appeal Court in addition to the Labour Court. The Labour Appeal Court is a superior court that has authority equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction.<sup>693</sup> The Judge President and the Deputy Judge President of the Labour Court become the *ex officio* Judge President and Deputy Judge President of the Labour Appeal Court respectively.<sup>694</sup> The other judges of the Labour Appeal Court are appointed in the same manner as the Labour Court judges.<sup>695</sup> Effectively, this means Labour Appeal Court judges are seconded from the sitting Labour Court judges subject to them not having participated in the proceedings in the court *a quo*.<sup>696</sup>

The selection process and criteria for judges of the Electoral Court is of the utmost importance considering the important role that this court plays in settling electoral disputes which in turn have an impact on a country's democratic consolidation, including peace and stability. It is

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<sup>692</sup> Interview with JSC Secretariat, Johannesburg, 12/09/13.

<sup>693</sup> Section 167.

<sup>694</sup> Section 168.

<sup>695</sup> Section 169(1).

<sup>696</sup> Section 168(3).

hardly surprising therefore that South Africa vests the adjudication of electoral disputes to a superior court of record. The South African legislative framework establishes a separate Electoral Court which has a status similar to that of the Supreme Court of Appeal.<sup>697</sup> The South African Electoral Court is composed of three judges of the Supreme Court, and two other members who are South African citizens.<sup>698</sup> These judges are appointed by the President 'upon the recommendation' of the JAC.<sup>699</sup>

Considering the legal-political significance of this court, it is hardly surprising that Supreme Court judges are a majority in the Electoral Court. While the legislative text is not clear on the qualifications for the two members who only have to be South African citizens, the trend has generally been to appoint serving judges as members of the Electoral Court.<sup>700</sup> Significantly, the South African JAC plays an important role in the selection of Electoral Court judges, with appointments to this court subject to the JAC's judicial selection process. Moreover, the President's role in making these appointments is limited to the JAC's recommendations. Despite this limitation, the major threat to the independence of the Electoral Court emanates from the President's power to fix the terms of office, conditions of service, remuneration, and benefits of members of the Electoral Court. Vesting such powers in the hands of the executive creates a strong possibility of undesirable indirect influences especially taking into account the fact that the very same judges have an important say in political matters in which the executive has an interest.<sup>701</sup>

In contrast to Mozambique and Zimbabwe, South Africa establishes the Competition Appeal Court, and the Land Claims Court as superior courts of record with jurisdiction over matters relating to their respective spheres of expertise. The judges of the Competition Appeal Court

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<sup>697</sup> See section 18 of the South African Electoral Commission Act 51 of 1996.

<sup>698</sup> *Ibid.* Section 19.

<sup>699</sup> *Ibid.*

<sup>700</sup> Interview with JSC Secretariat, Johannesburg, 12 September, 2013.

<sup>701</sup> Section 19(2) of the South African Electoral Commission Act 51 of 1996.

are appointed by the President acting on the ‘advice’ of the JAC.<sup>702</sup> The President of the Republic also designates one of the judges to be the Judge President of the court.<sup>703</sup> The key criteria for appointment to this court, is that a prospective candidate must have been a judge of the High Court at the time of appointment.<sup>704</sup> This means that effectively, candidates outside the judiciary are automatically ineligible for appointment to the Competition Appeal Court.<sup>705</sup>

An important distinction is evident in relation to the appointment of Land Claims Court judges. The President of the Republic appoints the President of the Land Claims Court acting on the ‘advice’ of the JAC.<sup>706</sup> The additional judges of this court are appointed by the President of the Republic after ‘consultation’ with the President of the Court, and the JAC. Effectively, this means the President of the Republic is not bound by the opinion of the latter.<sup>707</sup> To be eligible for appointment to the Land Claims Court, a person must be a South African citizen who is ‘fit and proper’ to be a judge.<sup>708</sup> Additionally, the person must be a judge of the High Court, or be a practising legal practitioner and/or law lecturer of at least ten years cumulative experience, with expertise in land matters.<sup>709</sup> It appears the most critical criteria for appointment to the Land Claims Court relates to a candidate’s ability to demonstrate expertise in land matters as well as being a ‘fit and proper’ person to hold judicial office. Moreover, appointments to this court are not limited to members of the judiciary and this promotes a diversified bench with members from different legal professional backgrounds. An equally important point to note is the citizenship qualification criteria. The fact that the citizenship criteria is applicable to the

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<sup>702</sup> Section 36(2) of the Competition Act of 30 November 1998.

<sup>703</sup> Section 36(3). Electoral Act [Chapter 2:01].

<sup>704</sup> Section 36(2) of the Competition Act of 30 November 1998.

<sup>705</sup> Ibid. Section 36(1)(a).

<sup>706</sup> Section 22(3) of the Restitution of Land Rights Act, 22 of 1994.

<sup>707</sup> Ibid. Section 22(4).

<sup>708</sup> Ibid. Section 23(a-b).

<sup>709</sup> Ibid. Section 23(c).

Constitutional Court and the Land Claims Court only is indicative of the socio-political significance of this court.

A residual point of concern relates to the executive's undesirable control over the appointment of the majority of the Land Claims Court judges. The only check on executive discretion is imposed in the appointment of the President of the Court.<sup>710</sup> The dominance of the executive over Land Claims Court judicial appointments is put beyond doubt by the *ad hoc* consultation procedures provided for in the legislative text, which are different from the formal JAC process.<sup>711</sup> Significantly, the land question is a key issue in most of Africa's emerging democracies which are still grappling with untying the shackles of colonialism. Overall, the fact that the South African executive retains control over the selection of the majority of the Land Claims Court judges is hardly surprising especially taking into account the important political role of this court in redressing past historical imbalances.

### **5.3.3 The position in Zimbabwe**

The Zimbabwean constitutional and legislative framework establishes the Administrative Court, the Labour Court and the Fiscal Appeals Court as specialized superior courts of record.<sup>712</sup> However, it is important to note that in terms of the Electoral Act,<sup>713</sup> the Electoral Court is not established as a stand-alone court. Jurisdiction over electoral disputes other than the presidential elections is vested in the High Court which sits as the Electoral Court.

The judicial selection criteria for the Administrative Court, and the Labour Court is discussed concurrently below due to the similarity of the selection criteria. The Labour Court and Administrative Court judges are appointed in the same manner as the High Court judges in

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<sup>710</sup> Section 5 of Government Regulation 423/2003.

<sup>711</sup> Ibid. Section 6.

<sup>712</sup> Section 162(d-e) of the Zimbabwean Constitution. See also section 3 of the Fiscal Appeals Court Act [Chapter 23:05].

<sup>713</sup> Section 36 of the Electoral Act [Chapter 2:01].

terms of the process leading to the appointment, as well as the qualification criteria.<sup>714</sup> The key constitutional provision in the appointment of these judges provides as follows;

*“To be appointed as a judge of the High Court, the Labour Court or the Administrative Court a person must be a fit and proper person to hold office as a judge.”*<sup>715</sup>

The above constitutional provision is complimented by the general selection criteria that a candidate be at least forty years old plus seven years experience either as a judge or legal practitioner in a Roman-Dutch or English law jurisdiction.<sup>716</sup> Furthermore, both the Administrative Court Act and the Labour Act sets out three similar qualification criteria for prospective judges. To be eligible for appointment, a candidate must be a former judge of the Supreme Court or High Court, or is qualified to be a High Court judge, and/or has been a magistrate for not less than seven years.<sup>717</sup> While the provisions of the 2013 Constitution are supreme to any other law, the qualification criteria set out in the Administrative Court Act and the Labour Act needs to be aligned with the 2013 Constitution. These amendments can perhaps go a step further in detailing the attributes expected of a prospective judge in terms of expertise in administrative and labour law.

Similarly to the Administrative and Labour courts, the Fiscal Appeals Court Act sets out two qualification criteria. Firstly, a candidate is qualified for appointment if he/she is a former judge of the Supreme Court or the High Court, and secondly, if the candidate is qualified to be appointed as a judge of the Supreme Court or High Court.<sup>718</sup>

A number of observations can be made in respect of the judicial selection criteria for the specialized superior courts in Zimbabwe. Significantly, the subsidiary legislation establishing all

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<sup>714</sup> Section 179(1) of the Zimbabwean Constitution.

<sup>715</sup> Ibid. Section 179(2).

<sup>716</sup> Ibid. Section 179(1)(a-b).

<sup>717</sup> Section 85 of the Labour Act [Chapter 28:01]. See also section 5 of the Administrative Court Act [Chapter 7:01].

<sup>718</sup> Section 3 of the Fiscal Appeals Court Act [Chapter 23:05].

three specialized courts entrenches more or less similar qualification criteria. Perhaps the most critical lacuna in the legislative texts is the omission to specify the requisite skill and expertise antecedent to judicial appointment for each specialized court. While it can be assumed that during the interviewing process, questions relating to a candidate's experience in a specialized area of the law are likely to arise, it is important that the law clearly give guidance as to the qualities expected of each specialized superior court judge. This point is pertinent considering the recent past experiences where Labour Court judges appointed had no previous experience in labour matters.<sup>719</sup> Consequently, it came as no surprise when the Chief Justice bemoaned the poor quality of service delivery in the Labour Court when officially opening the 2014 legal year.<sup>720</sup>

#### **5.4 Acting judicial appointments**

The judicial selection processes of superior court judges in Mozambique, South Africa and Zimbabwe necessarily bring into perspective the legislative framework governing acting judicial appointments. Acting judgeships are a practical necessity and experience as an acting judge increases a candidate's chances of getting a permanent judicial appointment. Consequently, acting judgeships become an important qualification criteria in judicial selection. Furthermore, acting judgeships are important insofar as they provide an avenue through which the executive can indirectly constitute the judiciary. In light of the above observations, a discussion of acting judicial appointments in all three countries follows.

The Mozambican constitutional and legislative framework is silent in relation to acting judicial appointments for the superior courts. The Mozambican position was summarized by the Chief Justice as follows;

*"The Constitution does not allow for the appointment of acting judges in the superior courts. It has always been an assumption of the legal system as a whole that judges*

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<sup>719</sup> See 'Zimbabwe: Four Labour Court Presidents Sworn In' available at <http://allafrica.com/stories/201307180483.html> accessed on 18/07/14.

<sup>720</sup> The speech by the Chief Justice is available at <http://www.jsc.org.zw/> accessed on 6/08/14.

*have to be appointed on a permanent basis. This situation however does not mean that there are no vacancies or backlogs in the court system which could be solved by a system of acting appointments. Acting judgeships remain an open issue for interrogation in our legal system.”<sup>721</sup>*

The non-entrenchment of acting judicial appointments can be attributed to the Mozambican judicial structure which is predicated on a judicial career system. Acting judicial appointments are not an issue within the career system since vacancies necessarily lead to the opening of promotion opportunities. The Constitutional Council and the Supreme Court are different propositions altogether with their own peculiar judicial selection procedures. It would appear the interface of the three systems of judicial selection resulted in the current gap on acting judgeships in the enabling legislative framework.

The South African Constitution on the other hand, entrenches acting judicial appointments. Furthermore, the subsidiary legislation establishing the various specialized superior courts also provides for the procedures regulating acting judicial appointments.<sup>722</sup> The Constitution provides the broad acting judicial appointments framework as follows.

*“The President may appoint a woman or a man to be an acting judge of the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice.”<sup>723</sup>*

*“The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.”<sup>724</sup>*

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<sup>721</sup> Interview with President of the Supreme Court, Justice Muchanga, 22/07/14.

<sup>722</sup> See also section 153(5) of the Labour Relations Act 66/1995; section 36(4) of the Competition Act, Section 22(8) of the Restitution of Land Rights Act, 22/94.

<sup>723</sup> Section 175(1) of the South African Constitution.

<sup>724</sup> Ibid. Section 175(2).

A number of observations can be made about the appointment of acting judges in South Africa.<sup>725</sup> First, the Constitution limits the appointment of acting judges in the Constitutional Court to situations where there is a vacancy or a judge is absent.<sup>726</sup> There are however no limitations on the appointment of acting judges to the other superior courts. This perhaps explains the prevalence of acting judges in the various divisions of the High Court.<sup>727</sup> The limitations on the appointment of acting judges for the Constitutional Court were confirmed by the same court in the case of *Hlophe v. Premier of the Western Cape Province, Hlophe v. Freedom under Law*.<sup>728</sup> The Constitutional Court held that the appointment of between six and eight acting Constitutional Court judges was unconstitutional.<sup>729</sup> The important point emanating from this judgment is that if large numbers of judges serve on an acting basis, the purpose and intent of section 178 of the Constitution is seriously undermined.<sup>730</sup> It means in reality, the executive will be usurping the critical role of the JAC in judicial appointments. As the final court of appeal, it is undesirable that it be constituted by judges without full judicial tenure.

Second, it appears the JAC is reluctant in practice to appoint anyone who has not previously served as an acting judge even though the Commission itself has no control over acting judicial appointments.<sup>731</sup> This unwritten rule has been justified on the basis that acting appointments give an opportunity to potential judges at the same time deepening the candidate pool from

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<sup>725</sup> See generally Olivier, 'The Appointment of Acting Judges in South Africa and Lesotho' 2006, *OBITER*, 554.

<sup>726</sup> See Trengove, 'The Prevalence of acting judges in the High Court- Is it consistent with an independent judiciary?' 2007, *Advocate* (Dec), 37.

<sup>727</sup> *Ibid.*

<sup>728</sup> 2012 (6) SA 13 (CC).

<sup>729</sup> *Ibid.* Paragraph 41.

<sup>730</sup> See also Trengove, 'The Prevalence of acting judges in the High Court- Is it consistent with an independent judiciary?' 2007, *Advocate* (Dec), 39.

<sup>731</sup> See Moerane, 'The Meaning of Transformation of the Judiciary in the New South African Context', 713. See also Van der Vyver, 122. The South African method of appointing acting judges has however, not changed since the apartheid era.

which judges can be drawn.<sup>732</sup> Moreover, the use of acting judicial appointments has helped reduce the backlog of court cases by facilitating *ad hoc* appointments with less bureaucratic procedures.<sup>733</sup> The South African Constitutional Court justified the appointment of acting judges in the following terms;

*'If there is a vacancy in a Court the JSC is under a duty to fill it. It may no doubt deal or defer an appointment until a suitable appointment is identified, but it should not be assumed that it will abdicate its responsibility by allowing permanent vacancies to be filled indefinitely by acting judges...Acting appointments often have to be made urgently and unexpectedly. The JSC is a large body and there are practical reasons why a meeting of the JSC cannot be convened whenever the need arises for such an appointment to be made.'*<sup>734</sup>

Despite these seemingly positive attributes of the system, concerns have been raised over the Minister's control over acting judicial appointments.<sup>735</sup> It has been argued that the process is a closed system which lacks transparency.<sup>736</sup> Moreover, the JAC's bias towards persons who have acted as judges in a way extends the power of the Minister over permanent judicial appointments.<sup>737</sup> The Minister determines who gets appointed as an acting judge, and

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<sup>732</sup> See Corder, 'Judicial Authority in Changing South Africa', 264. See also Corder, 'Judicial Independence in South Africa', 198.

<sup>733</sup> Ibid at 265.

<sup>734</sup> *In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), paragraph 128.

<sup>735</sup> See Du Bois, 'Judicial Selection in Post-Apartheid South Africa', 290. Du Bois notes that [i]n 1999, the Judge President of the Natal High Court resigned after the Minister refused to make two acting appointments he had requested on the ground that expertise was needed to counterbalance the inexperience of recent appointees in the pursuit of transformation, and the Cape Judge President was asked to stay on in an acting capacity beyond the normal retirement age.

<sup>736</sup> See Gordon; Bruce, 51. See also the report by the United Nations Special Rapporteur for the Independence of Judges and Lawyers available at <http://www.ohchr.org/EN/Issues/Judiciary/Pages/Visits.aspx> accessed on 15/01/14. The UN Special Rapporteur expressed concern over the impact of acting judicial appointments on the independence of the judiciary in South Africa.

<sup>737</sup> See Trengove, 2007, Advocate (Dec), 38.

therefore indirectly, determines eligibility for permanent appointment.<sup>738</sup> This unfettered discretion given to the executive over acting judicial appointments is undesirable. Executive discretion needs to be counterbalanced by a process which promotes the virtues of the system, while at the same time safeguarding the independence of the judiciary from inappropriate negative influences.<sup>739</sup> It has been further argued that acting judgeships also create potential conflict of interest situations considering that most of these judges do not sever their professional relationships.<sup>740</sup> This point becomes pertinent since the majority of the acting judges are drawn from the bar.<sup>741</sup>

Unlike the South African position, the Zimbabwean Constitution peculiarly grants the President the power to make acting judicial appointments acting on the 'advice' of the JAC. The position is different with regards to the Chief Justice, the Deputy Chief Justice and the Judge Presidents of the superior courts whose positions are automatically filled by the next most senior judge in an acting capacity.<sup>742</sup> With respect to the rest of the judges, the Constitution provides as follows.

*"If the services of an additional judge of the High Court, the Labour Court or the Administrative Court are required for a limited period the President, acting on the advice of the Judicial Services Commission, may appoint a former judge to act in that office for not more than twelve months, which period may be renewed for one further period of twelve months."*<sup>743</sup>

It is clear that the JAC plays a key role in selecting candidates for acting judgeships since the President acts on its 'advice'. Significantly, acting judicial appointments are limited to former

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<sup>738</sup> Ibid.

<sup>739</sup> See also the Lesotho Court of Appeal case of *Sole v. Cullinan* 2003 8 BCLR 935 (LesCA), which had to deal with question of whether or not acting judicial appointments infringe judicial independence.

<sup>740</sup> See Trengove, 2007, *Advocate* (Dec), 38.

<sup>741</sup> Ibid.

<sup>742</sup> Section 181(1-2) of the Zimbabwean Constitution.

<sup>743</sup> Ibid. Section 181(3).

judges only. Apparently, the Zimbabwean process avoids some of the concerns relating to the South African process which is heavily dominated by the executive. However, the major drawback of the Zimbabwean process is that it undesirably restricts the candidate pool by excluding practising lawyers who could potentially ‘test the waters’ by acting as judges. It appears the Zimbabwean process concerned itself more with removing direct political considerations from the process at the expense of opening up the acting judicial appointments system to wider stakeholder participation.

From the above discussions, it is clear that the judicial selection processes for the permanent members of the judiciary, are equally important as the appointment of acting judges. It is easy for the executive to pack the judiciary with compliant acting judges thereby seriously compromising the independence of the judiciary. In fact, acting judicial appointments create a ‘back door’ through which appointments are made and which can be easily manipulated by an overbearing executive. In light of the above, it is therefore necessary to create an acting judicial appointments framework which is not prone to the vicissitudes of the executive.

### **5.5 An assessment of emerging trends in judicial selection criteria in all three countries**

The previous sections have so far highlighted the judicial selection criteria for the various superior courts in Mozambique, South Africa and Zimbabwe. It is important at this juncture to determine if there is emerging anything which suggests consensus on the elements constitutive of the superior courts judicial selection criteria in all three countries. This analysis is useful in that it will bring out the critical points of convergence and divergence in the three systems of judicial selection.

All three countries in varying degrees constitutionally entrench the judicial selection criteria for both the ordinary and specialized superior courts. While the South African Constitution entrenches a common judicial selection criteria for all superior courts, the Mozambican and Zimbabwean Constitutions entrench different judicial selection criteria depending on the level of the court. These differences mainly relate to the specific requirements such as the age threshold and level of experience required for a particular court. Significantly, South Africa has gone a step further than both Mozambique and Zimbabwe in publishing supplementary criteria

on judicial selection which aim to give guidance on the interpretation of the constitutional criteria.

In relation to the Constitutional Courts/Council, the constitutions of Mozambique and Zimbabwe entrench the minimum age and professional experience threshold for prospective judges. Significantly, the Mozambican thresholds are lower than the Zimbabwean ones. It emerges from the interviews that the lowering and entrenchment of the same qualification criteria for Mozambique's Constitutional Council and the Supreme Court had more to do with the post-independence legal developments which resulted in a diminished pool of legal practitioners.<sup>744</sup> The entrenched minimum professional experience requirement for the Mozambican Constitutional Council and the Supreme Court is similar to the constitutionally entrenched Zimbabwean Supreme Court position.<sup>745</sup> The South African Constitution on the other hand does not entrench any thresholds but in practice, jurists with vast professional experience have traditionally been appointed to the Constitutional Court.

It appears that citizenship continues to be an important eligibility criteria for judicial appointment in all three countries. The Mozambican constitutional criteria entrenches citizenship as an important eligibility requirement paradoxically for the Supreme Court only. The South African Constitution on the other hand, entrenches citizenship as one of the criteria for appointment to the Constitutional Court and the Land Claims Court but not to the rest of the superior courts. Similarly, the Zimbabwean Constitution entrenches citizenship as an important qualification criteria for the Constitutional Court and the Supreme Court only.<sup>746</sup> It emerges from the interviews that while the constitutional framework is permissive for the appointment of foreign jurists in some superior courts, in practice, all three countries heavily rely on their own nationals to staff their respective superior courts. This is hardly surprising considering the heightened politico-legal significance of the apex courts in each jurisdiction.

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<sup>744</sup> Transcripts of interviews available on file with author.

<sup>745</sup> See section 178(1)(b) of the Zimbabwean Constitution. See also Articles 226 and 242 of the Mozambican Constitution. That is a minimum of 35 years of age and ten years professional experience.

<sup>746</sup> See section 177-178 of the Zimbabwean Constitution.

An emerging trend evident in Mozambique and South Africa is the need to balance the apex courts in terms of composition. The apex courts are staffed with judges from diverse professional backgrounds. This practice is evident in the Mozambican Constitutional Council and the Supreme Court, and the South African Constitutional Court. It however remains to be seen how the Zimbabwean Constitutional Court will be constituted as per the 2013 Constitution. Furthermore and unlike the position in Mozambique, the trend in the South African and Zimbabwean Supreme Courts has been to elevate sitting judges to these courts. While constitutional frameworks are permissive to the appointment of jurists outside the judiciary, in practice, Supreme Court judges continue to be drawn from the pool of High Court and specialized court judges

Regarding specialized courts, South Africa establishes more specialized superior courts compared to the Mozambican and Zimbabwean positions. Unlike the Mozambican and Zimbabwean positions, the South African legislative framework entrenches specific eligibility criteria for each of the specialized courts which goes beyond the general judicial selection criteria. While considerations relating to a candidate's experience are likely to arise in any specialized court judicial appointment, the South African legislative framework gives guidance on the specific judicial selection criteria for each specialized court. This legislative clarity perhaps explains the earlier noted difference between the South African and Zimbabwean criteria for appointment to the Labour Courts.

Moving on to acting judicial appointments, it appears experience as an acting judge is a relevant consideration by the JAC in the South African context more than it is in Mozambique and Zimbabwe. Both the South African and Zimbabwean constitutional frameworks entrench acting judicial appointments unlike the Mozambican position which is silent on this aspect. Critically, the executive in South Africa is generally given a relatively free hand in the appointment of acting judges with some constraints being placed on the appointment of acting judges for the Constitutional Court. The Zimbabwean position on the other hand represents a complete departure from the South African position in terms of limitations placed on the executive. The Zimbabwean JAC plays an important role in acting judicial appointments which are also limited

to former judges. While acting judgeships are a practical necessity, the divergences in the three countries' approaches have more to do with the over-arching national objectives. For example, the South African system was designed so as to address demographic imbalances in the way the judiciary was constituted. Acting judgeships in South Africa are generally viewed as an instrument which gives opportunities to previously marginalized groups in the judiciary. As noted earlier, this view is traditionally one of the major justifications for the current system which is more or less a continuation of the pre-independence system of appointing acting judges.

An important point emanating from the different positions in all three countries is that the judicial selection criteria seek to achieve the same results using diverse constitutional prescriptions. In principle, all three systems of judicial selection are concerned with appointing seasoned jurists despite some controversies experienced in the implementation of the selection criteria with regards to particular candidates. A classic example of the controversy that can surround the judicial selection criteria is the public furore surrounding the South African JAC's failure to recommend Jeremy Gauntlett for appointment.<sup>747</sup> The need for more legislative clarity in respect of the judicial selection criteria is a common concern for stakeholders in the justice delivery system in all three countries. While recognizing the attempts at providing clarity in the constitutional and legislative texts, there is still room to guide the public on the qualities expected of an ideal superior court judge. Judicial selection systems and their resultant selection criteria are ever evolving phenomena and it is this aspect which results in the 'cross-pollination' of judicial selection criteria across constitutional systems.

## 5.6 Conclusion

Debates surrounding judicial selection criteria in all three countries are as critical as the ones centering on the judicial selection process itself. In fact, the criteria for judicial selection is a logical corollary of the judicial selection process which in turn is an important element of the independence of the judiciary. The preceding discussions have highlighted the main features of

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<sup>747</sup> See Legal Brief, Issue Number 3158, 7 November 2012.

the judicial selection criteria for the ordinary and specialized superior courts in all three countries. Particularly significant in this endeavor was the attempt at de-constructing the textual meaning of the entrenched constitutional and legislative judicial selection criteria. This chapter has further demonstrated that, the criteria for judicial selection is not an end in itself. It is a means to an end. First, judicial selection criteria provide guidelines on the caliber of appointed superior court judges. Second, they act as a safeguard against unfettered executive discretion. Critically, executive discretion is limited by directing executive preferences to candidates who meet the stipulated minimum professional threshold.

While all three countries in varying degrees institutionalize the judicial selection criteria for the superior courts, the imperative for clear judicial selection criteria remains a common concern. Considering the serious threats posed to the independence of JAC's by over-bearing executives generally, it is critical that the judicial selection criteria be entrenched in the law with much clarity as far as practicable. Legislative clarity guards against unwarranted external influences at the same time instilling public confidence in the judicial selection process.

With the judicial selection processes and criteria in all three countries having been examined, the next chapter puts into perspective these discussions by analyzing case studies of specific superior court judicial appointments. This endeavor is critical in demonstrating the convergence and/or divergence between the law and the actual state practice in superior court judicial appointments. Furthermore, the subtle aspects of each system of judicial selection can only be meaningfully discussed in a case study context.

## CHAPTER VI

### CASE STUDIES: SUPREME COURT JUDICIAL APPOINTMENTS

#### 6.1 Introduction

The preceding discussions have so far highlighted the general considerations as well as the judicial selection criteria for the superior courts in all three countries. It is useful at this point to evaluate case studies of superior court judicial selection processes in each country. These case studies basically involve an analysis of a specific judicial selection process from the beginning to the end. The rationale for this approach is two-fold. Firstly, it enables the distinctive features of each process to come out thereby allowing for a more meaningful comparison of the judicial selection processes. Secondly, these case studies address some of the key questions which this study seeks to answer by reconciling the previous discussions on the constitutional and legislative basis of judicial appointments with the actual state practices.

The case studies focus on a similar court in all three countries, that is, the Supreme Court. The choice of the Supreme Court as a study unit/comparator has been motivated by several factors. First, the Supreme Court is the highest court of appeal in non-constitutional matters in both Mozambique and Zimbabwe. The same position obtained in South Africa until the recent amendments ushered in by the Supreme Court Act.<sup>748</sup> Second, as a higher court within the judicial hierarchy, its judicial selection process provides meaningful comparisons across all three countries. Third, the Supreme Court as a comparator provides recent case study opportunities since all three countries have more or less recent Supreme Court judicial selection processes from which useful lessons can be learnt.

It is perhaps necessary to begin by giving a brief overview of the methodology which was employed in the case study analyses. It must be noted from the onset that the methodology utilized relied heavily on Robert Yin's work on case study research.<sup>749</sup> The data for the case

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<sup>748</sup> Supreme Court Act No. 10 of 2013.

<sup>749</sup> See Yin, 'Case Study Research. Design and Methods' 1994, Second edition, Thousand Oaks: Sage.

studies was sourced from multiple sources of evidence which included primary and secondary documents, interviews, and direct observations by the researcher. These sources were useful for the purposes of data triangulation. The use of multiple sources of evidence inevitably enhanced the reliability and validity of the data collected.<sup>750</sup>

This chapter begins with the case study analyses of Supreme Court judicial appointments in all three countries. The analysis in each country is discussed separately so as to fully canvass all the issues arising out of the judicial selection process. This is followed by a comparative analysis of the salient points emerging from the process in each country. An assessment of developments in all three countries in light of emerging global trends leads to the conclusion of this chapter.

## **6.2 Case Study 1: Mozambique**

The selection of Mozambican Supreme Court judges in 2011 represented a complete break with the pre-2004 Constitution judicial selection process. In fact, the 2011 judicial appointments were the first post 2004 Constitution attempt at opening up a traditionally closed system of judicial selection. The Supreme Court judicial selection process began in October 2011 with the JAC advertising the Supreme Court vacancies in the government gazette as well as in the print media.<sup>751</sup> The public advertisement called for applications from suitably qualified persons to fill the seven vacancies which had arisen. Preceding this, the JAC had appointed a seven member committee to oversee the judicial selection process and would ultimately make recommendations to it. The committee was constituted as follows; one retired Supreme Court judge, one serving Supreme Court judge, two serving Administrative Court judges, a dean of a law faculty, the President of the bar association, and the Deputy Attorney General.<sup>752</sup> It is important to note that the committee was composed of members outside the JAC.

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<sup>750</sup> Ibid.

<sup>751</sup> Valuable insights into this process were obtained from retired Supreme Court Judge Joao Carlos Trindade, who was the President of the selecting committee appointed for this purpose by the JAC.

<sup>752</sup> Interview with the President of the Committee, 22 August 2014, Victoria Falls, Zimbabwe.

Furthermore, the committee was constituted in such a manner as to be generally representative of the legal profession.

The committee's first session was held in the presence of the President of the Supreme Court who subsequently recused himself from the deliberations.<sup>753</sup> The recusal was intended to give room to the committee members to deliberate freely without the possibility of external pressure from the JAC chairperson.<sup>754</sup> During its first sitting, the committee did not have any terms of reference and guidelines on the procedures governing its mandate. The committee members discussed the above issues extensively and resolved to elect the President of the committee by secret ballot in-order to properly manage the committee's mandate.<sup>755</sup> The committee subsequently wrote to the JAC requesting clarity on their mandate. The JAC responded by furnishing the committee with guiding principles on the criteria for judicial selection. These principles also provided that the proceedings of the committee would be valid if all committee members were present.<sup>756</sup>

The committee subsequently deliberated on the judicial selection criteria in several meetings within the first three months of its work.<sup>757</sup> The main issue which the committee had to grapple with was evaluating the candidates with different legal backgrounds in the light of the constitutional requirements which provide as follows:

*'Judges of the Supreme Court shall be nominated by the President of the Republic on the recommendation of the Superior Council of the Judiciary, on the basis of their curricula, after a*

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<sup>753</sup> Ibid.

<sup>754</sup> Ibid.

<sup>755</sup> Interview with past President of the Mozambican Bar Association.

<sup>756</sup> The committee initially faced some financial challenges and its work was hampered by this principle. A member of the committee was based in Beira and the committee did not initially have a budget to discharge its mandate.

<sup>757</sup> Interview with the President of the Committee, 22 August 2014, Victoria Falls, Zimbabwe.

*public tender open to judges and other national citizens of reputed merit, all of whom shall hold degrees in law and be in full possession of their civil and political rights.*<sup>758</sup>

*At the time of their appointment, judges of the Supreme Court shall be of at least thirty-five years of age and shall have at least ten years of experience at the bar or in teaching law, and all other requirements shall be fixed by law.*<sup>759</sup>

The committee finally settled for criteria which was based on the educational qualifications and professional experience of the candidates. Furthermore, candidates were subjected to a pre-interview ranking based on their submitted curriculum vitae, published works, court decisions made, and professional development conferences/seminars attended.<sup>760</sup>

42 candidates applied and the committee rejected three applications on the basis that they did not meet the minimum judicial appointment criteria threshold.<sup>761</sup> The guidelines on the interview process were formulated and these focused on the candidates' motivations as well as their resume. Subsequently, 39 candidates were invited for the interviews which were in camera, and which took two weeks to complete.<sup>762</sup> The interview process was organized as follows: the President of the committee asked questions first, followed by the rest of the committee members. Each candidate was allocated an hour but on average the interviews took forty minutes per candidate.<sup>763</sup>

A respondent who was a candidate in the Supreme Court interviews commented on the interview process as follows;

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<sup>758</sup> Article 226(3) of the Mozambican Constitution.

<sup>759</sup> Ibid. Article 226(4).

<sup>760</sup> Interview with the President of the Committee, 22 August 2014, Victoria Falls, Zimbabwe.

<sup>761</sup> Ibid.

<sup>762</sup> The Committee would deliberate for two to three days in a week.

<sup>763</sup> Interview with the President of the Committee, 22 August 2014, Victoria Falls, Zimbabwe.

*'The interview panel asks many questions which are not limited to legal considerations. Everyone was interviewed and the results made public. It is difficult to determine if politics or legal experience dominates the judicial selection process. As a candidate in the last Supreme Court interviews, it is difficult for me to make judgment on the process. However, the selection committee is made up of reputed jurists.'*<sup>764</sup>

Each of the set criteria had points and committee members evaluated candidates on their individual score-sheets. At the end of the interview process, the committee averaged scores for each set criteria which became the final score per candidate. This process of averaging the scores of each committee member was justified by the President of the committee as being an important safeguard against subjectivity in the score allocations.<sup>765</sup> Ultimately, the candidates were ranked from 0-20 points and the committee submitted this list to the JAC. In cases where candidates had the same number of points, the professional experience years determined the ranking order.<sup>766</sup> It is also critical to note that the JAC was at liberty to reject the submitted ranking list and hence retains the final decision on the submitted candidate list.<sup>767</sup> Commenting on this aspect, one scholar noted that the judicial selection process necessarily depends on the integrity of the President of the Supreme Court who wields considerable influence in the JAC.<sup>768</sup>

The committee made two critical recommendations to the JAC.<sup>769</sup> First, the committee recommended that candidates with less than 10 points on the final grading list should not be appointed. Second, the committee recommended that the JAC respect the committee's ranking

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<sup>764</sup> Interview with the Director of the School of Judicial Magistracy who was a judicial candidate, Maputo, 11 July 2013.

<sup>765</sup> Interview with the President of the Committee, 22 August 2014, Victoria Falls, Zimbabwe.

<sup>766</sup> Ibid.

<sup>767</sup> Interview with the Vice President of the Supreme Court ( as he was then), Justice Muchanga, Maputo, 11 July 2013.

<sup>768</sup> Interview with Professor of Administrative law, Maputo, 4 July 2013.

<sup>769</sup> Interview with the President of the Committee.

of the judicial candidates. The final candidate ranking was published in the government gazette as reflected in Table 1 below.<sup>770</sup>

**Table 1**

**Extract from the gazetted final judicial candidates classification list**

<i>Ord.</i>	<i>Nome</i>	<i>Classificacao</i>
1.	Augusto Raul Paulino	16,50
2.	Matilde Augusto Monjane Maltez de Almeida	15,75
3.	Maria Benvinda Delfina Levi	15,50
4.	Pedro Sinai Nhatitima	15,00
5.	Osvalda Joana	14,25
6.	Maria Isabel Bento Rupia	14,25
7.	Jose Fernandes Xavier Junior	13,75
8.	Achirafu Abubacar Abdula	13,50
9.	Rafael Sebastiao	13,25
10.	Inacio Ombe	13,00
11.	Claudina Ernesto Macuacua Mutepua	12,75
12.	Carmen Antonieta Francisco Guilherme Nhanale Lucas	12,75
13.	Vitalina do Carmo Papadakis	12,75
14.	Arlindo Moises Mazive	12,50
15.	Custodio Vasco Djedje	12,25
16.	Jose Maria de Sousa	12,00
17.	Valentim Daniel Sambo	11,75
18.	Felicidade Sandra Machatine Ten Jua	11,75
19.	Antonio Paulo Namburete	10,75
20.	Henrique Carios Xavier Cossa	10,75

<sup>770</sup> From the interviews, it emerges that the results of the interviews are valid for three years from the date of publication. However, diligent enquiries have not yielded the source of this rule.

21.	Joao Antonio Baptista da Assuncao Beirao	10,25
22.	Augusto Abudo da Silva Hunguana	10,00
23.	Bernardo Bento Chuzuaio	10,00
24.	Pascoai Francisco Jussa	10,00
25.	Valdomiro Tome Socrates	10,00
26.	Hermenegildo Carlos Jossias Jone	9,75
27.	Antonio Sebastiao Fernando Matimula	9,50
28.	Maria Alexandra Zamba	9,50
29.	Alfredo Damiao Phiri	9,50
30.	Paula da Conceicao Machatine Honwana	8,75
31.	Vitorino Niquisse	8,50
32.	Tome Gabriel Matuca	8,25
33.	Carlos Magaia Mahumane	8,25
34.	Jose Antonio Candido Sampaio	7,75
35.	Sara Jaime Panguene	7,50
36.	Luis Mabote Junior	7,00
37.	Joao Enoque Mabjaia	6,25
38.	Helder Elias Mangujo	5,00
39.	Ricardo Antonio Nhaguliane	3,00

Source: *Conselho Superior Da Magistratura Judicial (JAC)* Government gazette dated 15 December 2011.

One judicial candidate queried the published candidate grading list.<sup>771</sup> The candidate appealed to the JAC resulting in the selection committee subsequently justifying its position. The matter ended at that point but the candidate still had an option to appeal the JAC's decision to the Administrative Court.<sup>772</sup> The JAC subsequently submitted the candidates' list to the President of the Republic and proposed that he make appointments from those candidates with 10 points

<sup>771</sup> Candidate 30 on the final classification list.

<sup>772</sup> Interview with the President of the Committee, 22 August 2014, Victoria Falls, Zimbabwe.

and above.<sup>773</sup> The President however sent the list back to the JAC for further clarifications since the list did not categorize candidates according to legal professional background, which was important in balancing the composition of the court.<sup>774</sup> In response, the JAC came up with two candidate lists, that is, one for judges and the other for jurists outside the judiciary. The President of the Republic eventually appointed seven judges to the Supreme Court.<sup>775</sup> The President of the Republic appointed candidate numbers 1 to 5, 19 and 22 as per Table 1 above. It emerged from the interviews that the failure by the President of the Republic to follow the candidate ranking list was justified on the basis of representativity as discussed below. The appointed judicial candidates included the Attorney General at the time,<sup>776</sup> the Director of the Legal Aid Institute,<sup>777</sup> a former Attorney General,<sup>778</sup> two judges,<sup>779</sup> one jurist,<sup>780</sup> and the Minister of Justice.<sup>781</sup>

A number of observations can be made about the judicial selection process for Mozambique's Supreme Court judges. First, the 2011 interviews were a major milestone insofar as opening up the selection process of judges in Mozambique is concerned. This openness is evidenced by the public advertisement of the vacancies as well as the publication of the final results. However, some limitations to greater openness in the judicial selection process still remained. These were the fact that the interviews and the final deliberations of the JAC were held in camera. While the attempt at opening a previously closed system to the public is commendable, there is still

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<sup>773</sup> Interview with the Vice President of the Supreme Court (as he was then), Justice Muchanga, Maputo, 11 July 2013.

<sup>774</sup> Ibid.

<sup>775</sup> Ibid.

<sup>776</sup> Augusto Raul Paulino.

<sup>777</sup> Pedro Sinai Nhatitima.

<sup>778</sup> Antonio Paulo Namburete.

<sup>779</sup> Osvolda Joana and Matilde Augusto Monjane Maltez de Almeida.

<sup>780</sup> Augusto Abudo da Silva Hanguana.

<sup>781</sup> Maria Benvinda Delfina Levi.

need to open the critical stages of the process such as the interviews to public scrutiny if the objectives of openness are to be meaningfully achieved.

Second, a number of important lessons can be learnt from the ended 2011 judicial selection process. The fact that the committee did not initially have any terms of reference as well guidelines for the selection process is hardly desirable considering that the committee's composition and role is not entrenched in the law but is a matter of JAC practice. Furthermore and as noted in Chapter 4 of the study, the fact that the committee's membership is kept out of the public domain does not completely eliminate the possibility of external influences or even caucusing to adopt common positions. Since this was the first such process in Mozambique's legal history, these gaps are hardly surprising but what is important are the lessons that can be learnt for the benefit of future processes.

Third, it is clear that the President of the Republic did not respect the ranking of the candidates according to performance in the interviews. While the law does not oblige the President to follow the submitted ranking list, a number of respondents interviewed queried this aspect of the judicial selection process.<sup>782</sup> To them, the failure by the President to respect the ranking list negates against meritocracy in the selection of judges. It does not augur well for public confidence in the system if for subjective reasons, the President can simply overlook better candidates in favour of his own preferred candidates. This situation is even more glaring considering that the public had access to the ranking list. For example, candidates five and six on the list had the same points but one was preferred over the other and to make matters worse, candidates with lesser points were appointed. The President supposedly justified his choices on the basis of diversity and representativity. However, perceptions are abound that politicking played an important role since these candidates are presumed to be ruling party sympathizers.<sup>783</sup> Commenting on the above issue, one respondent had this to say;

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<sup>782</sup> Transcripts available on file with author.

<sup>783</sup> Ibid.

*'Rigorous screening takes place at the political level before the President appoints from the list. Being a Supreme Court judge is increasingly becoming a privilege dependent on the politics of the day.'*<sup>784</sup>

The same sentiments were echoed by the UN Special Rapporteur on the independence of judges and lawyers as follows;

*'Information received indicated that, in numerous cases, membership of the ruling party (in power since 1975) is a de facto prerequisite for access to public administration, including the judiciary, as well as for career advancement and job security. This situation and the lack of an effective system of checks and balances constitute considerable obstacles to the development of a truly independent judiciary.'*<sup>785</sup>

Particularly worrying about the judicial selection process was the appointment of the then Minister of Justice and the Attorney General as judges. These candidates subsequently took up their positions on the bench after they had left their positions in government.<sup>786</sup> This state of affairs is hardly desirable and poses a serious threat to the independence of the judiciary. It negates the separation of powers principle if serving members of the executive can have the political insurance that when their terms of office end, they can find refuge in Supreme Court positions. The same concerns apply to the involvement of the Deputy Attorney General in the committee who in reality was assessing his superior, the Attorney General who as noted earlier was a judicial candidate. It can be argued that the Deputy Attorney General might not have known that the Attorney General had applied, and in any case was only exercising a pre-determined position that did not depend on who had applied. As observed in Chapter 4 of this study, it is critical that the judicial selection process eliminate the possibilities of external influences which militate against public confidence in the process.

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<sup>784</sup> Ibid.

<sup>785</sup> Report available at [www.refworld.org/pdfid/50f036122.pdf](http://www.refworld.org/pdfid/50f036122.pdf) accessed on 10/05/14.

<sup>786</sup> See 'Mozambique: Supreme Court Judges Sworn in' available at <http://allafrica.com/stories/201210121357.html> accessed on 26/10/2012.

An equally controversial aspect of the 2011 judicial selection process was the fact that one of the selection committee members had a son who participated in the interviews and was subsequently appointed. An overwhelming majority of respondents felt that candidate number four on the list was less experienced compared to the other judicial candidates.<sup>787</sup> In fact, this candidate had no prior experience in the bar or in the judiciary. While it is important to distinguish between perceptions and facts, the above scenario creates a strong possibility of caucusing considering the personal interests involved. It is therefore necessary for the credibility of such a process, that it be conducted in a manner that is impartial to an objective by-stander.<sup>788</sup>

Lastly, a perhaps progressive aspect of the Mozambican judicial selection procedure is the availability of remedies for redress for aggrieved judicial candidates. The fact that judicial candidates can query the deliberations of the selection committee all the way to the Administrative Court is an important remedy in a participatory democracy. However, the fact that there is no public record of the deliberations of the committee as well as the JAC clearly puts an aggrieved judicial candidate at a disadvantage in any potential litigation for redress.

### **6.3 Case Study 2: South Africa**

The South African case study focuses on the April 2013 Supreme Court of Appeal judicial selection process. The process began with the JAC secretariat advertising the two vacancies which had arisen in the Supreme Court. Nominations for potential candidates were required to comply with certain pre-requisites which included the candidate's written consent, a detailed curriculum vitae disclosing the candidate's formal qualifications, a completed standard questionnaire, and copies of at least three written judgments by the candidate.<sup>789</sup> It is important to note from the onset that the JAC screening committee is composed of seven

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<sup>787</sup> Transcripts available on file with author.

<sup>788</sup> According to several respondents, this candidate was on the list to be considered for the Minister of Justice position but he was rejected by the Politburo. The Supreme Court appointment was widely seen as a consolation for the political failure.

<sup>789</sup> JAC media announcement. The deadline for receiving nominations was 1<sup>st</sup> February 2013.

members representative of the commission membership. Furthermore, the head of the court where a vacancy arose leads the discussion on the nominees for short-listing purposes.<sup>790</sup> After receipt of the complete nomination papers, the JAC screening committee short-listed the nominees and the criteria for short-listing purposes was whether or not a person is appointable.<sup>791</sup>

The JAC screening committee shortlisted three candidates, namely Judge Nigel Willis, Judge Clive Plasket, and Judge Halima Saldulker.<sup>792</sup> An important aspect of the process relates to the candidates' assessments received from critical stakeholders such as the bar associations and interest groups. For example, the Democratic Governance and Rights Unit (DGRU) report to the JAC focused on the judicial records of all three nominees.<sup>793</sup> The importance of these records was that they clearly showed the judicial philosophy of the candidates. Similarly, the Johannesburg Bar Council categorized its submission into themes as follows;

- a) the candidate's appropriate qualifications,
- b) whether the candidate was a fit and proper person
- c) whether the candidate's appointment would help to reflect the racial and gender composition of South Africa,
- d) the candidate's knowledge of the law, including constitutional law,
- e) the candidate's commitment to the values of the constitution,
- f) whether any judgments have been overturned on appeal,
- g) the extent and breadth of the candidate's professional experience,
- h) the candidate's linguistic and communication skills,
- i) the candidate's ability to produce judgments promptly,
- j) the candidate's fairness and impartiality,

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<sup>790</sup> Ibid.

<sup>791</sup> Interview with JAC secretariat, Johannesburg, 12 September 2013.

<sup>792</sup> See 'No frontrunner for Appeal Court' available at <http://www.bdlive.co.za/national/law/2013/04/08/no-frontrunner-for-appeal-court> accessed on 6/09/2013.

<sup>793</sup> See also discussion on judicial appointment procedures in Chapter four of this study.

- k) the candidate's independent mindedness,
- l) the candidate's ability to conduct court proceedings,
- m) the candidate's administrative ability,
- n) the candidate's reputation for integrity and ethical behavior,
- o) the candidate's judicial temperament,
- p) the candidate's commitment to human rights, and experience with regard to the values and needs of the community,
- q) the candidate's potential and lastly,
- r) the message that the candidate's appointment would send to the community at large.<sup>794</sup>

As noted in the previous chapter, it is apparent that the above themes are largely an extrapolation of the constitutional requirements on judicial appointments.<sup>795</sup> What is particularly significant about these stakeholder contributions is that they enable the JAC commissioners to fully appreciate the candidates that eventually appear before them in the interviews. The degree of stakeholder input in the South African context is therefore an important indicator of the seriousness with which judicial appointments are taken within the constitutional matrix.

The interviews were conducted on the 9<sup>th</sup> of April 2013 and were open to members of the public as well as the media. Judge Plasket, a white male, was the first to be interviewed followed by Judge Saldulker, a black female and lastly, Judge Willis, a white male.<sup>796</sup> The interview sequence was that the Chief Justice asked questions first, followed by the Judge President of the court and the rest of the commissioners. The manner in which the three candidates were interviewed offers interesting comparisons. Judge Plasket had the previous year been interviewed for the same position but had been overlooked. The commissioners acknowledged having read the transcript of his previous interview and proceeded to cross

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<sup>794</sup> Johannesburg Bar Council submission dated 19 March 2013.

<sup>795</sup> Section 174(1)(2) of the South African Constitution.

<sup>796</sup> The JSC secretariat furnished the researcher with the interview transcript for Judge Plasket but not those for Judges Saldulker and Willis.

examine him for over two hours. From the interview transcript, the nature of the questions which Judge Plasket had to answer mainly related to two issues.<sup>797</sup> The first issue related to his impression of the Supreme Court of Appeal judgment which had found the JAC's inability to appoint candidates to the Western Cape High Court to be irrational. The second issue which took a considerable amount of time was the judge's views on judicial transformation. It is hardly surprising therefore that at the end of the interview, Judge Plasket commented as follows;

*'Well, I realize that most of the questions that I faced today, have had very little to do with my competence as a Judge, they have been on other issues and I was happy to deal with them. But what I would urge the Commission to do, is to consider my track record as a Judge and to examine my track record in particular as a Judge- an Acting Judge of Appeal, because it is on that basis that a decision can be taken whether I am a suitable person to be appointed. Thank you.'*<sup>798</sup>

The next candidate to be interviewed was Judge Saldulker, who had been appointed to the bench in 2004 and had been acting in the Supreme Court of Appeal. From contemporaneous accounts of the interview process, it emerges that a 'comparatively bland and uneventful interview ensued.'<sup>799</sup> Perhaps the only major issue in the interview was the remark by the Judge President of the Supreme Court of Appeal, which was to the effect that the other judges of the same court were not supportive of her appointment.<sup>800</sup> Surprisingly, Judge Saldulker was not even questioned on the few reported judgments she had to her name, which are necessarily an

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<sup>797</sup> Transcript of the JAC interview available on file with the author.

<sup>798</sup> Page 39 of the interview transcript.

<sup>799</sup> See an article by Richard Calland in the *Mail and Guardian* titled, 'JSC's attitude opens door to conservatism', 12 April 2013 available at <http://mg.co.za/article/2013-04-12-00-jscs-attitude-opens-door-to-conservatism/> accessed on 14/09/2014. See also 'Willis slams obnoxious smear campaign' Legal Brief Issue No. 3264, 30 April 2013.

<sup>800</sup> *Ibid.*

important indicator of the work ethic for a prospective appellate court judge. The interview passed without much incident and lasted a little more than half an hour.<sup>801</sup>

The last candidate to be interviewed was Judge Willis who had been appointed to the bench in 1998. Contemporaneous accounts of the interview reveal some interesting contrasts with the preceding interviews for the other two candidates.<sup>802</sup> Judge Willis was interviewed for less than an hour. The general tenor of the interview has been described by observers as a ‘convivial’ affair.<sup>803</sup> Judge Willis indicated to the commission that, the fact that he has never acted on the court should not be an impediment to his appointment.<sup>804</sup> Furthermore, Judge Willis was never asked a single question on judicial transformation which issue had dominated the interview for another white male judge.<sup>805</sup> Rather, Judge Willis was quizzed about his religious theses for a PhD and an Mphil as well as his annoyance with an earlier Constitutional Court judgment.<sup>806</sup>

At the end of the interviews, the JAC deliberated in camera and recommended Judge Saldulker and Judge Willis who were subsequently appointed to the Supreme Court of Appeal by the President of the Republic. It is clear that all three interviews reveal stark contrasts in the treatment of the judicial nominees.<sup>807</sup> There were huge disparities in the length of the interviews, the nature of the questioning as well as the attitude of the commissioners to the candidates. While the commission’s choice of Judge Saldulker has elicited less controversy due

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<sup>801</sup> Ibid.

<sup>802</sup> See Legal Brief ‘Judges’ appointments ‘not all about merit’-CJ’ Issue No. 3250, 10 April 2013. See also ‘Willis slams obnoxious smear campaign’ Legal Brief Issue No. 3264, 30 April 2013.

<sup>803</sup> See ‘JSC defends transformation imperatives for the judiciary’ in the Mail and Guardian, 9 April 2013 available at <http://mg.co.za/article/2013-04-09-jsc-to-recommend-two-judges-for-supreme-court-of-appeal/> accessed on 18/09/14.

<sup>804</sup> Ibid. See also ‘Surprise nod to Willis for appeal court post’, 10 April 2013 available at <http://www.bdlive.co.za/national/law/2013/04/10/surprise-jsc-nod-to-willis-for-appeal-court-post> accessed on 6/09/2013.

<sup>805</sup> Ibid.

<sup>806</sup> Ibid.

<sup>807</sup> See Legal Brief ‘Judges’ appointments ‘not all about merit’-CJ’ Issue No. 3250, 10 April 2013.

to racial and gender transformation imperatives, the commission's choice in respect of the two white male candidates reveals bias in the conduct of the two interviews.<sup>808</sup> The previous bias of the JAC in favour of candidates who had previously acted as judges on a particular court was surprisingly discarded.<sup>809</sup> Commenting on these glaring inconsistencies, two scholars commented as follows;

*'The commission-or its dominant caucus-had made up its mind beforehand. For ideological and political reasons, the JSC was against Clive Plasket, an experienced administrative and human rights lawyer...'*<sup>810</sup>

*'This is why the decision of the JSC to recommend Justice Nigel Willis for appointment to the Supreme Court of Appeal is so perplexing and why it runs counter to that body's stated commitment to advance judicial transformation. Justice Willis has demonstrated a remarkable animosity to the egalitarian ethos of the Constitution as developed by the Constitutional Court.'*<sup>811</sup>

Another commentator made the following observation;

*'Some white men are interviewed aggressively for a long time and are not recommended (for a judicial position). It is general knowledge that some of South Africa's top and most senior advocates do not allow themselves to be nominated, and are not prepared to be humiliated in this manner.'*<sup>812</sup>

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<sup>808</sup> See also Legal Brief 'Loss of confidence under way-Hefer' Issue No. 3265, 2 May 2013.

<sup>809</sup> See previous discussions on acting judicial appointments in Chapter 5 of this thesis.

<sup>810</sup> See an article by Richard Calland in the *Mail and Guardian*, 'JSC's attitude opens door to conservatism', 12 April 2013.

<sup>811</sup> See an article by De Vos titled 'The JSC must redefine merit to advance judicial transformation' available at <http://constitutionallyspeaking.co.za/category/jsc/> accessed on 27/08/2013.

<sup>812</sup> See Legal Brief, Issue No. 3254, 16 April 2013.

It would appear that inconsistencies in the conduct of the interviews have traditionally been the bane of the South African judicial selection process. Commenting on the April 2012 interviews, some commentators observed that;

*'We have previously criticized the JSC for the inconsistent lengths of interviews- too many interviews became bloated with questions that appeared to have little relevance to establishing whether a candidate would be a good judge...Without a discussion of candidates' judgments, it can be difficult to anchor discussion of broader issues such as a candidate's judicial philosophy or commitment to constitutional values.'*<sup>813</sup>

The main observation emanating from the South African judicial selection process is the unequal treatment of candidates during the interviews. It augurs well for the credibility of the JAC's deliberations that judicial nominees be treated equally. Despite the general pedigree of the South African judicial selection process discussed in Chapter 4, the April 2013 Supreme Court interviews failed to achieve the degree of fairness expected of such an important process. While judicial transformation imperatives are an integral part of the constitutional framework on judicial selection, there is need for a consistent approach which subjects all candidates to the same rigours of the interview process.

#### **6.4 Case Study 3: Zimbabwe**

The July 2014 Supreme Court judicial selection process represented the first practical test of the constitutionally entrenched judicial selection process. The process began with the appointment of the JAC commissioners as per the 2013 Constitution's provisions. As noted earlier in Chapter 4 of this study, the JAC is constituted by 13 members.<sup>814</sup> As at July 2014, nine members of the commission had been sworn into office.<sup>815</sup> In terms of the Constitution, the appointed JAC

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<sup>813</sup> See *Sunday Independent*, 'JSC again makes appointment to the bench appear suspect', 29 April 2012 available at <http://www.highbeam.com/doc/1G1-288188364.html> accessed on 15/01/15.

<sup>814</sup> Section 189 of the Zimbabwean Constitution.

members constituted a quorum for the purposes of overseeing the judicial selection process. Section 344(1) of the Constitution provides as follows;

*'A body established by or under this Constitution may act even if there are one or more vacancies in its membership, provided that the members of the body who authorize or perform the act are a quorum.'*

Section 344(2) further provides that;

*'Unless this Constitution or a law regulating the proceedings of the body concerned makes some different provision, half the total membership of any body established by or under this Constitution constitutes a quorum.'*

The newly constituted JAC proceeded to advertise three Supreme Court vacancies which had arisen in the public media on 14 March 2014. The advertisement invited the President of the Republic and members of the public to make nominations of their preferred judicial candidates. The JAC circulated a nomination form which had to be attached to the curriculum vitae of the nominated person. The JAC received 12 nominations but two of the candidates withdrew from the process without giving any reasons. The JAC secretariat subsequently short-listed the remaining ten candidates for the vacant judgeships thereby complying with section 180(1)(d) of the Constitution which requires at least three nominees per vacancy. The short-listed nominees subsequently completed a standard candidate questionnaire as part of the process.<sup>816</sup> It is important to note that while the Constitution opens Supreme Court vacancies to lawyers outside the judiciary, surprisingly only members of the judiciary were nominated. A senior

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<sup>815</sup> These were the Chief Justice, Deputy Chief Justice, Judge President of the High Court, the Chief Magistrate, three legal practitioners, and a public accountant. The remaining four members, namely the Attorney General, a member of the legal academia, a judges' representative and a human resources expert are still to be sworn into office.

<sup>816</sup> The shortlisted candidates were Justice C. E Bhunu, Justice C. Hungwe, Justice S. Kudya, Justice E. Makamure, Justice L. Makoni, Justice N. Mathonsi, Justice S. Mavangira, Justice Moya-Matshanga, Justice T. Uchena and Justice H. Zhou.

lawyer interviewed explained this dearth of interest from the legal fraternity in the following terms;

*'The main problem is that senior lawyers are not interested in the bench because of the poor conditions of service. The economic situation has had an impact on the recruitment of competent lawyers as judges, hence the reliance on appointing members within the judiciary to higher courts. This is seen as a promotion rather than a downgrade. One cannot therefore take an armchair approach because there are several factors which impact on the appointment of judges. Another factor which discouraged lawyers was the 2000- 2003 situation where competent judges were pushed out of the system.'*<sup>817</sup>

The interviews were conducted on the 15<sup>th</sup> of July 2014. Prior to this, the commissioners had been given the candidates' information packs ten days before the interviews. Furthermore, the commissioners met a day before the interviews for a pre-interview session. For the first time in Zimbabwe's legal history, the interviews were open to the public as well as the media.<sup>818</sup> The sequence of the interviews was that the Chief Justice who is the chair of the commission asked questions first followed by the Deputy Chief Justice and the rest of the commissioners. A standard interview template was devised through the assistance of a consultant.<sup>819</sup> The interview template had a set of ten standard question categories which all candidates were tested on by the Chief Justice. Thereafter, other commissioners asked follow-up questions. The standard questions were categorized as follows;

- a) Work background
- b) Leadership
- c) Collaboration
- d) Teamwork and co-operation
- e) Planning and organization

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<sup>817</sup> Interview with a senior lawyer and past President of the Law Society of Zimbabwe, 10 November 2013.

<sup>818</sup> The researcher attended and observed these interviews.

<sup>819</sup> Interview with JAC secretariat, 17 September 2014.

- f) Decisiveness
- g) Independence
- h) Work standards
- i) Motivational fitness
- j) Integrity

Each of these categories had its own follow up questions. With regards to work background, candidates were asked about particular judgments which showed their expertise in a field of law. Other questions in this category related to the motivations to be a Supreme Court judge as well as giving examples of judgments which were upheld on appeal. Questions on the leadership category related to difficult decisions which the candidates had to make and how they arrived at those decisions. The collaboration category contained questions on cases where the candidates sought ideas from persons who are not judges and cases where the candidates had to analyse numerical and financial information. The teamwork and cooperation category related to instances where the candidates compromised their positions under the influence of a fellow judge, and cases where the candidate's legal opinion differed from that of a fellow judge. Furthermore, candidates were asked about their reaction to the lack of ethics from colleagues in the judiciary and how they handled such issues.

In the planning and organizing category, candidates were asked to describe the methods they use to keep court arguments on track as well as missing deadlines and keeping track of urgent matters. The decisiveness category focused on the ability of candidates to make quick or delayed decisions. Candidates were asked to describe the longest period they had to delay a judgment and situations where they departed from the previous decision of the High Court. In the independence category, candidates were tested on three issues, namely describing an outstanding case they dealt with, an unpopular decision made and a decision made without the use of a precedent. The work standards category focused on examples of the candidate's work below and above standard as well as instances where quality was compromised. The motivational fitness category centred on situations which were problematic and stressful to the candidates and these mainly related to the judges conditions of service. The final category on

integrity/propriety obliged candidates to disclose situations in which their integrity was compromised.

Other notable follow-up questions included issues of the conflict between the judges' farming activities and court time as well as motivations for desiring to be on the Supreme Court bench. Candidates were also asked their personal views on whether meritocracy should take precedence over seniority in Supreme Court judicial appointments as well as the criteria they thought was suitable. Furthermore, candidates who had served in the Labour Court only and not in the High Court were asked basic questions such as distinguishing between action and application procedures. Surprisingly, two of the candidates failed to answer this question prompting the Chief Justice to remark as follows;

*'That is very elementary and we cannot have a Supreme Court judge who doesn't know that.'*<sup>820</sup>

From the above scenario, it remains to be seen if this public chastisement of sitting judges will have an impact in the future in terms of discouraging would be applicants who are averse to being publicly embarrassed.

Once the interview stage was completed, the JAC subsequently deliberated on the candidates' interview performances in camera. From the interviews, it emerged that each JAC member completes a score sheet which they justify during the deliberations which culminate in voting. Unfortunately, no information is publicly available as to the voting procedure since it is a confidential process at this stage of the judicial selection process. From the voting stage, the JAC prepared the final list of nine names which was submitted to the President. The candidates were ranked according to their interview performance and the President chooses his preferred candidates from the submitted list. As of August 2015, no appointments from this process had been made and it is not clear what criteria the President would use in making the final

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<sup>820</sup> See also an article in *The Herald*, 'Justice Hungwe grilled in public', 16<sup>th</sup> July 2014, p1.

appointments. From the constitutional text, the President simply appoints one candidate from the three submitted nominees per vacancy.<sup>821</sup>

A number of observations can be made in respect of the 2014 Supreme Court judicial selection process. It is significant that the July 2014 judicial selection process represented a departure from past judicial selection processes insofar as the openness and transparency of the process is concerned. The use of interviews which were open to the public and the media had a positive impact in instilling greater public confidence in the process. The use of public interviews had a mitigatory effect on negative perceptions that the selection of judges is a purely political process.<sup>822</sup> However, the fact that the deliberations of the JAC are held in camera still remains a contentious issue. A significant majority of respondents interviewed queried the confidentiality of the process post the interview stage.<sup>823</sup>

Another contentious issue which has arisen in the post interview debates relates to the JAC's final ranking as well as the Presidential choices.<sup>824</sup> The Constitution obliges the President to select one candidate out of three nominees per vacancy. As noted earlier, the JAC simply sends the final ranking list to the President who in turn can choose anyone from the submitted list of nine names. There were ten candidates who were interviewed in the July 2014 interviews. Of those ten, two had been publicly declared unfit for appointment during the interviews. What this means therefore is that the JAC included one of the two candidates who had performed badly in the interviews in the final list so as to meet the constitutional requirements.<sup>825</sup> A possible complication arises when the President for his own subjective reasons appoints the least performing candidate on the submitted nominees list. As a relatively new process, these are some of the possible scenarios which can arise and which have the potential to seriously

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<sup>821</sup> Section 180(2) of the Zimbabwean Constitution.

<sup>822</sup> Discussions with stakeholders in the legal fraternity.

<sup>823</sup> Transcripts available on file with author.

<sup>824</sup> Discussions the researcher had with the JSC secretariat.

<sup>825</sup> See section 180(1) of the Zimbabwean Constitution.

dent the integrity of the judicial selection process. Clearly, there is need to revisit this constitutional gap so as to avoid rewarding the least deserving candidates. It is necessary that the judicial selection framework limits the possibilities of purely political factors dominating the process so as to avoid losing the constitutional gains made thus far.

### **6.5 Comparative analysis of the case studies**

The preceding sections have so far given the contextual analysis of specific judicial selection processes in all three countries. This section deals with comparative discussions of the key issues emanating from each case study. These discussions are critical in that they bring out the distinctive features of each system of judicial selection at the Supreme Court level. In-order to engage in a meaningful analysis of the issues emerging from the case studies, the discussion will be broken down into three thematic stages. These are a comparative analysis of the pre-interview, the interview and post-interview stages of the judicial selection processes in all three countries.

The pre-interview stages in all three countries involve the public advertisement of the judicial vacancies. It would appear that the public advertisement of vacancies is an element of openness and transparency which is intended to ensure greater stakeholder participation in the process. The overwhelming stakeholder interest is evident particularly for Mozambique, which had to interview a large contingent of nominees.<sup>826</sup> Both South and Zimbabwe follow the public nomination system where another person or body nominates a preferred candidate, whereas Mozambique's system requires interested applicants to make an application themselves. An important aspect of the pre-interview stage is the short-listing of candidates. The short-listing of nominees is critical in that it allows for stakeholder input on the candidates especially in the South African context. While South Africa permits direct stakeholder input on the short-listed nominees, the position is different in both Mozambique and Zimbabwe. These two countries appear to be predicated on 'secret soundings' in respect of the judicial nominees.

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<sup>826</sup> Similarly, the Zimbabwean JAC interviewed 39 nominees shortlisted for the High Court in October 2014.

Furthermore, both Mozambique and South Africa entrust the short-listing exercise in the hands of a committee created for this purpose unlike the Zimbabwean position which vests this function in the JAC secretariat. The South African screening committee is representative of the JAC membership compared to the Mozambican committee which is dominated by judges. The Mozambican position is hardly surprising considering that the judiciary is predicated on a career system. In fact, the judges domination of the selection committee mirrors the dominance of members of the judiciary in the JAC composition itself. Nevertheless, the peculiarity of the Mozambican process relates to the preliminary ranking of candidates based on their curriculum vitae. However, this practice is largely an extension of the past judicial selection process which was essentially curriculum vitae based.

The interview stage in all three countries offers some interesting contrasts. The interview deliberations in South Africa and Zimbabwe are open to the public and the media whereas, those in Mozambique are conducted in camera. Furthermore, the selection committee in Mozambique is guided in the interview process by an interview guideline which focuses on the candidate's educational and professional background. While the selection committee members are at liberty to ask extra-legal questions, the guide is an important JAC tool in ensuring more or less uniformity in the nature of the questions. The Zimbabwean process goes much further than the Mozambican one by utilizing a standard set of questions which all candidates are tested on. The use of standard questions is meant to address inconsistencies that may arise in relation to questioning the judicial nominees.

The South African process on the other hand is not based on pre-determined questions and individual commissioners are at liberty to cross-examine candidates on any matter. It is perhaps this aspect of the South African process which has resulted in the criticism that some of the interviews are riddled with irrelevant considerations to judicial office. With respect to the fairness of the interview process, it can be seen that the South African process appears to be reflecting inequalities in the treatment of judicial candidates compared to the Mozambican and Zimbabwean experiences so far. However, it must be underscored that both Mozambique and Zimbabwe have implemented the Supreme Court judicial selection process only once under the

current constitutional dispensations. This is in contrast to the South African process which is long established and continues to be jurisprudentially tested in the courts.

The post-interview deliberations in all three countries take place in camera. In the Mozambican context, the process involves the averaging of each committee member's score on every aspect. The total weighted average becomes the final score for every candidate which is subsequently gazetted according to the candidates' interview performance. While this approach is intended to remove subjectivity in the process, the possibility of caucusing to adopt common positions still remains. Unlike the Mozambican position, both South Africa and Zimbabwe utilize the vote mechanism in coming up with the final recommendation list. The voting procedure adopted invariably becomes a critical determinant of the fairness the process. The voting process in the South African context has been subjected to judicial scrutiny as previously discussed in Chapter 4 of this study. While the Zimbabwean voting procedure is outside the public domain, important lessons on the voting process itself can be derived from the South African experiences.<sup>827</sup> Furthermore, the South African JAC, just like the Mozambican commission, publicly announces its recommended candidates immediately after deliberations. By way of contrast, the Zimbabwean process is confidential up to the Presidential appointment stage. It is perhaps this secrecy which is undesirable in the Zimbabwean process. It is necessary for the JAC to publicize its recommendations so as to enhance the transparency of the process. It is contradictory to open the process to the public up to the interview stage but fail to disclose the commission's final recommendations.

It is clear that the Mozambican post-interview process goes much further than the South African and Zimbabwean processes in publicly disclosing the candidates' interview performances. It is perhaps paradoxical in terms of openness and transparency that the Mozambican JAC interviews are in camera while the deliberation results are publicized. While it remains debatable as to the propriety of publicly disclosing the post interview deliberation results, a recent South African judgment is instructive on this point.<sup>828</sup> In the case of the Helen

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<sup>827</sup> See discussions on the voting procedures in Chapter 4 of this study.

<sup>828</sup> Judgment dated 5 September 2014.

*Suzman Foundation v. Judicial Service Commission*, Le Grange J in dismissing an application which sought to compel the commission to avail records of its deliberations, held that;

*'While it is accepted that transparency in judicial selection should obviously be welcomed, the continuing entrenchment of some degree of secrecy in all comparable systems demonstrates that the JSC's claim that it should deliberate in private is well-founded. In fact, certain of these international courts and academic writers have recognized the justification for confidential deliberations similar to what has been advanced by the JSC. They have held that confidentiality breeds candor, that it is vital for effective judicial selection, that too much transparency discourages applicants, and will have an effect on the dignity and privacy of the applicants who applied with the expectation of confidentiality'*<sup>829</sup>

An equally important aspect of the post-interview stage relates to the commissions' roles in the final judicial appointments made. The Mozambican and Zimbabwean positions differ remarkably from the South African position. In both Mozambique and Zimbabwe, the commissions produce lists of candidates ranked according to their performance in the interviews. The President of the Republic subsequently chooses his/her preferred candidates from the submitted list irrespective of performance in the interviews. From this aspect, it is apparent that the Mozambican and Zimbabwean executives are given unfettered discretion in making the final judicial appointments. By contrast, the South African JAC has significant input in the appointment of the rest of the Supreme Court judges with the exception of the President and Deputy President of the court.<sup>830</sup> The President of the Republic appoints the rest of the judges on the 'advice' of the JAC.<sup>831</sup> This explains the JAC recommendation of only two

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<sup>829</sup> See paragraph 48 of *The Helen Suzman Foundation v. Judicial Service Commission with Police and Prisons Civil Rights Union, first amicus curiae, National Association of Democratic Lawyers, second amicus curiae and Democratic Governance and Rights Unit, third amicus curiae*, Case No. 8647/2013.

<sup>830</sup> Section 174(3) of the South African Constitution.

<sup>831</sup> *Ibid.* Section 174(6).

candidates for the two vacancies which had arisen in the Supreme Court of Appeal interviews, unlike the Zimbabwean process where the JAC submits three names for every vacancy.

It is clear that the President of the Republic plays a more formal role in Supreme Court judicial appointments in the South African context compared to the situations obtaining in Mozambique and Zimbabwe. In fact, the executives in Mozambique and Zimbabwe are given a lot of leeway in terms of selecting Supreme Court judicial candidates. The Mozambican experience is particularly valuable in demonstrating how confidence in the process can be undermined by extra-meritorious considerations. The same observation equally applies to the South African process which is still grappling with balancing meritocracy and judicial transformation imperatives.

In light of the above discussions, it is necessary at this juncture that the experiences of Mozambique, South Africa and Zimbabwe be juxtaposed with emerging global trends. This objective is achieved in the following section through an analysis of the superior court judicial selection mechanisms for a broad spectrum of countries across the civil and common law divide.

## **6.6 An assessment of developments in all three countries in light of emerging global trends**

Before concluding this chapter, it is perhaps necessary to highlight some of the emerging superior court judicial selection practices globally. Such an endeavor is critical in reconciling the practices in Mozambique, South Africa and Zimbabwe with emerging global trends. This comparative assessment is important in several ways. First, it enables useful lessons to be drawn from the experiences of other jurisdictions. Second, this analysis is useful in determining the extent to which all three countries are converging with or diverging from the emerging global trends in judicial selection. While it is beyond the scope of this study to analyse all countries, the following survey focuses on the positions obtaining in some of the leading judicial selection systems as well as the Anglophone, Francophone and Lusophone Africa perspectives.

A survey of Anglophone African countries such as Botswana,<sup>832</sup> Ghana,<sup>833</sup> Kenya,<sup>834</sup> Namibia,<sup>835</sup> Uganda,<sup>836</sup> and Zambia,<sup>837</sup> reveal some interesting contrasts in respect of their judicial selection procedures. These countries constitutionally entrench judicial appointment commissions. However, the point of departure relates to the role of these commissions in judicial selection as well as the commission procedures. For example, the commissions in Botswana, Ghana, Namibia and Zambia do not advertise judicial vacancies. The superior court judicial appointments are initiated by the executives with the commissions recommending nominees who would have been suggested by the executives. Moreover, these commissions do not conduct public interviews of prospective judges, their deliberations being essentially curriculum vitae based. Kenya on other hand appears to have been influenced by the South African judicial selection process in its recent constitutional revision exercise.<sup>838</sup> The Kenyan JAC advertises judicial vacancies. The shortlisted candidates are publicly interviewed and recommended to the executive for appointment. However, it is critical to note that, the deliberations of the JAC are in camera. Furthermore, the Kenyan Constitution limits executive discretion at the appointment stage by making it obligatory to appoint nominees according to the JAC's recommendations.<sup>839</sup> This aspect of the Kenyan process is clearly different from the positions obtaining in Mozambique, South Africa and Zimbabwe where the executive exercises some discretion on the recommended candidates.

Among the Anglophone countries, there are some countries which make a distinction between the appointment of the Chief Justice and the Deputy Chief Justice from the rest of the superior

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<sup>832</sup> Section 96 of the Botswana Constitution.

<sup>833</sup> Article 153 of the Constitution of Ghana.

<sup>834</sup> Section 166 of the Kenyan Constitution.

<sup>835</sup> Article 82 of the Namibian Constitution.

<sup>836</sup> Section 142 of the Ugandan Constitution.

<sup>837</sup> Article 95 of the Zambian Constitution.

<sup>838</sup> The revised Kenyan Constitution was promulgated in August 2010.

<sup>839</sup> See section 166(1) of the Kenyan Constitution.

court judges. These countries also differ with respect to parliamentary ratification of judicial appointments with countries such as Ghana and Zambia entrenching parliamentary ratification of Supreme Court judges.<sup>840</sup> Of the three subject countries of this study, only Mozambique entrenches parliamentary ratification of the President and Vice President of the Supreme Court.<sup>841</sup>

Similarly, most Francophone and Lusophone African countries constitutionally entrench judicial appointment commissions which generally manage appointments and promotions within the judiciary. As earlier alluded to in Chapter 2, the French Gaullist model has had a significant influence in several civil law based constitutional systems. A survey of the constitutions of countries such as Angola, Cameroon, Guinea Bissau, Niger, and Senegal clearly shows that the executives dominate the selection of superior court judges. In reality, these commissions merely perform perfunctory roles in superior court judicial selection.<sup>842</sup> It is critical to note that these commissions do not advertise judicial vacancies. Furthermore, judicial nominees are not interviewed publicly with all processes deemed to be confidential. The superior court judicial selection processes in these countries are characterized by information asymmetries as there is little or no publicly available information on the JAC activities. It is clear that Mozambique, as a civil law based country, has gone much further than most of the civil law based African countries in promoting the openness and transparency of the Supreme Court judicial selection process.<sup>843</sup> For example, the appointment of Supreme Court judges in Angola is still predicated on the curriculum vitae of nominees, a position which Mozambique has already departed from.<sup>844</sup> In a typical Francophone fashion, the Constitutions of Niger<sup>845</sup> and Senegal relegate the

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<sup>840</sup> See Article 95 of the Zambian Constitution.

<sup>841</sup> Article 53 of Law No. 24/2007.

<sup>842</sup> See for example Article 37(3) of the Cameroonian Constitution.

<sup>843</sup> See the previous discussion on the Mozambican case study.

<sup>844</sup> Article 181 of the Angolan Constitution

<sup>845</sup> Article 136 of the Niger Constitution.

Supreme Court judicial selection procedures to subsidiary legislation.<sup>846</sup> Guinea Bissau on the other hand represents an extreme example of executive domination in the selection of judges. According to Article 92 of its constitution, judges are appointed by the President of the Council of State without any participation by any other body.

As observed in the discussions in Chapter 2, some of the old democracies such as the UK have recently reformed their mechanisms of judicial selection for the superior courts.<sup>847</sup> It is clear that there are some critical points of convergence in the UK reforms and the practices in Mozambique, South Africa and Zimbabwe. For example, the UK process is characterized by advertising judicial vacancies followed by the short-listing and interviewing of prospective candidates. These reforms were aimed at promoting the openness and transparency of the judicial nomination and selection procedures. However, an important point of divergence relates to the confidentiality of the processes. The UK process is predicated on the confidentiality of the commission deliberations with disclosure of information only permissible in exceptional circumstances. Other established democracies such as Australia, Canada and New Zealand are seized with robust policy debates on their mechanisms of judicial appointments in light of these UK reforms.<sup>848</sup> Similarly, it appears that most of the American States that utilize commissions subject the judicial selection deliberations to confidentiality.<sup>849</sup> Confidentiality in judicial appointments in the American context has been justified in the following terms;

*'The commissioners ... must be able to candidly discuss the nominees, and in so doing, be free from the general public's emotional appeals and pressure from interested political actors. At the same time, sufficient openness must exist to demonstrate that the commission is free from the cronyism and commission-captures that threaten its*

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<sup>846</sup> Article 94 of the Senegalese Constitution.

<sup>847</sup> See also discussions in Chapter 2 of this study.

<sup>848</sup> See generally Volcansek, 'Exporting the Missouri Plan: Judicial Appointment Commissions' 2009, *Missouri Law Review*, 74, 785. See also Woodhouse, 'United Kingdom. The Constitutional Reform Act 2005-Defending Judicial Independence the English Way' 2007, *I.CON*, 5, 1, 159.

<sup>849</sup> Of the 33 American States, only 5 do not require confidentiality of the deliberations.

*independence. Such transparency catalyzes public confidence about the fairness of the process. Thus, a carefully constructed balance must be struck between the two diametrically opposed objectives of openness and confidentiality. This can be accomplished by allowing for public hearings followed by confidential interviews of the prospective nominees and commission deliberations.*<sup>850</sup>

Other countries such as India entrench a self-selecting judiciary with the collegium of Supreme Court judges key in the selection of superior court judges.<sup>851</sup> In fact, the Indian executive plays a formal role in superior court judicial appointments. It is perhaps useful to draw comparisons with Israel's JAC which is one of the oldest in the world.<sup>852</sup> A committee appointed in 2000 re-examined Israel's judicial selection procedures and made some critical recommendations.<sup>853</sup> These recommendations included publishing widely the judicial nominees list 21 days before the JAC deliberations, and setting up a sub-committee constituted by three JAC members which would interview the candidates.<sup>854</sup> It is critical to note that the committee recommended that the JAC's deliberations should not be open to the public effectively entrenching the confidentiality of the JAC deliberations. Judging from the preceding case studies, it is clear that Mozambique, South Africa and Zimbabwe's superior court judicial selection processes are more or less in sync with emerging global trends insofar as the openness and transparency of the processes are concerned. In fact, all three countries go beyond some of the old democracies in opening judicial appointments to public scrutiny.

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<sup>850</sup> Colquitt, 'Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support' 2007, *Fordham Urban Law Journal*, 34, 73, 110.

<sup>851</sup> See Volcansek, 2009, *Missouri Law Review*, 74, 785.

<sup>852</sup> The Israeli JAC has been operational since 1953.

<sup>853</sup> See Salzberger available at

[http://www.researchgate.net/publication/228244778\\_Judicial\\_Appointments\\_and\\_Promotions\\_in\\_Israel\\_-\\_Constitution\\_Law\\_and\\_Politics/links/02e7e524297995f3ed000000](http://www.researchgate.net/publication/228244778_Judicial_Appointments_and_Promotions_in_Israel_-_Constitution_Law_and_Politics/links/02e7e524297995f3ed000000) accessed on 20/10/14 at 22.

<sup>854</sup> *Ibid.*

The above survey of a broad spectrum of countries across the civil and common law divide, whilst not exhaustive, reveals critical points of convergence and divergence across countries. While judicial selection systems are diverse, the critical consideration relates to the extent each country puts in place mechanisms which promote the openness, transparency and independence of the judicial selection process. In a comparative study of this nature, the analysis necessarily relates to which country has more or less of a particular feature of judicial selection in the context of emerging global trends.

### **6.7 Conclusion**

This chapter set out to explore the processes of judicial selection in all three countries. This comparative exploration was aimed at reconciling the theory and practice relating to judicial selection focusing on a specific superior court. The comparative case study analysis was aimed at unearthing the subtle aspects of each country's judicial selection process. As such, the preceding comparative case study discussions have demonstrated useful points of convergence and divergence in Supreme Court judicial appointments in all three countries. Despite the differences in the common and civil law traditions attaching to these countries, it appears that similar concerns resonate across all three countries. These concerns relate to the extent to which the respective judicial selection procedures promote fairness and meritocracy in judicial appointments. Intertwined with this is the extent to which the superior court judicial selection processes are insulated from purely political influences. All three systems of judicial selection vest the functions of managing Supreme Court judicial appointments in JACs. However, the roles played by the JACs differ depending on the level of influence each commission has on the final judicial appointments.

Particularly significant is the appropriate role of executives in the judicial selection process. It is clear that the Mozambican and Zimbabwean processes give the executives a lot of leeway in choosing candidates. It is undesirable that these executives make appointments from a large pool of candidates without the need to justify their choices. The South African process on the other hand, better curbs unfettered executive discretion by restricting the executive to the submitted JAC nominee list which usually corresponds with the available vacancies.

Furthermore, the time frame within which the executive has to make the final appointments needs to be circumscribed. The fact that executives, especially in Zimbabwe can take forever in making final appointments undermines public confidence in the judicial selection process. An equally critical point for Mozambique relates to constituting the selection panel in such a way as to instill public confidence in the selection process. The need for a less controversial process is apparent judging from the 2011 Supreme Court selection process which respondents generally viewed as being dominated by political patronage. These perceptions were buttressed by the close associations between some of the selection panelists and the judicial candidates.

It can be seen that all three countries have in varying degrees made attempts at opening the judicial selection process to public scrutiny. It appears that the judicial selection procedures utilized in all three countries are more or less consistent with emerging global trends. While there are no blueprints on judicial selection, emerging global trends are an important indicator of best practices which enhance the prospects for an impartial and independent judicial selection process. The important point to note is that all three countries appear to be going much further than other countries in promoting the openness and transparency of the judicial nomination and selection process.

A critical issue in all three countries as well as in other comparable jurisdictions is striking the appropriate balance between openness and confidentiality in respect of the JAC deliberations in the judicial selection process. All three countries have adopted different approaches which basically reveal different philosophies underpinning their judicial selection mechanisms. As noted earlier, Mozambique goes much further than South Africa and Zimbabwe in publicizing the interview results. The bane of such an approach is that instead of attracting the best available candidates, the system can actually discourage potential candidates who are risk averse to being publicly ridiculed. A possible solution therefore might be to allow public access to the interview transcripts without necessarily publicizing the candidate interview scores in newspaper pages.

Having explored the emerging issues relating to the theoretical and practical implementation of judicial selection in all three countries, the next chapter concludes the previous discussions by

offering some suggestions from the lessons learnt. It will not pretend to suggest a new model for judicial selection, but it will offer some practical recommendations from a comparative perspective.

## CHAPTER VII

### SUMMARY, RECOMMENDATIONS AND CONCLUSIONS

The previous chapters introduced the global judicial independence discourse, and further explored comparatively, the superior court judicial selection processes in Mozambique, South Africa and Zimbabwe. It is clear that no system of judicial selection can be meaningfully assessed in the absence of available alternatives. In this respect, this comparative study enabled the judicial selection processes in all three countries to be usefully examined, with a view to further enhancing the prospects for independent and effective judiciaries. Significantly, all three countries provided a good comparative fulcrum by virtue of two critical factors. First, all three countries share more or less similar contextual backgrounds. Second, the comparison of judicial selection processes in legal systems predicated on the common law and civil law traditions respectively necessarily enriched the study.

Before concluding this thesis, it is critical to highlight the key methodological aspects of the study. The first aspect was the integration of country specific questionnaire responses from stakeholders in the justice delivery system into the analysis. In order to achieve this objective, a standard questionnaire on judicial selection was administered in all three countries. The questionnaire was complemented by interviews with key participants in the judicial selection process. The second aspect relates to the case study analysis of Supreme Court judicial selection processes in all three countries. The choice of the Supreme Court as a comparator across all three countries was an important aspect of the functional comparison adopted principally in the study.

In light of the foregoing discussions, this chapter concludes the thesis as follows. It begins by summarizing the main issues addressed in all preceding chapters. The summary of critical issues arising is followed by a discussion of country specific recommendations which leads to the thesis' final concluding remarks.

## 7.1 Summary

There is little, if any debate at all, on the importance of an independent judiciary in a constitutional democracy. Modern day constitutional democracies are, of necessity, predicated on an independent judiciary which safeguards the rule of law and the fundamental rights of citizens. Due to the broadness of judicial independence as a concept, this study focused on one key element of it, that is, judicial selection mechanisms in Mozambique, South Africa and Zimbabwe. Judicial selection mechanisms play a key role in determining the calibre of judges appointed to the superior courts. Despite this key role, a complex matter is formulating what can be termed the 'ideal' judicial selection process. The study acknowledges the difficulty in coming up with a model judicial selection process partly due to the indeterminate nature of the judicial independence concept itself. In fact, countries utilize a wide variety of judicial selection systems which basically reveal different conceptions of judicial independence.<sup>855</sup> Further, the perennial struggle in balancing judicial independence and accountability underpins the global judicial selection discourse.<sup>856</sup> Consequently, the diverse approaches to these issues are a clear indication of the aspects of the judicial selection process valued most across jurisdictions.

Emerging democracies in Africa are grappling with the aftermath of the so called 'third wave' of democratization.<sup>857</sup> Post colonial governments in countries such as Mozambique, South Africa and Zimbabwe have to ensure democratic consolidation by establishing institutions that promote the rule of law and the protection of fundamental rights of citizens. One such institution is the judiciary. It necessarily follows that the mechanisms of appointing superior court judges are critical insofar as the democratic consolidation imperatives are concerned. The mechanisms of judicial selection are important as they impact on the independence of judges from unnecessary external pressures in fulfilling their adjudicative functions. A bench which is

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<sup>855</sup> See Ginsburg; Garoupa, 'The comparative law and economics of judicial councils' 2008, *Berkeley Journal of International Law*, 27,1, 53. See also discussions on judicial appointments in Chapter 2 of this study.

<sup>856</sup> See Russell, 'Conclusion' in Malleson; Russell, "Appointing Judges In An Age Of Judicial Power: Critical Perspectives From Around The World" 2006, Toronto; Buffalo : University of Toronto Press, 426.

<sup>857</sup> See generally Huntington, "The third wave: Democratization in the late twentieth century" 1991, Norma, OK, University of Oklahoma Press.

free to deliver justice impartially is invariably better placed to safeguard the effectiveness of the judiciary in upholding democratic tenets. Furthermore, in an age characterized by the increasing judicialization of politics, the necessity for an independent and high quality judiciary is apparent.<sup>858</sup>

In the absence of judicial selection blueprints, the comparative study reviewed the existing judicial selection systems in all three countries. The review was aimed at suggesting practical ways in which all three systems could further enhance the prospects for the twin objectives of politically independent and effective judiciaries. From a comparative perspective, reviewing norms and processes operating in different contexts is no easy task. In the judicial selection context, the difficulty is compounded by the fact that judicial selection mechanisms necessarily encompass a broad spectrum of aspects which cannot be meaningfully assessed in isolation. Consequently, a determination of how all three countries could further enhance the prospects for independent and effective judiciaries through the judicial selection mechanisms involved enquiring into the following critical questions: What historical and contextual factors influenced the judicial selection systems in all three countries? To what extent are the theoretical aspects of judicial selection consistent with the actual state practices? What are the real and potential threats posed by the current judicial selection processes to the independence and effectiveness of the judiciary? To what extent have JACs been effective in promoting openness and transparency in judicial selection? To what extent are the judicial selection practices in all three countries consistent with emerging global trends?

Before addressing these questions, the study first explored the theoretical debates underpinning judicial independence generally. As Chapter 2 demonstrates, the judicial independence concept is deeply embedded in the separation of powers and rule of law paradigms. While its theoretical justifications have differed, the critical nature of an

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<sup>858</sup> See generally Hirschl, 'The judicialization of Politics' in Whittington et al (e.d), "*The Oxford Handbook of Law and Politics*" 2008, Oxford, 119.

independent judiciary still remains largely uncontested in modern day scholarship.<sup>859</sup> In fact, no single theory provides an exhaustive explanation for the existence of an independent judiciary. Recognizing its importance, the complex issue is determining how judicial independence can be measured in a polity.<sup>860</sup> It is hardly surprising that various toolkits have been developed which all aim to provide some measure of a country's compliance with judicial independence principles. The difficulty of measuring judicial independence is exacerbated by the fact that the concept is constituted by several elements. These include the institutional independence of the judiciary, security of tenure, financial independence and judicial accountability. It is perhaps the interplay of these key elements which determines a country's compliance with internationally recognized judicial independence principles. For example, a weak judicial selection system could be complemented by strong tenure rules thereby remedying any shortcomings relating to the independence and impartiality of the judges. As one scholar observed, judicial independence is less at risk at the front end - the appointment process, if the back end- the removal process, has strong tenure rules.<sup>861</sup>

Any meaningful study of norms and institutions within a legal system necessarily begins with a clear appreciation of the historical and contextual factors that have impacted on the legal system's evolution. It has been established in Chapter 3 that present day legal systems in Mozambique, South Africa and Zimbabwe in one way or another owe their manifestations to the colonial legacy. Particularly significant is the attempt to break away from the colonial legal system in Mozambique with disastrous consequences.<sup>862</sup> In fact, legal systems do not operate in a vacuum. Their evolution is influenced by each country's politico-economic context.

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<sup>859</sup> See generally Russell, 'Toward a General Theory of Judicial Independence' in Russell; O'Brien, "Judicial Independence In The Age Of Democracy: Critical Perspectives from around the World" 2001, Charlottesville: University Press of Virginia.

<sup>860</sup> See generally Stephenson, 'Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs' available at [www.siteresources.worldbank.org/INTLAWJUSTINST/Resources/Judicial\\_Independence.pdf](http://www.siteresources.worldbank.org/INTLAWJUSTINST/Resources/Judicial_Independence.pdf) accessed on 20/11/12.

<sup>861</sup> Russell, 2001 Charlottesville: University Press of Virginia, 16.

<sup>862</sup> See Trindade; Pedroso, 'The Judicial System: Structure, Legal Education and Legal Training' in Santos; Trindade; Meneses, "Law and Justice in a Multicultural Society. The Case of Mozambique" 2006, CODESRIA, 114.

Consequently, the political culture in each country impacts on the attitude of the governments of the day towards key institutions such as the judiciary, including on how they are constituted.

It is submitted that a politically competitive environment has better prospects of ensuring the entrenchment of a strong judiciary which is not dependent on the politics of the day. Chapter 3 has shown that all three countries are characterized by dominant political parties with South Africa manifesting some reasonable degree of political party plurality compared to Mozambique and Zimbabwe. It has also been established that long lasting executives appear to pose a serious threat to the independence of the judicial selection process. For example, Zimbabwe's dominant political party once purged the judiciary substituting it with perceived compliant judges. Further, the judiciary was stripped of its jurisdiction in politically sensitive land cases.<sup>863</sup> Worryingly, the South African dominant political party is increasingly showing signs of discomfort with its otherwise strong judiciary.<sup>864</sup> Mozambique and South Africa clearly need to avoid the undesirable past Zimbabwean experiences by not utilizing legislative majorities to undermine the judiciary.

The study proposes that the boundary of political influence in the judicial selection process needs to be carefully defined in each polity. In reality, politicians pose the most serious threat to the independence and effectiveness of the judiciary. It is expecting too much of politicians to leave critical judicial selection processes entirely in their hands. Finding an optimal boundary of political influence is not easy in different political contexts. Admittedly, it is impossible to completely remove politicians from the judicial selection process for legitimacy purposes.<sup>865</sup> Nevertheless, a worthwhile aspiration is limiting the possibilities of pure political considerations infiltrating the judicial selection process.

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<sup>863</sup> See the case of *Commercial Farmers Union & Others v. The Minister of Lands & Rural Resettlement SC 31/10*. See also Matyszak, 'Creating a Compliant Judiciary in Zimbabwe' in Malleson, "Appointing judges in an age of judicial power: Critical perspectives from around the world" 2006, University of Toronto Press, 334.

<sup>864</sup> See generally Legal brief, 'Zuma contemptuous of judiciary-DA' Issue 3667, 13/01/15. See also discussions on South Africa's political context in Chapter 3 of the study.

<sup>865</sup> See Russell, 2001 Charlottesville: University Press of Virginia, 420.

It is apparent that the constitutional entrenchment of judicial selection processes goes a long way in ensuring that such processes are not easily tempered with by simple legislative majorities. Possibly, inspired by the South African constitutional text, Zimbabwe's Constitution entrenches in detail the judicial selection process, a clear sign of constitutional borrowing across legal systems. What is noteworthy is the attempt not just at borrowing, but at remodeling the legal transplant to suit Zimbabwe's own peculiar judicial selection context. By way of contrast, Mozambique relies more on subsidiary legislation in its judicial selection processes. Further, the use of processes that are not expressly provided for in the law in the Mozambican context further fuels negative public perceptions that political gerrymandering plays a pivotal role in superior court judicial selection.<sup>866</sup>

Axiomatically, the use of JAC's is increasingly becoming the most popular method of selecting superior court judges across the common and civil law divide. The popularity of the JAC model is gaining momentum in some of the old democracies as well.<sup>867</sup> This study acknowledges the rationale for the preference of the commission model over others in studies on judicial selection systems generally.<sup>868</sup> Chapter 4 has shown that the apolitical nature of the JACs could perhaps be one of the main justifications for their popularity globally.<sup>869</sup> Critically, JACs are generally regarded as a medium for enhancing openness and transparency in the judicial selection process. Furthermore, JACs provide an opportunity for stakeholder participation in the processes leading to the appointment of superior court judges. In relation to this study, the popularity of the commission model was useful in providing a benchmark from which the consistency of all three countries with the emerging global trends could be meaningfully examined.

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<sup>866</sup> See discussions on the Mozambican constitutional and legislative framework in Chapter 4 of the study.

<sup>867</sup> See generally Volcansek, 'Exporting the Missouri Plan: Judicial Appointment Commissions' 2009, *Missouri Law Review*, 74, 785; Akkas, 2004 *Bond Law Review*, 16, 2, 200.

<sup>868</sup> See generally Malleson; Russell, "Appointing Judges In An Age Of Judicial Power: Critical Perspectives From Around The World" 2006, Toronto; Buffalo: University of Toronto Press.

<sup>869</sup> *Ibid.*

The Mozambican, South African and Zimbabwean JACs were examined in Chapter 4 on the basis of three key aspects characteristic of these commissions. These are the status of the commissions, their composition and selection of members, and the procedures utilized in judicial selection. The constitutions of all three countries in varying degrees entrench the JACs and their competences. The constitutional entrenchment of the JACs and their status goes a long way in insulating them from unwarranted external influences. On this basis, it is clear that it is much more difficult to tamper with a constitutionally entrenched body than one which is not. Considering the volatile political contexts evident in each country's historical epoch, the need for constitutionally entrenched bodies such as JACs is even more compelling. With the status of the JACs in all three countries more or less consistent with emerging global practices and generally accepted principles, the examination of the other two JAC aspects offered important insights and perspectives.

The composition of the JACs in all three countries varied. Two issues were key in the examination of the JAC compositions. The first issue related to who appointed the JAC members. The second issue related to the representativity of the JAC membership with regards to stakeholders in the justice delivery system, including lay persons. The inclusion of these stakeholders is critical as they are better placed to judge the competences of their professional colleagues. Further, the determination of these issues was important in assessing the possibility of JAC members being influenced by external factors in discharging their constitutional mandate. It was observed that the South African and Zimbabwean commissions are generally representative of key stakeholders in the justice delivery system compared to Mozambique. However, Mozambique incorporates these stakeholders via the 'back door' by the utilizing a selection committee nominated by the JAC members.

It is submitted that keeping direct and indirect executive input in the JAC composition to a minimum goes a long way in insulating the JAC functions from executive overreach. It also limits the possibility of caucusing over particular judicial candidates since the JAC membership would be representative of different constituencies in the justice delivery system as well as lay persons. In contrast to South Africa and Mozambique, an equally significant point relates to the

absence of politicians on the Zimbabwean JAC. As a corollary to this, the Zimbabwean executive directly and indirectly appoints 23 percent of the JAC membership compared to the South African JAC with a higher percentage of members appointed directly and indirectly by the executive.

The procedures utilized by the JAC are critical insofar as they promote the openness and transparency of the judicial selection process. This openness and transparency in respect of judicial selection is key to instilling public confidence in the judicial selection process. A number of observations were made in respect of the JAC processes in all three countries. To this end, a discussion of these issues will concomitantly suggest possible solutions to the identified structural weaknesses. Unlike the South African and Zimbabwe JAC procedures which are open to public scrutiny, the Mozambican JAC is essentially secretive in all its deliberations. Paradoxically, the Mozambican JAC publishes the candidates interview scores. While acknowledging that this degree of transparency goes much further than most jurisdictions, the propriety of such publication is debatable and is clearly inconsistent with emerging global trends on this aspect.

Further, Chapter 5 has shown that the criteria for judicial selection is an important element of the judicial selection process. Generally, all systems of judicial selection despite their different configurations are in perpetual search of the 'ideal' judge. While the study acknowledges previous scholarly attempts at formulating the qualities of an 'ideal' judge, prescribing the desired attributes of an 'ideal' judge remains a daunting task.<sup>870</sup> Despite this difficulty, the imperative for clear judicial selection criteria which is indicative of meritocracy in judicial selection remains. Consequently, the search for the 'ideal' judge brings into perspective the criteria for judicial selection. These issues confront Mozambique, South Africa and Zimbabwe. A noticeable common trend is that controversy is never far away in superior court judicial selection as the Mozambican and South African case studies have shown. The challenge is appointing the best available candidates with little or no controversy at all. Notwithstanding

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<sup>870</sup> See generally Cowen, 'Judicial Selection in South Africa', available at [www.dgru.uct.ac.za/print/.../researchreports/](http://www.dgru.uct.ac.za/print/.../researchreports/) accessed on 10/10/13.

this, it must be underscored that the judicial conditions of service to a great extent impact on the calibre of judges appointed. In order to attract and retain senior jurists, it is critical for the judiciary to have financial autonomy.<sup>871</sup>

It is critical that the constitutional and legislative framework entrench specific superior court judicial selection criteria. The entrenchment of minimum qualification requirements is critical as it demarcates the experience and skill attaching to a particular court. While these constitutional prescriptions are important, they still do not inform the public about the qualities expected of a superior court judge. From a stakeholder perspective, the necessity for legislative clarity in respect of the criteria for judicial selection is evident.<sup>872</sup> Admittedly, both Mozambique and Zimbabwe address these issues during the interview process but it is important for the public and potential candidates to know in advance these specific attributes.

In the South African context, the desirability of the same constitutional criteria applicable to all superior court judges is questionable. Whilst it can be argued that any gaps in the constitutional text in terms of the level of experience required are remedied in practice during the short-listing and interview stages of the judicial selection process, it is necessary that the South African process not leave matters to conjecture. The specialized courts are a different proposition altogether as the subsidiary legislation establishing them detail the skill and experience necessary for judicial selection.<sup>873</sup> The same approach can be extended to the ordinary superior courts. The importance of legislative clarity cannot be overemphasized. Judges preside over cases which affect citizens generally, and it is necessary that the public fully appreciate the processes and criteria leading to such selection.

An important aspect of the judicial selection criteria in practice relates to acting judicial appointments. It is desirable that acting judgeships be framed in a way which avoids the executive indirectly constituting the bench. Unlike Mozambique, both South Africa and

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<sup>871</sup> See discussions on the judiciary's financial independence in Chapter 2 of the study.

<sup>872</sup> See discussions on the constitutional and legislative framework in Chapter 4 of the study.

<sup>873</sup> See country discussions in Chapter 5 of the study.

Zimbabwe constitutionally entrench the procedures for appointing acting judges. While the practical necessity for acting judicial selection is beyond doubt, the South African process gives unfettered powers to the Minister of Justice.<sup>874</sup> The JAC in practice has a bias in favour of persons who have previously acted on a particular court. This effectively means that the Minister of Justice indirectly determines a candidate's prospects for judicial selection. The danger posed by such a system is that it can exert undue pressure on acting judges to be more executive minded especially where one considers future prospects. There is a clear need to limit executive influence over acting judicial selection if the possibility of political patronage is to be minimized.

The Zimbabwean process for acting judgeships requires the President to appoint acting judges on the advice of the JAC.<sup>875</sup> However, the bane of the Zimbabwean process is that potential candidates are limited to former judges only as per the constitutional requirement.<sup>876</sup> It is submitted that the post 2013 Zimbabwean Constitution process for acting judgeships represents a missed opportunity to broaden stakeholder participation. By virtue of the seriousness of the superior court judicial career, it is necessary that candidates from diverse professional backgrounds are given the opportunity to 'test' the waters. It is further submitted that this approach is better than appointing judges on probation as recently suggested by the Zimbabwean Chief Justice.<sup>877</sup> It is clear that the Zimbabwean reform process concerned itself more with removing political considerations in acting judicial selection at the expense of stakeholder participation.<sup>878</sup> Needless to say, stakeholders such as the legal profession, legal academia and civil society practitioners generally constitute the pool from which most of the judicial candidates emanate.

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<sup>874</sup> However, there are limitations with respect to the Constitutional Court only. See also discussions on acting judicial appointments in Chapter 5 of the study.

<sup>875</sup> See Section 181 of the Zimbabwean Constitution.

<sup>876</sup> Ibid.

<sup>877</sup> See discussions on the Zimbabwean position in Chapter 5 of the study.

<sup>878</sup> See generally Manyatera; Fombad, 'An assessment of the Judicial Service Commission in Zimbabwe's new Constitution' 2014, CILSA Vol XLVII, No 1, 89.

Debates on judicial transformation in South Africa have also been at the centre of the controversy bedeviling the criteria for superior court judicial selection. In contrast to Mozambique and Zimbabwe, actualizing judicial transformation has been a hotbed of controversy in the South African context. However, these difficulties are a direct consequence of the lack of constitutional clarity. The constitutional text is vague with respect to whether transformative considerations take priority over meritocracy in judicial selection. Considering the recent high profile controversies occasioned by transformative considerations, it is important that those responsible for appointing judges address the constitutional gap on this aspect.<sup>879</sup> As a country still grappling with its apartheid past, it is critical that the judicial selection process be far removed from race politics. It is beyond doubt that judicial transformation is a necessity in post-apartheid South Africa but these considerations should not be used to overlook deserving candidates.

The fairness of the interview process is a critical aspect of the judicial selection procedure. It is important that judicial candidates be treated equally so as to enhance public confidence in the impartiality of the judicial selection process. It is apparent from Chapter 6's discussions that key issues of concern permeate the South African judicial selection process. A structural weakness identified relates to the unequal treatment of candidates during the interview process as shown by the South African case study. This inequality relates to inconsistencies in the questioning of the candidates. Some candidates are tested rigorously on their jurisprudential philosophies while others are tested on peripheral issues which have nothing to do with their competences as judges.<sup>880</sup> There is an urgent need for the South African JAC to address these inconsistencies which are leading to increasing perceptions that political overtones are finding their way into the judicial selection process.

Equally significant in the JAC processes is the candidate evaluation procedures utilized. It is important that the JACs practice internal democracy by adopting evaluation procedures which

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<sup>879</sup> See the analyses of the South African position in chapter four of the study. See also Davis, 'Judicial Appointments in South Africa' 2010 (December) *Advocate*, 41.

<sup>880</sup> See the analysis on the South African case study in Chapter 6 of the study.

do not unnecessarily disadvantage potential candidates. For instance, South Africa and Zimbabwe utilize the voting mechanism. In contrast, Mozambique averages scores for each candidate. In this respect, it appears that the Mozambican process promotes objectivity by averaging the individual scores. Through these mechanisms, the impact of subjective considerations and prejudices is to a great extent minimized.

A contemporary key issue in superior court judicial selection is whether or not the post interview JAC deliberations should be conducted in camera. All three countries converge in respect of the post interview JAC deliberations which are held in camera. It is submitted that these practices are generally consistent with emerging global trends.<sup>881</sup> An analysis of the leading judicial selection systems points to the confidential necessity of this part of the judicial selection process.<sup>882</sup> It is hardly surprising that a recent court challenge aimed at opening this process to public scrutiny in the South African process was dismissed on the basis of global practices in comparable jurisdictions.<sup>883</sup> The study is supportive of this approach since it enables the JAC members to deliberate freely without the unnecessary pressure occasioned by the presence of members of the public and the media. As an important process which determines the calibre of judges appointed, it is critical that the JAC members feel free to express their views on candidates candidly without the fear of a backlash. Consequently, the dangers posed to the integrity of the judicial selection process by opening the post interview JAC deliberations to the public are greater than keeping the process confidential.

A critical aspect of the openness and transparency of the JAC procedures relates to the JAC recommendations. The difficulty of imposing a burden on the JAC to justify its choices is evident. A balance needs to be struck between the public interest to know the reasons for the JAC choices and not imposing an unreasonable burden on the JAC. There is no obligation on the

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<sup>881</sup> See the analyses of emerging global trends in Chapter 6 of the study.

<sup>882</sup> See discussions on the leading judicial selection systems in Chapters 2 and 6 of the study.

<sup>883</sup> See *The Helen Suzman Foundation v. Judicial Service Commission with Police and Prisons Civil Rights Union, first amicus curiae, National Association of Democratic Lawyers, second amicus curiae and Democratic Governance and Rights Unit, third amicus curiae*, Case No. 8647/2013.

JACs in all three countries to give reasons for recommending or not recommending candidates. However, the South African JAC has previously furnished reasons for not recommending certain candidates especially in controversial cases. It is submitted that the JACs would not be compromised if they gave general grounds on which the selection were based for the purposes of openness and transparency. The need for this approach is more apparent in the Zimbabwean context where the post interview processes are confidential.

By way of contrast, the South African JAC publicizes its recommendations immediately after the interviews. This approach to transparency is progressive. It is paradoxical for the Zimbabwean process to open the interviews to the public but thereafter to subject the remaining processes to confidentiality. While Mozambique publishes the interview scores, it is perhaps more desirable if the JAC would publish the criteria on which the candidate grading was based. Simply publishing interview scores without any guidance as to what factors determined the grading can only fuel negative perceptions about the judicial selection process. Despite these concerns, it is submitted that all three countries, albeit in varying degrees, fare much better in terms of the openness and transparency of JAC processes when juxtaposed with comparable jurisdictions in their respective legal traditions.<sup>884</sup>

Extrapolating from the point above, the Mozambican and Zimbabwean judicial selection procedures provide a lot of leeway to the executive to choose any candidate on the submitted JAC recommendation list irrespective of performance in the interviews. It is submitted that this kind of approach is permissive to other extra meritorious considerations infiltrating the process. The South African process on the other hand limits such possibilities by equating the recommended candidates to the number of available vacancies. It is suggested that both Mozambique and Zimbabwe should consider adopting the South African approach which clearly limits executive discretion. The Mozambican case study demonstrated the dangers posed to the integrity of the process if subjective considerations overshadow meritocracy in judicial selection. Unnecessary controversy needs to be avoided if the public is to have confidence in the manner judges are selected. In order to limit the possibility of such occurrences in the

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<sup>884</sup> See the assessment of emerging global trends discussion in Chapter 6 of the study.

Mozambican context, it is imperative for the JAC itself to determine representativity issues before submitting its final nominee list to the executive for final selection. With this approach, the unfettered discretion of the executive is curtailed with the JAC playing a critical role in a similar manner as the South African JAC.

The time frame within which the executive exercises its discretion over the submitted JAC nominee list is critical in the judicial selection process. A 'blank cheque' in terms of time frame is prone to abuse and subjective executive considerations which the public know nothing about. A significant concern emanating from the case study analyses relates to the prolonged timeframes within which the executives, especially in Zimbabwe, choose the recommended candidates. The July 2014 Zimbabwean Supreme Court interview process had not yet materialized by the end of August 2015. It undermines public confidence in the process if executives can for unknown reasons delay such critical appointments. There is no justification for such delays considering that the Constitution gives the executive options in case of dissatisfaction with the submitted nominee list. Stakeholders in the justice delivery system and the public alike had pinned their hopes on a new dawn insofar as judicial appointments are concerned, but the Zimbabwean experience is turning out to be a 'damp squib'.

Given the above summary, it is necessary at this point to address specific recommendations pertaining to the identified critical aspects of the superior court judicial selection processes in all three countries.

## **7.2 Recommendations**

The preceding summary canvassed the critical issues pertaining to superior court judicial selection in Mozambique, South Africa and Zimbabwe. Given this contextual background, it is important at this juncture to proffer recommendations which address the identified gaps/weaknesses in the judicial selection processes in all three countries. These recommendations are important as they give guidance to policy makers and those responsible for appointing judges on how they can further enhance the prospects for independent and effective judiciaries in each polity. For the purposes of clarity, the following recommendations are discussed on a country by country basis. It is submitted that the adoption of these

recommendations by all three countries will further strengthen their superior court judicial selection processes.

Beginning with Mozambique, it is recommended that Mozambique constitutionally entrench the judicial selection process in detail. This can be done either through a constitution revision exercise and/or a specific constitutional amendment. As a critical process in constituting the superior judiciary, it is necessary that it be constitutionally entrenched thereby insulating it from partisan politics. Relying on subsidiary legislation exposes the law on superior court judicial selection to simple legislative majorities.<sup>885</sup> Second, there is need for the Mozambican JAC to further de-construct the constitutional criteria by publishing regulations which address the criteria for each superior court.<sup>886</sup> The necessity for legislative clarity is apparent as it enables potential candidates to know in advance the important evaluation aspects in superior court judicial selection. Third, there is need to amend the JAC membership as constitutionally entrenched. The Mozambican judicial selection process needs to incorporate stakeholders in the justice delivery system as well as laypersons in its JAC composition. It is recommended that instead of a JAC composed of judges and politicians only, the Mozambican JAC will benefit more in its deliberations if the JAC itself is representative of stakeholders. In this respect, the Mozambican process can borrow from the South African and Zimbabwean JACs whose compositions are more or less consistent with emerging global trends.<sup>887</sup>

Fourth, it is critical that the Mozambican JAC not subject potential candidates to public ridicule by publishing candidate interview scores.<sup>888</sup> It is recommended that Mozambican policy makers revisit this aspect and instead open the nomination and interview process to the public. The dangers posed by a secretive process which only publishes interview results are apparent. Such a process can result in more experienced jurists not availing themselves for selection

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<sup>885</sup> See discussions on the legislative framework in Chapter 4 of the study.

<sup>886</sup> See discussions on the criteria for judicial selection in Chapter 5.

<sup>887</sup> See discussions on the JAC compositions in Chapter 4.

<sup>888</sup> See discussions on the Mozambican case study in Chapter 6.

considering the possible public ridicule associated with the process. As shown by the Mozambican case study in Chapter 6, several of the candidates had extremely low scores and the possibility of deterring potential candidates in the future cannot be discounted. Fifth, it is recommended that the Mozambican JAC publish the general grounds for its recommendations and not just the candidate interview scores.<sup>889</sup> Publishing these grounds provides the public with some appreciation of the criteria which determined the final JAC recommendations. Sixth, the Mozambican constitutional framework needs to be amended so that it limits executive discretion over the submitted JAC nominee list. Unchecked executive discretion is prone to abuse and can undermine public confidence in the manner superior court judges are selected. In a similar manner to the South African process, it is recommended that the JAC nominee list be equated to the available vacancies.

Moving on to South Africa, the first point which needs to be addressed relates to the JAC composition. It is critical that the percentage of JAC members appointed directly and indirectly by the executive be substantially reduced.<sup>890</sup> It is recommended that keeping direct and indirect executive influences in the JAC composition to less than a quarter of the total membership is desirable. Such an approach minimizes the possibility of pure political considerations dominating the judicial selection process. Further, the study recommends that South Africa consider incorporating lay persons in its JAC composition. An all-embracing composition augurs well for the JAC deliberations since it brings in members with diverse perspectives thereby enriching the judicial selection process. Second, it is important that South Africa constitutionally entrench specific judicial selection criteria for its ordinary superior courts.<sup>891</sup> The need for specific criteria depending on the hierarchy of the superior court is apparent. A one size fits all regime in respect of the criteria for superior court judicial selection can only result in some of the unnecessary controversy which has in the past bedeviled the South African process.

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<sup>889</sup> See discussions on the Mozambican case study in Chapter 6.

<sup>890</sup> *Ibid.*

<sup>891</sup> See discussions on the superior court judicial selection criteria in Chapter 5.

Third, the South African constitutional framework entrusts too much power in the executive over acting judicial appointments clearly pointing to the necessity for a constitutional amendment.<sup>892</sup> South Africa can borrow from the Zimbabwean process for acting judgeships in which the JAC also plays a critical role.<sup>893</sup> A recommended approach would be to require the Minister of Justice to act on the advice of both the head of the court where a vacancy arose and the JAC before making the appointments. However, the process does not have to be cumbersome like the formal JAC processes. It simply requires the Minister to get advice on his/her submitted list of nominees. This recommendation is practicable in a jurisdiction like South Africa, with a vibrant and well-resourced civil society which can give valuable input into the process through the JAC.

Fourth, inconsistencies with respect to candidate questioning and the duration of interviews is apparent in the South African process.<sup>894</sup> In-order to address these inequalities in the South African JAC interview procedures, it is recommended that the JAC utilizes standard questions after which JAC members can ask specific questions just like the Zimbabwean process. By adopting such an approach, the JAC will also correspondingly address inconsistencies relating to the time candidates spend in the interviews. Fifth, it is recommended for the purposes of the JAC accountability, that JAC members evaluate candidates using a score-sheet with clear themes. An interview score-sheet with clear themes promotes objectivity by making JAC members accountable in their assessment of the judicial candidates. It is submitted that this approach avoids the problems associated with plain voting as the South African case of *Cape Bar Council v. The Judicial Service Commission and Others* would show.<sup>895</sup>

Sixth, there is a clear necessity for the Legislature to amend the South African Constitution in-order to address the vague formulation of the judicial transformation considerations in the

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<sup>892</sup> Ibid.

<sup>893</sup> See Section 181 of the Zimbabwean Constitution.

<sup>894</sup> See the South African case study discussions in Chapter 6.

<sup>895</sup> [2012] 2 All SA 143 (WCC).

judicial selection process.<sup>896</sup> Using judicial transformation as a political tool against deserving candidates is undesirable as it opens avenues for direct political influence in the judicial selection process. The Constitution needs to provide more clarity in respect of when and how transformative considerations should hold sway in the judicial selection process. It is recommended that, in a case where there are two or more candidates with more or less the same potential and they happen to be from different races, that is an opportunity to exercise transformative goals in favour of the disadvantaged race.

With regards to Zimbabwe, it is worth recalling that its superior court judicial selection process is relatively new.<sup>897</sup> Notwithstanding this, several issues of concern need to be addressed. First, there is need for the JAC to further de-construct the constitutional criteria by publishing JAC regulations which give clear indications as to the qualities expected in a superior court judge in a manner more or less similar to the South African approach.<sup>898</sup> Second, the Constitution needs to be amended so that acting judgeships are open to jurists from different professional backgrounds instead of limiting them to former judges only.<sup>899</sup> A stakeholder participatory approach is critical if the acting judgeships system is to achieve the objective of providing an opportunity to potential candidates to gain experience on the bench.

Third, the Zimbabwean JAC needs to adopt the approach recommended for Mozambique and South Africa in which the JAC publishes general grounds for its recommendations for transparency purposes.<sup>900</sup> As a corollary to this, it is recommended that the Zimbabwean Constitution be amended so that the recommended JAC nominees are equated to the available vacancies in-order to curtail unfettered executive discretion in judicial selection. Fourth, it is critical that the Constitution be amended so that it entrenches a reasonable timeframe within

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<sup>896</sup> See discussions on judicial transformation in Chapters 4 and 6.

<sup>897</sup> See discussions on the evolution of the Zimbabwean legal system in Chapter 2.

<sup>898</sup> See discussions on the judicial appointment criteria in Chapter 5.

<sup>899</sup> See acting judicial appointments discussions in Chapter 5.

<sup>900</sup> See discussions on the JAC procedures in Chapters 4 and 6.

which the executive appoints the recommended judicial candidates.<sup>901</sup> It is submitted that this approach to judicial selection avoids the undesirable situation where the executive delays judicial appointments for subjective reasons. Leaving such critical matters to the whims of politicians can undermine the foundations of a judicial selection system which had such a promising start.

In light of the preceding country specific recommendations, it is necessary at this juncture to end the thesis with final concluding remarks.

### **7.3 Final conclusions**

This comparative study has provided useful insights into the judicial selection processes in all three countries. These insights are important for appointing authorities, policy makers, judges, lawyers and academics alike.<sup>902</sup> The comparative analyses undertaken enable these stakeholders to draw useful lessons with a view to further enhancing the prospects for independent and effective judiciaries in each jurisdiction. Further, areas of convergence and divergence in the mechanisms of judicial selection in all three countries facilitated the identification of gaps in each system. Consequently, these gaps provided the platform for important lessons which all three countries invariably learnt from their respective experiences. It has been established that judicial selection norms are ever evolving processes and this comparative study makes a case for a law reform agenda in all three countries. It is submitted that this study will spur the law reform agenda in a positive direction which further strengthens the judiciary's independence as an important element of constitutionalism.

Equally significant was the determination of which country had more or less of a particular feature which enhances the prospects for an independent and effective bench in the context of

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<sup>901</sup> See the Zimbabwean case study discussions in the summary section of this chapter.

<sup>902</sup> See generally Malleon, 'Appointing judges in an age of judicial power, Critical perspectives from around the world' 2006, University of Toronto Press, 5. See also Jackson, 'Comparative Constitutional Law: Methodologies' in Rosenfeld; Sajo, "The Handbook of Comparative Constitutional Law" 2012, Oxford University Press, 54.

emerging global trends. From a functionalist perspective, the suggested recommendations were largely drawn from the comparison of how each judicial selection system dealt with particular aspects of the judicial selection process. While the study focused principally on three countries, its observations and recommendations have a general tenor applicable in other jurisdictions as well. In this respect, the study's findings are useful especially in emerging democracies in Africa which have/and or are undergoing more or less the same experiences with this key ingredient of judicial independence.

Notwithstanding the above, the study proposes three areas which were beyond the scope of this study for further exploration. First, it is submitted that a comparative analysis of the effect of dominant political parties on the independence of the judiciary generally is an area in which political scientists can explore in further studies. Second, while the study did not specifically address diversity in judicial selection, it is suggested that this is an area in which future comparative studies can explore in detail. Diversity in a broad sense has traditionally been synonymous with racial and gender dimensions in judicial selection. It is necessary that future studies address diversity in the ethnic and/or minority representation context. Third, there is need for future comparative studies to address the correlation between the independence of the judicial selection process and the quality of judgments emanating from the superior courts. An appreciation of this correlation will further enhance the understanding of a judicial selection system's capacity to produce an effective bench.

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## ANNEXURE I

### QUESTIONNAIRE

I am a Doctorate student in the Faculty of Law at the University of Pretoria, South Africa. I am carrying out a research titled. "A critique of the superior courts judicial selection mechanisms in Africa: The case of Mozambique, South Africa and Zimbabwe." I am kindly requesting you to assist me by completing the following questions in this questionnaire. Your responses will be strictly confidential. No individual names are required on the questionnaire. Thank you for agreeing to participate.

Complete the questionnaire by ticking ( ✓ ) in the applicable and appropriate box. Other items will require you to fill in the required information.

#### Section A: Background information

##### 1.0. Gender

- Male
- Female

##### 2.0. Legal Career

- Judge
- Lawyer
- Academia
- Ministry of Justice Official
- JSC Member
- Other (Specify)

##### 3.0. Level of Education

- Bachelors Degree
-

Masters Degree

PhD

Other (Specify)

**4.0. Number of years working in legal field**

8 years and above

6-7 years

4-5 years

2-3 years

One year

Less than one year

**Section B: Questions on Judicial Selection**

**5.0. In which of the following countries are you working?**

Mozambique

South Africa

Zimbabwe

**6.0. Do you think the judicial selection criteria are in the public domain?**

Yes

No

**7.0 Have you participated in any way in the judicial selection processes in the country?**

Yes

No

**If yes how?**.....

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.....

**8.0. What is your view on the calibre of judges appointed to the superior courts?**

.....

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.....

.....

**9.0. Do you think superior court judges are appointed on merit?**

Yes

No

**If no why?**.....

.....

.....

.....

**10.0. Which of the following considerations dominate the judicial selection mechanisms in the country?**

- Legal practice experience
- Political considerations
- Nationality
- Race or ethnicity
- Gender
- Other (Specify)

**11.0. Do you think there are measures which can be taken to enhance transparency in the appointment of judges?**

Yes

No

**If yes, how?**.....

.....

.....

.....

**12.0. Do you think the current judicial appointment mechanisms result in the appointment of the best candidates to the higher courts.**

Yes

No

**13.0. Are there potential threats posed to the independence of the judiciary by the current judicial selection mechanisms?**

Yes

No

**If yes, which are the threats?.....**

.....

.....

.....

.....

**14.0. Has the composition of the selection commission instilled public confidence in the judicial selection process?**

Yes

No

**If no, how can the composition be improved?.....**

.....

.....

.....

.....

**15.0. What other critical stakeholders do you think should be involved in the selection of judges?**

.....  
.....  
.....  
.....

**16.0. Do you think prospective judges should be interviewed publicly?**

Yes

No

**Support your answer to the above question**

.....  
.....  
.....  
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.....

**17.0. Do you think there is a gap between the law on judicial selection and the actual state practice?**

Yes

No

**If Yes, what gaps are there?.....**

.....  
.....

.....

**18.0. What else on judicial selection mechanisms in your country would you like to bring to the attention of the researcher?**

.....  
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.....  
.....

**End**