

## Criteria for Appointments to Specialized Superior Courts: Perspectives from Mozambique, South Africa and Zimbabwe.

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### ABSTRACT

*The paper discusses and evaluates criteria for judicial appointments to specialized superior courts in Mozambique, South Africa and Zimbabwe. It contends that processes to be followed when making such appointments, as well the eligibility criteria, are important parameters in the assessment of independence of the judiciary. Lack of specificity in the eligibility criteria leaves room for exercise of unfettered discretion by the appointing authority, usually the political executive in African countries. Specificity and clarity in the legislative frameworks, in terms of both the process and eligibility criteria, on the other hand, is a bulwark against unfettered executive discretion in the making of such appointments, and instils public confidence in prospects for judicial independence.*

### 1 INTRODUCTION

The effectiveness of legal institutions in Africa is of paramount importance to legal scholars, academics, politicians and policy makers<sup>1</sup> and one such key legal institution is the judiciary. 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>2</sup> An effective and independent judiciary<sup>3</sup> assures a better human rights record and entrenchment of democratic tenets in a state.<sup>4</sup> Most theories of judicial independence place a great deal of emphasis on

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1 \* Provide Institutional Affiliation

Joireman, 'Inherited legal systems and effective rule of law: Africa and the colonial legacy' (2001) 39, 4 *Journal of Modern African Studies* 571.

2 Ibid.

3 According to Fombad, 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa' 55, 1 (2007) *American Journal of Comparative Law*, 10 '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'.

4 Joireman, (n 1)

judicial selection systems as a key element of judicial independence and current 'constitutional developments in Africa necessarily continue to be influenced by Western constitutional models.'<sup>5</sup>

Emerging democracies in Africa are increasingly grappling with expectations intrinsic in a democratic dispensation. The judiciary as a pivotal institution in the separation of powers paradigm is under the spotlight as it has to satisfy expectations of societies oppressed for a long time. These expectations are unavoidable as the end of colonial rule brought with it the promise and prospects for good governance and emerging new states which subscribed to democratic virtues. The role of the judiciary in strengthening democracy and the appointment of independent-minded judges is therefore critical in post-colonial African countries.<sup>6</sup> Judicial independence therefore seeks to ensure the freedom of judges to administer justice impartially without any fear or favour.<sup>7</sup>

This paper attempts a functional assessment of judicial selection or appointment criteria for specialized superior courts in the three Southern African countries of Mozambique, South Africa and Zimbabwe. The functional analysis will enable this comparative assessment to bring out the distinctive features of each system of judicial selection at the specialized superior court level.<sup>8</sup> Further, legal systems in Africa have a lot to learn from each other and this comparative assessment enables each comparator legal system to draw important lessons which can inform a law revision agenda in the selection of specialized superior court judges.

## **2 ANALYSIS OF THE POSITION IN MOZAMBIQUE, SOUTH AFRICA AND ZIMBABWE**

The Mozambican Constitution establishes an Administrative Court, which is the highest court in the hierarchy of administrative, customs and fiscal courts,

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5 Fombad, 'A preliminary assessment of the prospects for judicial independence in post-1990 African constitutions' Public Law 2 [2007] 236

6 [www.sabar.co.zw/law-journals/2010/december volume 023 no 3 p43](http://www.sabar.co.zw/law-journals/2010/december%20volume%20023%20no%203%20p43) accessed on 10 April 2012.

7 Akkas, 'Appointment of judges: A key issue of judicial independence' 16, 2 (2004) Bond Law Review 200

8 In this paper, any references to the Judicial Appointment Commission, unless the context clearly indicates, should be taken to refer to the Judicial Council in Mozambique and the Judicial Service Commissions in South Africa and Zimbabwe.

and which is a superior court of record.<sup>9</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. 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 and 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>10</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 interviews for prospective judges. Paradoxically, the same JAC advertises vacancies in the Provincial Administrative Courts followed by interviews of shortlisted candidates.<sup>11</sup> These inconsistencies in judicial selection procedures necessarily bring political patronage into the selection of Administrative Court judges. Perceptions abound that political gerrymandering plays a key role in judicial appointments to the Administrative Court.

In relation to the criteria for appointment to the Administrative Court, 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>12</sup>

The Constitution does not elaborate on other criteria for the appointment of Administrative Court judges, delegating these matters to subsidiary legislation. As of 2013, however, there was no subsidiary legislation providing such criteria. This is hardly surprising, considering inclinations of the executive at the time to have an unfettered discretion in the making of judicial appointments. A key stakeholder observed:

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9 Article 228 (1) of the Mozambican Constitution. There are nine Provincial Administrative Courts in Mozambique.

10 Article 229 (3).

11 Ibid.

12 Article 229 (4) of the Mozambican Constitution.

‘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 target of the constitution revision exercise which started in 2013 and is yet to be completed.’<sup>13</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>14</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>15</sup> Consequent to this fundamental change in the structure of the administrative judiciary, it is probable that the pre-2010 executive stranglehold over appointments to the Administrative Court will weaken as more judges from the career judiciary get elevated to the apex court.

The South African legislative framework on the other hand provides for the establishment of four specialized superior courts, being: the Labour Court; the Electoral Court; the Competition Appeal Court; and the Land Claims Court. It is also critical to note that the appointment/ selection process for each court is specified in relevant special legislation. More is required for appointment to the specialized courts than what is generally required for appointment to ordinary superior courts. The additional criterion specified is expertise in a particular field of law. This may be the explanation for the smaller number of applications for appointments to specialized courts as compared to applications for judicial positions in ordinary superior courts. In the April 2013 JAC interviews, for example, only one candidate was interviewed for the Competition Appeal Court and two candidates for the Electoral Court.<sup>16</sup> The April 2014 JAC interviews

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13 Interview with Professor of administrative and constitutional law at Eduardo Mondlane Law Faculty, Maputo.

14 Ibid.

15 Ibid.

16 See Report of the Democratic Governance and Rights Unit (DGRU), University of Cape Town (2014), available at <http://www.dgru.uct.ac.za/dgru/reports/researchreports> accessed on 12 August 2014..

also had only one candidate for the Electoral Court.<sup>17</sup>

Appointment of Labour Court judges in South Africa is governed by the Constitution and the Labour Relations Act.<sup>18</sup> While the Constitution lays down the general criteria for appointment of 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>19</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>20</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>21</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>22</sup> The requirements for appointment as a Judge President and Deputy Judge President are a notch higher than for 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>23</sup>

It is clear that expertise in labour law is an important attribute which prospective Labour Court judges must possess. The Act is, however, silent on the level of expertise required for appointment. 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. It is apparent from the South African legislative framework that the President, as head of the Executive arm of Government is the ultimate appointing authority. The executive's role is however appropriately circumscribed by the need to consult or seek advice, and the involvement of many stakeholders in the process of selecting a meritorious bench. One uncertain aspect of the law and process

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17 Ibid.

18 No. 66 of 1995

19 See Labour Relations Act 1995, s. 153

20 Section 153 (1) (a).

21 Section 153 (1) (b).

22 Section 153 (6).

23 Section 153 (2) (a) – (b).

of appointing Labour Court judges in South Africa is that it is not clear how differences of opinion between stakeholders such as the JAC and NEDLAC are to be resolved. In practice, account ought to be taken of the fact 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>24</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>25</sup> The other judges of the Labour Appeal Court are appointed in the same manner as the Labour Court judges.<sup>26</sup> This effectively means that 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>27</sup>

The appointment 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 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>28</sup> The South African Electoral Court is composed of three judges of the Supreme Court, and two other members who should be South African citizens.<sup>29</sup> These judges are appointed by the President 'upon the recommendation' of the JAC.<sup>30</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 Act is not clear on the qualifications for the two members who only

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24 Section 167.

25 Section 168.

26 Section 169 (1).

27 Section 168 (3).

28 See section 18 of the South African Electoral Commission Act, 51 of 1996.

29 Electoral Commission Act 1996, s. 19.

30 *Ibid*.

have to be South African citizens, the trend has generally been to appoint serving judges as members of the Electoral Court. Significantly, the South African JAC plays an important role in the appointment of Electoral Court judges, with appointments to this court subject to the JAC's judicial appointment 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>31</sup>

In contrast to Mozambique and Zimbabwe, the South African legal framework provides for a Competition Appeal Court and a Land Claims Court as additional specialized courts. They have the stature of superior courts of record with jurisdiction over matters relating to their respective spheres of expertise. The judges of the Competition Appeal Court are appointed by the President acting on the 'advice' of the JAC.<sup>32</sup> The President of the Republic also designates one of the judges to be the Judge President of the court.<sup>33</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>34</sup> This effectively means that candidates outside the judiciary are automatically ineligible for appointment to the Competition Appeal Court.

An important distinction is evident in relation to the appointment of judges of the Land Claims Court. The President of the Republic appoints the President of the court acting on the 'advice' of the JAC.<sup>35</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>36</sup> To be eligible for

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31 Section 19 (2)

32 Section 36 (2) of the South African Competition Act, 89 of 1998.

33 Competition Act 998, s. 36 (3)

34 Section 36(2) of the Competition Act states that the court shall consist of 'at least three judges, ... each of whom must be a judge of the High Court.'

35 Restitution of Land Rights Act, 22 of 1994, s. 22 (3)

36 Section 22 (4).

appointment to the Land Claims Court, a person must be a South African citizen who is ‘fit and proper’ to be a judge.<sup>37</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>38</sup> It would appear that the most critical criteria for appointment is 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 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>39</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 text, which are different from the formal JAC process.<sup>40</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 appointment of a majority of the judges for the Land Claims Court is hardly surprising especially taking into account the important political role of this court in redressing past historical imbalances.

Moving on to the Zimbabwean position, the Zimbabwean constitutional and legislative framework provides for establishment of an Administrative Court, a Labour Court and a Fiscal Appeals Court as specialized superior courts of record.<sup>41</sup> Zimbabwe also an Electoral Court, but this is not a stand-alone court in terms of the Electoral Act.<sup>42</sup> Jurisdiction over electoral disputes other

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37 Section 23 (a) - (b).

38 Section 23 (c).

39 Section 5 of Government Regulation 423/2003.

40 *Ibid.* Section 6.

41 See section 162 (d) and (e) of the Zimbabwean Constitution, 2013; and section 3 of the Fiscal Appeals Court Act, Cap 23:05.

42 Electoral Act, Cap. 2: 01, s. 36



than in respect of presidential elections is vested in the High Court which sits as the Electoral Court.

The criteria for judicial appointments to the Administrative Court and the Labour Court is similar and, therefore, concurrently discussed below. Labour Court and Administrative Court judges are appointed in the same manner as High Court judges in terms of the process leading to the appointment, as well as the qualification criteria.<sup>43</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>44</sup>

The above constitutional provision is complimented by the general appointment criteria that a candidate be at least forty years old, and have seven years’ experience either as a judge or legal practitioner in a Roman-Dutch or English law jurisdiction.<sup>45</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>46</sup> As 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 should be aligned to what the 2013 Constitution requires. These amendments could perhaps go a step further and indicate attributes expected of prospective judges in terms of expertise in administrative and labour law.

In terms of the Fiscal Appeals Court Act, the qualification criteria stipulated, as in the case of appointments to the Administrative Court and Labour Court, is whether a candidate is a former judge of the Supreme Court or the High Court, or whether if he/ she is qualified to be appointed as a judge of the Supreme Court or High Court.<sup>47</sup>

A number of observations can be made in respect of the judicial

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43 Zimbabwean Constitution, 2013, s. 179 (1)

44 Section 179 (2).

45 Section 179 (1) (a) and (b).

46 See Labour Act, Cap. 28:01, s. 85; and Administrative Court Act, Cap. 7:01, s.5

47 Fiscal Appeals Court Act, Cap. 23:05, s.3

appointment criteria for the specialized superior courts in Zimbabwe. Significantly, the subsidiary legislation establishing all three specialized courts entrenches more or less similar qualification criteria. Perhaps the most critical lacuna in the texts is failure to specify requisite skills and expertise for appointment to each court, over and above qualification for appointment as a judge of the Supreme Court or High 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 recent past experiences where Labour Court judges appointed had no previous experience in labour matters.<sup>48</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>49</sup>

It is apparent from the foregoing discussion that South Africa has more specialized superior courts than Mozambican or Zimbabwean positions. South Africa also has a superior and more sophisticated legislative framework, which entrenches specific eligibility criteria for each of its specialized courts, going beyond the general criteria for judicial appointments. Mozambique and Zimbabwe could do well to use the South African legislative framework as a model for reform or amendments to laws relating to similar or comparable specialized courts established in Mozambique and Zimbabwe.

### 3 CONCLUSION

Debates surrounding criteria for judicial appointments in all three countries are as critical as the ones centering on the judicial selection process itself. In fact, the criteria for judicial appointments is a logical corollary of the judicial appointment process, which in turn is an important element for the independence of the judiciary. The preceding discussion has highlighted main features of the criteria for appointment to ordinary as well as specialized superior courts in all

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48 See 'Zimbabwe: Four Labour Court Presidents Sworn In' Anonymous AllAfrica News Extract, available at <http://allafrica.com/stories/201307180483.html> accessed on 18 July 2014

49 The speech by the Chief Justice is available at <http://www.jsc.org.zw/> accessed on 6 August 2014.

three countries. Particularly significant in this endeavor was the attempt at deconstructing the textual meaning of the entrenched constitutional and legislative judicial appointment criteria. This discussion has further demonstrated that the criteria for judicial appointment is not an end in itself. It is a means to an end. First, criteria for judicial appointments impacts on the caliber of appointed superior court judges. Second, it acts 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 criteria for judicial appointments to specialized superior courts, the imperative for clarity in the rules or guidelines 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 criteria for judicial appointments be entrenched in the law, with much clarity as is practicable. Legislative clarity guards against unwarranted external influences, at the same time instils public confidence in the judicial selection process.