

Appointment of constitutional adjudicators in Africa: some perspectives on how different systems yield similar outcomes¹

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The last decade has seen the judiciary's legitimacy come under increasing scrutiny as more and more sensitive and politically charged battles are fought in the courts. These have not only placed constitutional adjudicators in awkward situations but raised questions about how they are chosen. The process of selecting judges, generally, is probably one of the most powerful and effective means that could be used by the other two branches of government to interfere with and influence the judiciary. Are they chosen through procedures that ensure the appointment of persons based on their technical and professional merit as well as their ability to decide matters independently, objectively and fairly? Is there any constitutional design that can facilitate the appointment of the calibre of independent-minded judges that are needed at a time of tremendous change and when the threats to sustaining Africa's fragile attempts to entrench an ethos of constitutionalism, good governance, protect human rights and respect for the rule of law is under siege by pro-authoritarian forces masquerading as democrats?

This paper critically examines, compares and contrasts the systems that operate in some Anglophone, Francophone and Lusophone African countries. It starts by underscoring the importance and significance of the method of appointing constitutional adjudicators. It then examines the divergent approaches to the appointment of constitutional adjudicators. From an analysis of the different approaches used, it shows that political involvement, and sometimes interference leading to politicisation of the judiciary, is a common phenomenon in all jurisdictions on the continent with the differences being only in the degree of interference. It, therefore, proposes constitutional entrenchment of a model of constituting the Judicial Service Commissions or *Conseil Sup'erieur de la Magistrature* that limits the powers of the executives, who often also control the legislature. Whilst it is clearly undesirable both from the perspectives of the law and that of political legitimacy to exclude politicians from playing any role in the appointment of judges generally and constitutional adjudicators in particular, the paper argues that their role should be reduced to ensure that they will not be in a position to manipulate or control judges.

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1. Introduction

The strides made by African states to adopt constitutions that promote constitutionalism, the rule of law and respect for human rights in the last two decades have been widely

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commented upon (Akiba 2004; Federico and Fusaro 2006; Fombad 2007a, 2008a; Hatchard, Ndulo, and Slinn 2004; Oloka-Onyango 2001). These developments have seen the introduction of relatively independent judiciaries with expanded powers especially in dealing with disputes involving the interpretation and application of the constitution. In recent years, however, the judiciary's legitimacy has increasingly come under scrutiny as more and more politically charged battles are fought in the courts. These have not only placed constitutional adjudicators in awkward situations but raised questions about how they are chosen.¹ The process of selecting judges, generally, is probably one of the most powerful and effective means that could be used by the other two branches of government to interfere with and influence the judiciary. Are they chosen through procedures that ensure the appointment of persons based on their technical and professional merits as well as their ability to decide matters independently, objectively and fairly? Are they also chosen in a manner that ensures that these courts reflect the gender, ethnic, religious and legal diversity of the community and thus gain the confidence of the people they serve?² Is there any constitutional design that so far ensures this?³

Although there is an abundance of literature worldwide on the selection of constitutional adjudicators, there is little of this which deals critically either theoretically and/or comparatively on the selection processes in Africa. Nevertheless, there are studies on some African countries such as South Africa. In some of these studies, it has been suggested that the South African mechanism for appointing constitutional adjudicators may provide a good model for ensuring that the best qualified people to judicial office are appointed (Akkas 2004; Russell 2007). It has also been suggested that the judicial appointing system in France, which was widely copied in Francophone Africa, at least until the 1990s, is widely insulated from extra-judicial politics (Russell 2007). The politically charged nature of some of the disputes that constitutional adjudicators in Africa are increasingly faced with requires in addition to the high degree of technical knowledge, skill and experience required of such adjudicators, public confidence in their independent mindedness and impartiality. Do the existing appointment systems ensure that this actually happens? More specifically, do they facilitate the appointment of the calibre of independent-minded judges that are needed at a time of tremendous change and when the threats to sustaining Africa's fragile attempts to entrench an ethos of constitutionalism, good governance, protect human rights and respect for the rule of law is under siege by pro-authoritarian forces masquerading as democrats. In times like this, the need for wise, skilled, pragmatically adept, independent-minded judges is at a premium. Therefore, it is a matter of great interest how they are selected and who selects them.

This paper compares and contrasts the systems that operate in some Anglophone, Francophone and Lusophone African countries. It starts with a discussion of the complicated politics of constitutional adjudication in Africa and underscores the importance and significance of the method of appointing constitutional adjudicators. It then examines the divergent approaches to the appointment of constitutional adjudicators. This is followed by a critical appraisal of the different approaches and ends with some concluding remarks. It is shown that in spite of differences in the manner of appointing constitutional adjudicators in Africa, the problem of political interference leading to politicisation of the judiciary is a common phenomenon in all jurisdictions on the continent with the differences being only in the degree of interference. This is true not only in countries that have made tremendous progress in entrenching constitutionalism and good governance such as Botswana, Ghana and South Africa, but also in countries still wallowing under the throes of "democratic" dictatorship such as Cameroon, Gabon and Zimbabwe. It is therefore necessary to start by briefly considering why the

issue of how constitutional adjudicators are selected is of increasing importance today in Africa.

2. The increasing importance of constitutional adjudication in Africa

The global expansion of judicial power in the last two decades has been widely commented upon (Fombad 2007a; Malleson and Russell 2007; Russell and O'Brien 2001; Tate and Villander 1995). From at least a formal perspective, this expansion has been quite remarkable in Africa, particularly with respect to constitutional adjudication in Francophone Africa. Before 1990, constitutional disputes were reserved in most Francophone African countries to a chamber operating within the Supreme Courts and because only the very politicians who made laws had the *locus standi* to bring any disputes before these bodies; there were very few cases alleging violation of the constitution that were brought before them (Fall; Fombad 2014a). Since the introduction of new or revised constitutions in the 1990s, constitutional courts have now been established in most Francophone countries and these for the first time are open to individual citizens. Besides this, most pre-1990 African judiciaries were weak and substantially compromised because of their close association with the various dictatorial regimes in power. They could therefore hardly play the important role of guardians of the constitutions, protectors of human rights and impartial enforcers of the rule of law. In the case of South Africa, the supremacy of parliament before 1994 meant that judges had no powers to review primary legislation for its conformity to the constitution. The post-1990 era has not just seen serious efforts to make the judiciaries more independent but these institutions have now been conferred sufficient powers to adjudicate disputes involving violations of the constitution. It is this progressive enhancement of judicial powers with respect to review of legislative and executive actions for conformity to the constitution that has made the choice of constitutional adjudicators a matter of critical importance.

In many African countries, the judiciary in general and constitutional adjudicators in particular are sometimes regarded as part of the political system because of the increasingly political role that they are often asked to play. For example, in Francophone Africa, electoral disputes, especially those concerning disputed presidential elections, are exclusively reserved for determination by constitutional adjudicators.⁴ The regular multi-party parliamentary and presidential elections which in the last two decades have been put forward as the evidence of democracy in Africa have often provoked disputes and sometimes bloody confrontation.⁵ The most divisive and contentious of these are presidential elections which have always ended up before constitutional adjudicators. As the electoral conflicts, especially during the last few years, have intensified with incumbents resorting to all forms of electoral irregularities to hang on to power, the courts have increasingly been the battleground for these politically sensitive battles.⁶ Considering the fact that capturing and controlling Africa's most-coveted political prize, the presidency, gives access to limitless accumulation of personal wealth, wielding influence and running the country, the decision as to who sits on the bench of the courts that decide election disputes is not one that is taken lightly. As a result, whoever determines who is appointed a judge is likely going to be better placed to capture and retain political power and the benefits that go with it. Besides this, constitutional courts deal not only with disputes between parties but also with intra-party disputes over party leadership.⁷

The issue of who determines the appointment of constitutional adjudicators has also become important because of the efforts to adopt constitutions that promote constitutionalism. However, the efforts to entrench certain core elements of constitutionalism, such

as the principles of constitutional supremacy, judicial independence and separation of powers, have sometimes led to tension in many countries between the judiciary and the executive (Akiba 2004; Federico and Fusaro 2006; Fombad 2007a, 2008a; Hatchard, Ndulo, and Slinn 2004; Oloka-Onyango 2001). No African country illustrates this conflict more than South Africa. After a number of important constitutional cases went against the Government and some prominent politicians, the South African Government decided to review the jurisdiction of the two highest courts, the Supreme Court of Appeal and the Constitutional Court.⁸ Many critics, however, view this as an attempt by the Government to intimidate the court (De Vos). One of these cases is particularly relevant here because it illustrates the politics involved in the appointment of constitutional adjudicators. This case involved the appointment of a new Chief Justice to replace the incumbent whose term was about to expire. His initial appointment had been controversial because the President had overlooked the Deputy Chief Justice who should customarily have replaced the incumbent on account of what newspapers speculated was the latter's independent line of thinking that did not go down well with the ruling African National Congress (ANC). Instead of promoting the Deputy Chief Justice to take over from the retiring Chief Justice, the President decided to extend the latter's tenure by five years. A number of civil society organisations in *Justice Alliance of South Africa v President of the Republic of South Africa*⁹ challenged this. The President had acted on the basis of section 8(a) of the Judges' Remuneration and Conditions of Employment Act, which allowed the President to extend the term of a Chief Justice. This section was supposed to be based on section 176(1) of the Constitution which authorises Parliament to extend the term of office of a Constitutional Court judge. The applicants contended that the Act was inconsistent with the Constitution because it allowed only the term of office of the Chief Justice to be extended and not that of the other judges of the Constitutional Court. This was a pretty awkward case in which the judges had to determine the fate of their boss and colleague, the Chief Justice. In a carefully reasoned judgement, the Court pointed out that the section 8(a) of the Act on which the President had acted was unconstitutional because it effectively allowed the President to usurp the power of Parliament. A request for an order suspending the declaration of invalidity was also firmly rejected by the court pointing out that this will be an indirect manner of rendering "valid an extension that [was] invalid."¹⁰ Probably with the decision in another politically sensitive case, *Glenister v President of the Republic of South Africa*¹¹ where the Constitutional Court's decision was taken by a narrow majority of five to four in mind, President Zuma in reiterating the need to review the jurisdiction of the Constitutional Court questioned the logic of having split decisions amongst judges and asked: "how could you say that [the] judgment is absolutely correct when the judges themselves have different views about it." He was thus clearly suggesting that he wanted a court in which all the judges are in agreement with all the decisions taken.¹² Mistrust of the judiciary runs quite deep in the ANC hierarchy.¹³ In an earlier speech welcoming the new Chief Justice in November 2011, President Zuma had declared:

... we also wish to reiterate our view that there is need to distinguish the areas of responsibility between the judiciary and the elected branches of the state, especially with regards to policy formulation.

Our view is that the executive, as elected officials, has the sole discretion to decide policies for government.¹⁴

Whilst this is certainly trite, it is equally important to note that it is the duty of constitutional adjudicators to ensure that government policy is consistent with the constitution

and declare it invalid to the extent of its inconsistency. It is inevitable that politicians and judges will often be at loggerhead especially when the former's powers are curtailed or legislation that they have enacted is invalidated or their actions are fettered by the courts.

Mistrust by the present South African government of the judiciary has its roots in the pre-1994 apartheid judiciary (Forsyth 1985; Zimmermann and Visser 1996, 16 –19). The judiciary then, especially the apex court of the era, the Supreme Court of Appeal was notorious for its deference to the government and its willingness to unquestionably enforce the repressive apartheid laws used to subdue the black majority in the country. It was, therefore, no surprise that the 1996 Constitution not only strategically placed the newly created Constitutional Court as the apex court but also gave it final authority on the interpretation and application of constitutional disputes. However, the problem which the ANC government faces today in South Africa, and one which many post-independent African governments continue to face is that of transforming a liberation movement that has won power into a fully functional political party that understands, appreciates and accepts democratic governing processes and principles, especially issues of separation of power, judicial review and respect for the rule of law.

Constitutional adjudicators, therefore, have the difficult task of ensuring that the other branches of government, especially the executive, operate within their constitutional powers and do not abuse their powers. Many of their decisions have far-reaching social and political implications thus necessitating that great care is taken in appointing them to balance the need for judicial independence with that of accountability. It is therefore imperative that the best system that will enable them to act independently and impartially is adopted. It is now necessary to review the main systems that are provided for under the different African constitutions.

3. Methods of selecting constitutional adjudicators

3.1. An overview

Generally speaking, the different legal systems have devised different types of selection systems. However, although the selection systems presently used in many African jurisdictions have changed considerably from those that were in place before the 1990s, four preliminary observations need to be made. First, that in almost all African countries, the changes, whether slight or radical, have remained within the general framework of the legal system inherited at independence, namely, the common law system in Anglophone Africa and the civil law system in Francophone and Lusophone Africa. Second, in at least the case of South Africa, it is clear that the selection system is designed to address the particular problems and specific priorities that the country inherited from its pre-1994 past (Forsyth 1985; Zimmermann and Visser 1996, 16 –19). It may also be argued that in a general sense, most modern post-1990 Francophone African constitutions made a serious attempt to depart from the perceived defective constitutional adjudication model which many of them copied from the 1958 French Fifth Republic Constitution.¹⁵ In this respect, they have made it possible for effective judicial review, particularly at the instance of private individuals whose constitutional rights have been violated. Third, globally, three main methods of judicial selection systems operate. One system is the selection by democratic election (practised in some states in the USA) or some form of it.¹⁶ Another is the merit bureaucratic competitive system which is used in Europe,¹⁷ and the other is the executive in common law countries. It is also necessary to add that there are many hybrid systems that combined elements of democratic elections and executive appointments. Be

that as it may, since the 1990s, the executive appointment system has been the dominant form in the selection of constitutional adjudicators. This discussion, therefore, focuses on the different forms in which this executive appointment system operates in Africa.

The final point which deserves a little bit more elaboration is that the system adopted in appointing constitutional adjudicators, particularly in Francophone and Lusophone Africa, reflects the system of constitutional adjudication that is used. Three main models of constitutional adjudication operate in Africa, namely, the centralised model, the decentralised model and the mixed model, which combines elements of both the centralised and decentralised systems.¹⁸ The decentralised, concrete, dispersed or diffused model is often referred to as the American model because it is usually traced to the famous judgement of Chief Justice Marshall in the 1803 case of *Marbury v Madison*.¹⁹ This system has been widely copied in almost all of Anglophone Africa.²⁰ In these countries, constitutional matters are handled by the ordinary courts, although in certain cases, such as disputes dealing with the interpretation and application of the bill of rights, these may be dealt with only by the superior courts. The second model, the centralised or concentrated model sometimes referred to as the Austrian model, in recognition of the fact that it was the Austrian scholar, Hans Kelsen, who did most to develop and popularise it as an alternative to the American judicial review method, has been widely adopted in Francophone and Lusophone Africa. The main features of this model is the fact that constitutional adjudication is carried out by a centralised, often specialised tribunal established independently outside the judicial branch during special proceedings (*principaliter*). This model was widely adopted in Europe and the French have developed a particular form of it – the Constitutional Council system – which has been replicated very widely in Francophone, and to a certain extent, Lusophone and Hispanophone Africa. Because of the influence it has had in Africa, it can rightly be referred to as the French model. However, only one Hispanophone country (Equatorial Guinea²¹) and at least three of the Francophone countries (Cameroon,²² DR Congo²³ and Senegal²⁴) have retained the Constitutional Council model in its classic 1958 French Fifth Republic form. Most other Francophone African countries in the 1990's constitutional reforms retained the Constitutional Council model only after having made quite significant changes to remedy many of its perceived defects (Cappelletti and Cohen 1979; Juillard 1974). The third category consists of a group of states where the constitution provides for a mixed or hybrid system of constitutional adjudication. Thus, in the case of Ethiopia, it is a mix of judicial and non-judicial mechanisms,²⁵ for Ghana, certain matters may be handled by the High Court and others by the Supreme Court,²⁶ and for South Africa, it is a mix of a decentralised and centralised systems.²⁷ One important point that results from these differences is that whilst in most of Anglophone Africa, the system of judicial selection of constitutional adjudicators is essentially the same as that used for selecting ordinary judges,²⁸ in Francophone Africa, it is totally different, as we shall soon see, from that used in the appointment of ordinary judges.

3.2. The different approaches

As pointed out above, the executive appointing system, and more specifically appointments made by the President, is widely used by most African countries as the main method in appointing constitutional adjudicators.²⁹ The executive branch in Africa poses the most serious threat to judicial independence, not only because of their potential interest in the outcome of a myriad of cases but also because of the enormous power they have and can exercise over constitutional adjudicators. Judges, therefore, need to be insulated

from any threats or manipulation that may force them to act unjustly in favour of the state or powerful politicians. On the other hand, constitutional adjudicators cannot operate in total isolation from the political system but have to be appointed or elected to their positions. The Universal Declaration on the Independence of Justice makes it clear that:

participation in judicial appointments by the executive. . . is consistent with judicial independence, so long as appointments of judges are made in consultation with members of the judiciary and the legal profession, or by a body in which members of the judiciary and the legal profession participate.³⁰

The crux of the matter is, therefore, whether impartial justice can be administered within the bounds of the unavoidable judicial dependence on certain political and social actors in society who effectively determine who gets to be appointed as a constitutional adjudicator.

When the different constitutional provisions regulating the process of presidential appointments of constitutional adjudicators in Africa are analysed, four main patterns emerge, namely, appointment solely by the President, appointments by the President subject to confirmation, appointment by the President based on recommendations made by the Judicial Service Commission (JSC)³¹ or other appointing commission and appointments made by the President based on nominations made by an institution. These shall now be critically examined.

3.2.1. Appointments made solely by the President

Constitutional adjudicators who are appointed solely by the absolute discretion of the President or King occur in two main instances. The first but increasingly rare instance, found under some Anglophone African constitutions, is where the constitution allows the President to appoint the Chief Justice and the Deputy Chief Justice, and sometimes even the President of the Court of Appeal. The second, common under Francophone, Lusophone and Hispanophone African constitutions, is where the President is given the powers to appoint sometimes as many as one-third of the members of the constitutional court.

With respect to the first pattern, this was pretty common in pre-1990 Anglophone African constitutions.³² One of the few constitutions that still provides for this is the Botswana Constitution of 1966. It confers on the President the exclusive powers to appoint the Chief Justice of the High Court³³ and the President of the Court of Appeal.³⁴ However, in the appointment of the judges of the High Court and justices of the Court of Appeal, the President can only act in accordance with the advice of the Judicial Service Commission.³⁵ It is difficult to see any sound reason which can justify the selection of constitutional adjudicators being carried out by a commission composed of persons from diverse backgrounds including the executive and the judiciary, whilst the heads of the different courts dealing with constitutional disputes, namely, the Chief Justice of the High Court and the President of the Court of Appeal, are appointed exclusively by the President, even if guided by a number of specified criteria,³⁶ but ultimately at his/her complete discretion. It is very likely that presidents in such situations will most often appoint as heads of constitutional court persons who they are sure will be sympathetic towards their positions. This opens the way for easy interference in constitutional disputes and before the 1990s this was compounded by the fact that it was often the Chief Justices chosen

solely by the President who chaired the JSC under the constitutions of most Anglophone African countries. One of the major changes introduced in the 1990s has been to provide that the Chief Justices and other heads of constitutional courts in Anglophone Africa will no longer be appointed at the sole discretion of the President. Questions may well be raised whether in some cases, such as under the South African constitution, this has led to any diminution of and effective dispersal of powers where the President is merely required to make the appointments after consulting a number of other persons.³⁷ Is the President bound to follow their advice?

Perhaps, more problematic are the powers given under the constitutions of almost all Francophone and Lusophone African countries to the presidents to appoint “judges” of the Constitutional Courts. Under the classic French Fifth Republic model that most of these countries copied in the 1960s, it was never expressly spelt out that those appointed needed to be judges or necessarily be persons with any legal training. The composition of these specialised and centralised courts which deal exclusively with constitutional disputes, unlike courts having constitutional jurisdiction in Anglophone Africa which are often ordinary courts dispersed and operating within the normal hierarchy of courts,³⁸ vary from 5³⁹ to 12 members.⁴⁰ The role of the President in appointing the members of these courts is very similar in most of these countries but the significance usually depends not only on the ratio of those he/she appoints vis-à-vis those appointed by others but also whether or not there are any criteria which he/she must follow in making the appointments. An analysis of recent trend shows a pattern which at one extreme has those constitutions which confer enormous discretion on the President in deciding who sits in the constitutional courts. There are two typical examples of this. One is provided for under article 89 of the Senegalese Constitution of 2001 which gives the President exclusive powers to name all the five members of the Constitutional Council and leaves the criteria for appointment to be determined by subsequent law. Fairly similar is article 51(2) of the Cameroonian Constitution which provides that although the President shall appoint all the 11 members of the Constitutional Council, only 3 of these shall be at his/her sole discretion, whilst the others shall be based on nominations made to him/her by certain specified individuals. There is little practical difference between the President appointing by himself/herself and the President appointing after nominations by the heads of the National Assembly, the Senate and the *Conseil Supérieur de la Magistrature* (CSM)(Higher Judicial Councils) because these are essentially political bodies which, with the rapid expansion of dominant parties, are usually headed by people personally chosen by the President. It is thus merely a convoluted way of providing for direct presidential appointments.⁴¹ Most recent constitutions allow the President to appoint between a third and half of the members of these constitutional courts.⁴² The only significant constraints within which he/she operates and a major improvement on the classic Fifth Republic Constitutional Council model is that most of these constitutions now sometimes specify, not only that there should be a minimum number of members who are jurists (mainly judges and sometimes law professors) with specified years’ experience but even more interesting, some have borrowed from the Common Law system by specifying that some of the members must be practising lawyers.⁴³ Nevertheless, the role played by politicians, especially the President, and the scope allowed for the appointment of non-jurists to sit in these courts make it possible for mainly executive-minded persons to be appointed.

Appointments made solely by the President alone boils down to a sort of presidential unilateralism with no check to ensure that he/she does not pack the court with his/her supporters. It makes the appointees accountable and vulnerable to political manipulation in the sense that they will deliberately or inadvertently consider the preferences of their

political principal in the course of deciding specific cases. We, however, need to see whether presidential appointments made subject to confirmation will make any difference.

3.2.2. Appointments made by the President subject to confirmation

There are constitutions which state that the President or King⁴⁴ makes the final decision as to who will sit in the courts that determine constitutional disputes, but unlike in the next section, this determination is subject to approval by parliament. This is provided for under the constitutions of a number of Anglophone African countries. These usually provide that the President will determine who will be the chief justice and justices of the Supreme Court based on the recommendations of the JSC but this shall be subject to confirmation by parliament.⁴⁵ The potential implications of involving parliament in the appointment process are discussed in the next section. This is clearly an attempt to check an unfettered presidential discretion by dispersing some of his powers of decision-making and sharing this with parliament. In a fully functional democracy, this interposition of another democratic but political actor after the executive choice can encourage the appointment of adjudicators with solid reputations but moderate views. In other words, it may encourage discussion and compromise. It may also lead to stalemate in those rare situations where the President and parliament cannot agree because the latter is dominated by the opposition party. The more likely scenario today in Africa where the most ruling parties have dominant majorities in parliament is that the process of ratification becomes a mere formality.⁴⁶ There are thus little prospects of parliament operating as an effective mechanism that can prevent poor appointments dictated purely by political calculations. Will presidential appointments made by the President but based on recommendations by the JSC make any difference?

3.2.3. Appointments made by the President based on recommendations by the JSC

The appointment of constitutional adjudicators in most Anglophone African countries is usually made by the President based on “recommendations,”⁴⁷ “advice”⁴⁸ or “nominations”⁴⁹ made to him/her by the JSC. The ability of the JSC to positively affect the appointment process by ensuring that it only recommends fit and proper persons who can discharge their judicial responsibilities in an independent, impartial and competent manner without fear, favour or prejudice depends on several factors. The main one being its composition and its powers. A commission composed of essentially executive appointees with limited powers can hardly be expected to act independently of the politicians who appointed the members. Before looking at the structure of these JSCs in Anglophone Africa, it is worthwhile pointing out that the equivalent institution in Francophone and Lusophone Africa is the CSM.⁵⁰ Although they play the role of the JSC in Francophone and Lusophone Africa, they are of no relevance here since they deal exclusively with appointments to the ordinary courts and hardly play any role in the selection of members of the specialised constitutional courts that have exclusive jurisdiction to deal with constitutional adjudication.

The composition of the JSC has an important bearing on the ability of the members to independently assess and appoint constitutional adjudicators solely on their merits without any external pressure. The use of such commissions is now widely recognised as the most acceptable means of selecting judges (Baar 1991, 146). There is no standard model that has been adopted. Even the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, in recommending the use of

commissions is only able to suggest that “it should include representatives of the higher judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence is maintained.”⁵¹ It has, however, been suggested by some commentators that the South African JSC may be an acceptable model because it is asserted that it “may be very effective to ensure the appointment of the best qualified people to judicial office” (Akkas 2004, 11). Russell (2007, 424) has even gone further to assert that “it is doubtful if any other country’s commission has the same range and depth of membership as the South African Judicial Service Commission. . .”. Is this really borne out by the facts?⁵²

An examination of a selected number of JSCs presently operating in Africa provides us with a perspective on the range and depth of their membership and their ability to operate free from the control or domination of any external bodies such as the executive and legislature and even the judiciary itself. The countries whose constitutions have been analysed range from Botswana which is a typical example of a pre-1990 approach, Ghana, Namibia, Nigeria and South Africa, which illustrate the approach of the 1990s and the most recent practices under the Kenyan Constitution of 2010, the Zimbabwean 2013 Constitution and the 2013 draft Constitution of Tanzania. These countries provide a reasonably broad range of Anglophone practice from a historical perspective, current trends and developments. It is necessary to preface this with a number of general observations.

First, the number of members in these commissions generally ranges from 5 in the cases of Botswana and Namibia⁵³ to 25⁵⁴ in the case of South Africa. Second, in most cases, the commission is dominated by appointees from the judiciary and other members of the legal profession such as representatives of the law society or bar and representatives from academia. In only a few constitutions is provision made for the appointment of some representatives from the executive, the legislature or persons who are not lawyers. For example, Ghana’s 18-member JSC include four persons who are not lawyers and a Chief designated from the National House of Chiefs and the editor of the Ghana Law Reports.⁵⁵ Nigeria’s 23-member JSC includes only two non-lawyers as compared with South Africa’s 25-member JSC which includes six persons designated by the National Assembly from its members (at least three of whom must be members of opposition parties represented in the Assembly) and four persons designated by the President after consulting the leaders of all the parties in the National Assembly.⁵⁶ Zimbabwe’s 13-member JSC must include a public accountant or auditor with at least seven years’ experience and a human resources management expert with at least seven years’ experience.⁵⁷ What seems to be emerging is an attempt to diversify the membership of the JSC. In the case of South Africa, it is political diversity and for Zimbabwe, it is professional diversity. An attempt to ensure a modicum of regional diversity appears in the Tanzanian Draft Constitution. Although it adopts the traditional pattern of confining membership of the JSC to judges and other members of the legal profession, it nevertheless specifies that its nine-member JSC must include a representative of the Tanzanian Mainland Law Society and a representative of the Zanzibar Law Society and two deans of law faculties of whom one must come from the mainland and the other from Zanzibar.⁵⁸ Constitutional recognition and protection of diversity within a federal arrangement such as that which exists between the Tanzanian mainland and the Island of Zanzibar is rare in African constitutional practice but this draft constitution in this and many other instances goes to some length to take into account this important fact.⁵⁹ A third aspect worth noting is the extent to which the JSC is dominated by members appointed directly or indirectly by the President. Under Botswana’s old 1966 Constitution, five of the six members of the JSC are appointed by

the President.⁶⁰ Surprisingly, article 172(1) of the draft Tanzanian Constitution empowers the President to appoint all the nine members of the JSC. Although in the case of the two deans of the law faculties, he/she is supposed to act on the recommendations of the Chief Justice, there is no clear requirement that he/she is bound by these recommendations.⁶¹ With the exception of Ghana and Nigeria,⁶² a majority of the members of the JSC in Kenya (possibly 8 out of the 11 members),⁶³ Namibia (3 out of the 5 members),⁶⁴ South Africa (15 out of the 25 members) and Zimbabwe (6–7 members out of the 13)⁶⁵ are appointed directly or indirectly by the President. This is reinforced in most of these countries (with the exception of Namibia and Zimbabwe) by the fact that the Chief Justice, a presidential appointee, is required to act as the chair of the JSC. It is clear from this that in at least six of the eight countries examined here, including South Africa, the executive appointees have the numbers to influence the decisions that the JSC takes.

From the above analysis, there are a number of problems which seem to limit the ability of the JSCs to operate and act independently. The first is the obvious one alluded to earlier; that is the fact that a majority of the members, including the chair of the commissions, are usually appointed directly or indirectly by the executive. This provides the executive with the opportunity to easily influence its appointees to nominate its preferred candidates for judicial appointment. As we have seen, there are very many reasons why African politicians have an interest in and would not miss any opportunity to appoint their preferred candidates to take up the strategic position of constitutional adjudicators. Second, even where the JSC is not easily vulnerable to political influence, the provisions defining their powers in many constitutions are worded in a manner that could lead to stalemate between the commission and the President. For example, this may occur where the constitution merely provides that the President should act in accordance with the advice or recommendations made by the JSC.⁶⁶ What happens if the President disagrees with such advice? There is clearly no binding obligation on him/her to accept or follow the advice. Equally vague is the requirement that the President should before making appointments consult certain persons, such as the leaders of opposition parties.⁶⁷ This has been a source of controversy in South Africa as it is not clear at what stage such consultation should take place⁶⁸ and whether it means anything more than that the President is required to discuss his nominations with those with whom he is required to consult and listen to their views but with no obligation to accept or consider their views.⁶⁹ The most meaningful way of getting around this problem and effectively involving more people in the decision-making process is to require that the President must choose from a list of about three nominees for each vacant position submitted by the JSC with a right for him/her to request another list if he/she is dissatisfied with the list submitted to him/her. This ensures that the President is bound to choose from the list.⁷⁰

It is appropriate to conclude this section by pointing out that the British appointment system worked very well for a long time despite being in the hands of the members of the executive, namely, the Lord Chancellor and the Prime Minister. This was, however, less a question of constitutional safeguards (of which there were very few, if any, at the time) than of political conventions. Judicial appointments were (and are) made on the basis of professional competence (the Lord Chancellor consulting informally with the professions and the Law Societies before proposing somebody to the Prime Minister) rather than for party political motives. It is a practice which has earned Britain a high reputation for the quality and independence of its judiciary and owes its basis to a strong political culture and the congeries of delegated legislation, custom and conventions which the political elites assiduously respect (Stevens 2001, 151–155). Absent a solid and enforceable constitutional foundation, it is unlikely that this can happen in Africa.⁷¹

3.2.4. Appointments made by the President based on nominations by certain groups and institutions and other methods

Appointments based on nominations made by certain groups or institutions are the common pattern for selecting members of the constitutional courts in Francophone and Lusophone Africa. At one extreme are those countries where the entire membership of the constitutional court is appointed by the President alone.⁷² This is in many respects fairly close to the Fifth Republic model that appears in the Constitutions of Benin, Cameroon and Gabon. Under these constitutions, members of the court are based on persons nominated for appointment to the President by Parliament and the CSM as well as those selected by the President himself/herself.⁷³ There are a wide variety of other methods whose essential feature is that they combine presidential appointments and some forms of elections.⁷⁴ The common feature of the courts falling under this head is that they are specialised in dealing exclusively with constitutional matters and operate outside the normal hierarchy of courts.

In most cases, the constitutional courts in Francophone and Lusophone Africa are composed of members appointed directly by the executive and the legislature. Even where some of the members are elected or designated by the CSM, the effect is the same because the latter bodies are even more politicised than the JSC. The President of the Republic is usually the chair and his/her minister of justice acts as the vice chair of the CSM.⁷⁵ To this extent, the ability for the executive to arbitrarily dictate who wants to sit as judge in the constitutional court is far more extensive in Francophone and Lusophone Africa than it is in Anglophone Africa. The only restriction imposed on executive appointments in many post-1990 constitutions is that some minimum requirements for appointees to comply with are now often specified in the constitutions. Some constitutions not only specify a minimum number of members that must be trained in law but some-times also state the minimum qualifications they should possess.⁷⁶ One new feature, usually associated with the Common law tradition, is the specification in some constitutions that some members must be legal practitioners of several years' standing.⁷⁷ These qualifying criteria serve as some constraints on the otherwise free hand that the President has over the appointment of members of the constitutional courts.

Ethiopia provides a unique departure from the common patterns of constitutional adjudication that operates in most African countries. Article 82 of its Constitution provides for an 11-member Council of Constitutional Inquiry composed of the President of the Federal Supreme Court acting as President, the Vice President of the Federal Supreme Court acting as Vice President, six legal experts appointed by the President of the Republic on recommendation by the House of Peoples' Representatives and three persons designated by the House of the Federation from its members. It is clear from this that all the members are appointed by the President and the legislature and this therefore provides considerable scope for executive-minded appointees.

4. A critical appraisal: do differences matter?

The ultimate goal in any judicial appointment system, especially one that concerns the appointment of persons who will have the powers to interpret and apply the constitution, depends on its ability to ensure that the best persons who have the competence to administer justice independently and impartially without any fear or favour and free from all sorts of direct or indirect influences or interference are appointed. However, although the crux of an efficient and competent judiciary depends on the independence of the judges, this

must always be balanced with judicial accountability. Judges cannot and should not operate in total isolation from the social and political environment in which they live. The challenge that all countries, whether developed or underdeveloped, face is that of designing appointment systems that insulate judges from the partisan political processes through which they are appointed whilst ensuring their independence and accountability. The preceding discussion has in a general way indicated the main trends and patterns that have emerged in Africa since the 1990 wave of constitutional reforms started. It is widely recognised in both theories of judicial independence and judicial practice that judges whose appointment depends too much on the discretion of the persons who appoints them cannot be relied upon to deliver neutral, legitimate and high-quality decisions (Garoupa and Ginsburg 2009, 103–104). The discussion also shows that in many respects, the approach used in many Anglophone African countries differ from that used in many Francophone and Lusophone African countries. Do these differences matter? Given that constitutional adjudicators are increasingly being confronted with many politically sensitive disputes, which of these systems reduces the risks of political interference?

4.1. Balancing independence and accountability

Two important core elements of modern constitutionalism (Akiba 2004; Federico and Fusaro 2006; Fombad 2007a, 2008a; Hatchard, Ndulo, and Slinn 2004; Oloka-Onyango 2001), the requirements of an independent judiciary and the separation of powers, come into play here. In both constitutional theory and practice, it is recognised that both elements are ideals to be aspired due to the impossibility of completely eliminating some political role for the other two branches as a form of the checks and balances that are necessary to make a separate and independent judiciary effective and efficient.⁷⁸ The question, therefore, is whether what is provided for under African constitutions is anything more than the political involvement in the appointment of constitutional adjudicators that is necessary and helpful in providing checks and balances. Or, does it appear to have crossed the thin border between the acceptable into the arena of over politicisation of the appointment process which inevitably results in risk of the politicisation of constitutional adjudication?

Our earlier analysis clearly suggests that the process of appointment of constitutional adjudicators in Francophone and Lusophone Africa appears to be dominated by the President. This is because the appointments are made either directly by him/her or indirectly by institutions such as the National Assembly, Senate and, to a limited extent, the CSM, which are basically political institutions increasingly controlled and dominated by supporters of the President or his party.⁷⁹ It, therefore, follows from this that whether these other institutions recommend, nominate or even appoint the judges, because of the powerful position occupied by the President, he/she is often in the position to ultimately determine who serves as a constitutional adjudicator. This view is reinforced by the fact that the phenomena of an imperial presidency have survived in the post-1990 constitutional reforms and are particularly accentuated in the Francophone and Lusophone African constitutions (Fombad and Nwauche 2012, 91–118; Prempeh 2008, 761–834).⁸⁰

By contrast, in Anglophone Africa, constitutional adjudicators are appointed by presidents acting on the advice of their JSC which appear to play an important role in the process. Two important observations should be made here. First, we have noted that in quite a good number of countries, these commissions are dominated by persons appointed directly or indirectly by the President. As in Francophone and Lusophone Africa, where the members are appointed by other political institutions, the overarching phenomena of dominant

political parties will ensure that the final decision will conform to the President's preferences. Second, we have noted that in many Anglophone countries, whilst most ordinary constitutional adjudicators are selected on the basis of the recommendations of the JSC, there persists, even in some modern constitutions, the anomalous situation where the Chief Justice and his/her deputy, who in many instances are also stated to be the chair and deputy chair of the commission, are appointed at the absolute discretion of the President acting alone. The fact that he/she may be required to consult others in making this appointment does not in any way diminish his/her ability to appoint whosoever he/she wishes who meets the minimum requirements.⁸¹ It could, therefore, be argued that in Africa, the appointment of constitutional adjudicators is largely politicised. There are often some limitations based on certain requirements that the appointees need to meet. We will now examine this to see to what extent this may limit political discretion.

4.2. Impact of merit and other functional criteria

In an era marked by greater sensitivity than ever to constitutionalism, human rights protection and democratisation, something more than mere technical and professional merit, are important. Explicit selection criteria such as age limits, ethnicity, regional origin, legal qualifications and experience provide useful ways of mitigating the reach of political and partisan influence. One or more of these criteria may be emphasised to address the specific needs and concerns of a country at a particular time. We will briefly consider how some of these factors may impact positively or negatively on the appointment process.

The traditional factors that are often taken into account at least in Anglophone Africa are the setting out of a minimum academic qualification as well as minimum number of years spent in professional practice as criteria for appointment as constitutional adjudicators. Unlike the typical 1958 constitutional council model, Francophone and Lusophone African constitutions now expressly state that constitutional courts must be composed of a certain minimum number of people who are legal experts. Some of these constitutions also have adopted the common law approach by requiring that some of the adjudicators must be legal practitioners with several years of practical experience.⁸² These are positive constraints which compel the President to only appoint persons who meet these minimum standards.

Far more significant and sometimes controversial are some other constraining factors that are dictated by the particular history of the country and other peculiarities of its internal political dynamics. In this regard, the main issue in many African countries has been the challenge of ensuring that the country's diversity is reflected in the make-up of the constitutional court. A number of examples are worth mentioning here. The first is the draft Tanzanian Constitution which, in a fairly unique manner, tries to ensure that all institutions have representation from the two states that make up the "United Republic" of Tanzania. In appointing the Chief Justice and Deputy Chief Justice, the President is required to select from a list submitted by the JSC, but article 152(1) limits his/her discretion by stating that in acting, "... if the Chief Justice comes from one part of the United Republic then the Deputy Chief Justice shall come from the other part of the United Republic."⁸³ This is reinforced by article 173(3)(b) which states that the JSC in implementing its constitutional duties must observe the "representation of the two Parties to the Union." This is an excellent lesson in how to manage diversity in Africa. Zanzibar, in spite of its small size and population vis-à-vis, the mainland is treated as a partner.⁸⁴ Cameroon is the only other African country that has been confronted with a similar situation (Fombad 2008b, 121–156). At independence, it adopted a bi-jural legal system to

take account of the Anglophone community (which makes up almost one third of the population) but has since the late 1990s embarked on a policy of suppressing its legal diversity in favour of a uniform civilian system.⁸⁵ By contrast, Tanzania although essentially a common law country has taken steps to preserve and protect the Islamic law that applies to its minority Muslims. The issue of legal pluralism in modern Africa is a contemporary reality and given the increasing interest in reviving traditional systems of adjudication expertise in customary law and/or Islamic law, in those communities with large Muslim populations such as Nigeria is important.⁸⁶

Another dimension of diversity consciousness is the issue of gender representation on constitutional courts. Efforts to ensure that constitutional courts are constituted in a gender-sensitive manner are surprisingly reflected in only a few constitutions. One good example is article 74 of the Constitution of the Central African Republic. It states that the Constitutional Court should include *inter alia*, two magistrates elected by their peers, two persons appointed by the President and two persons appointed by the President of the National Assembly. It then adds that at least one of the appointees in each of these three instances must be a woman. In this way, at least three of the nine members of the Court will be women. Some other constitutions such as the South African Constitution merely provide in section 174(2) that the “need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.”⁸⁷ It would probably have been more effective if, as in the case of the Central African Republic, it was expressly stated that a minimum number of women must be appointed to the constitutional court. The South African situation presents an interesting example of the complexities of combining merit and other considerations which are often of a political nature but have to be rationally explained. The biggest challenge that the South African JSC faces today is that of rationally translating and reflecting the overarching national agenda of transformation through the appointment of judges in a manner that “broadly” reflects the “racial and gender composition of the country.” This, it must be said, does not necessarily mean that a court, such as the Constitutional Court, must exactly reflect the racial composition of the country.⁸⁸ Nevertheless, the JSC has been unable to develop a clear, coherent and transparent agenda on how to deal with judicial appointments that reflect these vague criteria. Some of the recent appointments have been controversial and have given rise to criticisms that political considerations and the heavy hand of the executive are as strong and decisive in South Africa as they are in most other African countries.

5. Looking forward: dispersing appointment powers

It is clear that none of the existing systems adopted, whether in Anglophone, Francophone or Lusophone Africa or in fact, in any country in the world for that matter, provide an irreproachable model for the appointment of constitutional adjudicators. Hence, whilst judicial appointment systems all over the world always generate controversy and criticisms, the problem is particularly acute in Africa. Nurturing, entrenching and consolidating constitutionalism and respect for the rule of law require competent adjudicators who are not easily vulnerable to political manipulation.

The efforts so far to improve on the inherited colonial legal models have often been half-hearted symbolic gestures. For example, many Francophone African countries pride themselves in the fact that their modern constitutions have transformed the judiciaries from being merely *autorité judiciaire* (judicial authority) to a *pouvoir judiciaire* (judicial power).⁸⁹ The mere introduction of the expression “judicial power” without more, as has

been the case in most of these countries, does not in itself and of its own possess any magic that will transform a judiciary still substantially emasculated by an overbearing executive into an independent judiciary.⁹⁰ A similar dominance of executives in critical aspects concerning the judiciary in Anglophone Africa has been noted. These executives often have the sole discretion to appoint the Chief Justice and his/her deputy, both of whom in playing the role of chair and deputy chair, respectively, of the JSC make it more difficult for the appointment of competent independent-minded judges.⁹¹ Promoting effective constitutional justice at a time when democracy and constitutionalism are under threat from recalcitrant African leaders still determined to hold onto power, and at a time when the courts are under increasing pressure from the executive, calls for serious rethinking of the way constitutional adjudicators are appointed. This entails undertaking a fundamental dispersal of the powers to appoint constitutional adjudicators in such a way that there is a fair balance between democratic legitimacy and accountability on the one hand and the independence that the adjudicators need to discharge their mandate in an impartial and effective manner, on the other hand.

Democratic accountability and legitimacy dictate that politicians should play a role. From the perspectives of the constitutional principles of separation of powers and independence of the judiciary, the political role serves as necessary and important checks and balances to minimise what the French 1789 revolutionaries saw as the risk of a “government of judges.” However, the judiciary, the weakest of the traditional triad of government, is possibly at its most vulnerable when it comes to appointments. What in principle looks like necessary checks and balances through the intervention of the executive and the legislature in the JSC and to a fairly limited extent the CSM, in the appointment of constitutional adjudicators does not in practice in Africa work out that way. The technical complexities of how the JSCs and CSMs operate in most countries on the continent cannot obscure the underlying power relationships at play. The powerful executives and the all-pervasive dominant parties ensure that parliamentary approval of JSC recommendations is a formality. Even within the JSC, a combination of the executive and the legislature, all under the influence of the all-pervasive dominant parties in Africa, often ensures that the executive agenda prevails. Although political parties may not fully implement a strict party whip voting system to have their way either on the JSC or CSM, it is a practical reality that political parties will always caucus and influence the outcomes of these commissions.

Ostensibly progressive provisions that seem to promise independent judiciaries with expanded powers, especially with respect to judicial review, are effectively compromised by the failure to ensure that merit and professional qualities are given priority over political considerations in judicial appointments. One lesson that does not appear to have been learnt well enough from the pre-1990 era was that African judiciaries were at their weakest and least efficient point when they came under the control of the authoritarian regimes in place. It was, therefore, no surprise that they were unable to play any effective role in checking the abuses of powers that regularly took place.

Judicial appointments will remain a complex issue in which one has to reconcile many conflicting factors and interests – professional qualifications, technical expertise, judicial independence, judicial accountability and political oversight. JSCs and CSMs, as presently constituted under modern African constitutions, are too heavily politicised to be impartial. Dispersing the powers of appointment amongst several actors will limit the risk of one individual or branch of government exerting undue influence in determining those who are appointed as constitutional adjudicators and in this way positioning themselves not only to influence the outcome of future constitutional disputes but also the future

development of the law. This will require an appointment commission that is non-partisan and in which no particular group or branch of government dominates.

At the heart of any future reforms of the constitution of JSCs and CSMs in Africa is the need to reduce the presence and participation of representatives or persons appointed directly or indirectly by both the executive and the legislature to less than 50% of the membership of these commissions. In designing such a system, whilst it is useful to look at good practices elsewhere, the decisive factor should be ensuring that it will be able to deal with politicisation of the present processes due to the ease with which Africa's imperial presidents are able to use their dominant parties to get executive-minded adjudicators appointed. Some of the defenders of the status quo often point to the politicised processes in many Western countries, for example, the appointment of judges of the US Supreme Court.⁹² This may well be so, but the point to emphasise is that the manner of appointment must not only reflect the history, political and constitutional culture of the country but must also be sufficiently robust to cope with its actual and potential challenges. Regardless of the manner of their appointment, US judges have, only in exceptional circumstances,⁹³ allowed their political ideology or leanings to distract them from their sacred responsibility to do justice in the manner that is routinely done by African constitutional adjudicators, especially when dealing with sensitive political disputes.

An ideal JSC or CSM should be non-partisan, broadly based and comprises members elected or appointed from diverse backgrounds. It is suggested that such a commission should be made up of 10–15 members constituted as follows: one person representing the executive; three persons of whom one must be from the main opposition party, representing parliament (in a bicameral setting, two from the lower and one from the upper house);⁹⁴ one to three persons representing civil society and other professional associations; one to two academics; one to two representatives of the bar, and two to three judges, at least one of whom must be retired.⁹⁵ The commission should be given the powers to elect its own chair rather than having either the President of the Republic or the Chief Justice being appointed a permanent chair. The anomaly of having the President of the Republic acting as chair of such a commission is so manifestly obvious that it warrants no discussion. It hardly makes any sense to expect him/her to chair a commission whose agenda he/she is supposed to prepare and make recommendations which are supposed to be sent to him/her! It is equally problematic to have a Chief Justice chairing the meetings of a commission whose recommendations might well become the subject matter of judicial review before him/her.⁹⁶ A commission structured along these lines strikes a reasonable and sensible balance between the need for the expert knowledge of lawyers (on the issue of expertise and merit) and the common sense of laymen and politicians (with respect to democratic accountability and legitimacy). It is a balance which ensures that judicial appointments do not ignore the social, economic and political conditions prevailing.

6. Conclusion

Our analysis clearly shows the system for the appointment of constitutional adjudicators in Anglophone African countries differs from that in Francophone and Lusophone African countries. However, the outcome, insofar as the scope for political meddling with who is ultimately appointed as a judge is concerned, is almost the same, the only difference being in the degree of meddling. For example, whilst in most Anglophone African countries, the President appoints at his/her sole discretion the Chief Justice, who is not only head of the judiciary but also head of the JSC; the President in most Francophone and Lusophone countries is responsible for appointing most of the constitutional

adjudicators and presides over the CSM which sometimes has a role in “recommending judges” for such appointments. This practically means that those who are most responsible for the abuse of powers have been given the decisive role in determining who will adjudicate over these abuses of powers. If constitutional adjudicators are supposed to constraint governments and protect citizens, it is difficult to justify why those who usually abuse powers most should have such a crucial role to play in who becomes a constitutional adjudicator. This is particularly so since these adjudicators occupy such sensitive and critical positions in that they can invalidate government action as well as legislative enactments. There is a risk that in the increasingly volatile and unpredictable political environment prevailing today, unless the manner in which constitutional adjudicators are appointed is made more transparent and the role of politicians significantly reduced, the judiciaries on the continent will once again be docile bodies perceived as willing accomplices who provide a veneer of legitimacy for the egregious oppressive, corrupt and incompetent ruling elites in Africa.

A high degree of judicial quality, probity and independence is a powerful bulwark against the abuses of powers, endemic corruption and hegemonic tendencies that have begun to manifest themselves as signs of an authoritarian resurgence and relapse to pre-1990 dictatorship increase. To further disperse the already exorbitant powers that executives throughout Africa possess or often easily arrogate to themselves and to reduce the risk of constitutional courts or courts dealing with constitutional issues being packed with executive-minded adjudicators, it is generally necessary to ensure that appointment bodies, such as the JSC or CSM, are never composed of persons, 50% of whom are directly or indirectly appointed by the legislature and executive. If these bodies are properly constituted as proposed in this paper, this will enhance the chances of a well-balanced selection system that is well placed to objectively appoint or recommend for appointment constitutional adjudicators that are competent, impartial and politically neutral but accountable. Politicians, whether in the executive or legislature, are too self-seeking and preoccupied with trying to consolidate their hold on power to bother about looking for the quality judges that are needed to promote constitutionalism and the rule of law. Besides this, society legitimately expects certain high standards from their constitutional adjudicators: scholarship, experience, dignity, rationality, courage, forensic skill, capacity for articulation, diligence, intellectual integrity, rigour and energy. These important qualities will hardly be given priority where politicians play the decisive role in deciding who judges will be. Nor can such qualities be displayed by a person whose only claim to a position on the constitutional court bench is because he/she is favoured by politicians. As many African leaders grudgingly grapple with the challenges of operating within the bounds of constrained powers, nothing should be done that will provide them with an easy means to evade these constraints. Giving them the powers to determine who will judge them when they abuse their powers places them in the situation of judge and party. Whilst it is clearly undesirable both from the perspectives of the law and that of political legitimacy to exclude politicians from playing any role in the appointment of judges generally and constitutional adjudicators in particular, this paper strongly argues that their role should be reduced to ensure that they will not be in a position to manipulate or control judges.

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Notes

1. The term “constitutional adjudicators” is used in a broad sense to refer to all judges who have been conferred with the power to deal with any disputes concerning the interpretation or application of the constitution, regardless of whether they are sitting in an ordinary court which has jurisdiction to handle constitutional disputes as well as other disputes or are sitting in a specialised court which deals exclusively with constitutional disputes. As is shown later in the paper, some of those appointed to sit in some of the specialised courts, such as the constitutional courts/councils in Francophone and Lusophone Africa, need not really be jurists.
2. Legal pluralism is a key feature of African legal systems but is hardly factored in when judicial appointments are made.
3. It must be pointed out that this paper deals exclusively with the issue of appointment which is one but by no means the only factor that is crucial in enabling judges generally to act independently without fear, favour or prejudice. Besides the need for an effective system of separation of powers, other important factors needed to facilitate the establishment of a genuinely independent judiciary are (1) institutional arrangements for judicial autonomy; (2) financial arrangements for judicial autonomy; (3) arrangements for the security of the judicial office; (4) adequate remuneration of judicial officers; and (5) judicial accountability. For a detailed comparative discussion of this from an African perspective, see Fombad (2007b).
4. See, for example, article 117 of the Benin Constitution of 1990, article 73 of the Constitution of the Central African Republic of 2004, article 161 of the Constitution of the Democratic Republic of Congo of 2006, article 84 of the Constitution of Gabon of 1991 and article 127 of the Constitution of Niger of 1999.
5. For example, the violence and loss of lives that followed the disputed Kenyan and Zimbabwean presidential elections of 2008 are still very fresh in people’s minds.
6. The most recent examples are the Kenyan and Zimbabwean presidential elections of 2013 where the courts had to intervene. Similarly, but perhaps more problematic on account of its protracted nature is the fact that the challenge over the outcome of the 2012 Ghanaian presidential elections was only resolved in September 2013 when the Supreme Court delivered its judgement in favour of the incumbent.
7. For example, in July 2010, three South African political parties, the Inkatha Freedom Party (IFP), the Africa National Congress (ANC) Youth Wing and the Congress of the People (COPE), went to court to resolve leadership disputes. See “Bench becomes ballot box,” accessed at <http://www.accessmylibrary.com/article-1G1-232534332/interdict-season-bench-becomes.html> (accessed in May 2014).
8. Two examples of these decisions are: *Glenister v President of the Republic of South Africa* [2011] ZACC 6 where the Constitutional Court by a majority of five to four declared that the amendment of Chapter 6A of the South African Police Service Act which replaced a corruption unit which the ruling party did not like was inconsistent with the constitution and invalid to the extent that it failed to provide for an adequate degree of independence for the corruption-fighting unit. And in *Crawford-Browne v President of the Republic of South Africa*, Case No: CCT 103/10 (applicant’s submissions), accessible at http://www.ifaisa.org/current_affairs/Crawford-Browne_heads_for_Concourt_FINAL.pdf (accessed in May 2014), pressure was put on President Zuma to appoint a commission of inquiry to review a controversial arms deal in which it was alleged many politicians, including the President had received huge bribes.
9. [2011] ZACC 23.
10. [2011] ZACC 23.

11. [2011] ZACC 6.
12. See, “Constitutional: Zuma on ConCourt powers raises concerns,” *Legalbrief Today* Issue No: 2974 of Tuesday, 14 February 2012.
13. For example, Mr. Ramatlhodi, a member of the national executive committee (NEC) of the ANC, chairperson of the ANC National Elections Committee and Deputy Minister of Correctional Services, argues that the Apartheid regime sought to retain white domination over the black government when they left office by immigrating substantial power away from the legislature and the executive and vesting it in the judiciary, Chapter 9 institutions (established in the Constitution) and civil society movements. See, “THE BIG READ: ANC’s fatal concessions,” <http://www.timeslive.co.za/opinion/commentary/2011/09/01/the-big-read-anc-s-fatal-concessions> (accessed in May 2014).
14. See, “Judiciary must respect separation of powers – Jacob Zuma,” <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=264525&sn=Detail&pid=71616> (accessed in May 2014).
15. The French Constitutional Council for several decades never worked well and in fact, was able to address some of the violations of the French Constitution by default rather than by design. From its establishment in 1958, it did almost nothing until 1974. Some commentators have even argued that the late President De Gaulle, author of the 1958 Constitution, designed the Constitutional Council as the handmaiden of a strong and dominant executive and did not anticipate that the Council would become an arbiter of fundamental constitutional guarantees. Before the 2008 revision of the French Constitution, the Council was able to intervene in a number of cases merely because it arrogated to itself more powers than it was given and the fact that it needed to pre-empt aggrieved citizens resorting to the various supranational judicial bodies that were available because of France being a member of the European Union (Merryman 1996, 109–119; Provine 1996, 177–248).
16. This mainly obtains in the USA but there is some form of it in some African jurisdictions. An example of this can be found in article 170(1) and (4) of the Mozambican Constitution of 1990. More generally, see Akkas (2004, 201–202) where he discusses the elective system; and Flango and Ducat (1979, 2 5 –44) who discuss the judicial selection systems in the USA.
17. This operates within the career judiciaries that exist in Francophone Africa (Fombad 2007b, 233–257).
18. For further discussion of these methods, see Fombad (2014a) and Ngege (2013, 433–460).
19. 5 US (I Cranch) 137, 180.
20. See sections 18 and 95 of the constitution of Botswana, sections 22 and 119 of the constitution of Lesotho, sections 11 and 108 of the constitution of Malawi, sections 83–84 of the constitution of Mauritius, articles 25 and 80 of the constitution of Namibia, section 251(1)(9) of the constitution of Nigeria, section 24 of the constitution of Zimbabwe, and sections 127 and 131 of the constitution of Gambia.
21. See items 94–97 of the constitution of 1991.
22. See articles 46–52 of the constitution of 1996. Although the law introducing the constitution gives the impression that it is merely an amendment to the 1972 constitution, the declared intention until this constitution was promulgated into law had been to make a new constitution and, in fact, the number of articles doubled.
23. See articles 157–169 of the constitution of 2005.
24. See articles 74–75 and 89–90 constitution of 2001.
25. See articles 82–84 of the constitution of 1994.
26. See articles 33 and 130 of the constitution of 1992.
27. See sections 38 and 167 of the constitution of 1996.
28. It is usually different in those Anglophone countries which have a specialised constitutional court, such as South Africa. In this regard, see section 174(3),(4),(5) and compare with section 174(6) and (7) of the South African Constitution.
29. There are some exceptions usually in those countries where there is a dual executive, for example, where there is a monarchy. Thus, in Morocco, under article 130 of the July 2011 Constitution, and in Swaziland under section 153(1) of the 2006 Constitution, the appointments are made by the King.
30. See article 2.14(b) of the Universal Declaration on the Independence of Justice, otherwise known as the Montreal Declaration of 1983.
31. This is a generic name which, in this context, refers to the different commissions provided under Anglophone African constitutions to deal with issues of judicial appointment,

promotions and discipline. Although most of them are referred to as Judicial Service Commissions, some countries have adopted different names. For example, in Nigeria under the 1999 Constitution, we have the Federal Judicial Service Commissions and National Judicial Council (see Third Schedule of the Constitution), the Judicial Council in Ghana (article 153 of the 1992 Constitution) and Judiciary Service Commission in articles 172–175 of the draft Tanzanian Constitution of July 2013. This must, however, be distinguished from the Supreme Council for Magistracy, at least insofar as the appointment of constitutional adjudicators are concerned which will be discussed later.

32. See, for example, article 118(2) and (3) of the Tanzanian Constitution of 1977.
33. See section 96(1) of the Constitution.
34. See section 100(1) of the Constitution.
35. See sections 96(2) and 100(2).
36. The qualifications for appointment as Chief Justice and President of the Court of Appeal are not explicitly stated but it may be implied that they are the same as that laid down for appointment of judges and justices in sections 96(3) and 100(3), respectively, of the Botswana Constitution.
37. See section 174(3) of the South African Constitution of 1996.
38. There are a few exceptions to the constitutions mentioned earlier which provide for a hybrid system of constitutional review, a typical example being South Africa's well-known Constitutional Court.
39. This rather unusually small court is provided for under article 89 of the Senegalese Constitution of 2001. Other equally small courts composed of seven members are provided for under article 115 of the Benin Constitution of 1991 and article 121 of the Niger Constitution of 1999.
40. This is the case under article 130 of the Moroccan Constitution of 2011 and article 115 of the draft Tunisian Constitution of 2013. Some also provide for an 11-member court, such as article 180(2)(f) of the Angolan Constitution of 2010, and article 51(1) of Cameroon's Constitution of 1996.
41. These are three by the President of the National Assembly, three by the President of the Senate and two by the Higher Judicial Council.
42. For example, 6 out of the 12 in Morocco's Constitution of 2011; 3 out of the 7 in Benin's Constitution of 1990; 4 out of the 11 in Angola's Constitution of 2010; 3 out of the 9 in article 89 of Gabon's Constitution of 1991 and also in article 158 of the Constitution of DR Congo of 2006; and 2 out of the 9 in article 74 of the Constitution of Central African Republic of 2004. The rest of the members are appointed or recommended for appointment by the President by other bodies or institutions such as the Presidents of the Senate and National Assemblies and occasionally, the head of the National Bar Association.
43. Insofar as the requirement for the appointment of legal practitioners is concerned, see, for example, article 115 of the Benin Constitution of 1990 and article 74 of the Constitution of the Central African Republic.
44. See, for example, under article 130 Morocco Constitution of 2011, and in Swaziland under section 153(1) of the 2006 Constitution, where the appointments are made by the King.
45. Under the Nigerian 1999 Constitution, this applies under section 231 to the Chief Justice and justices of the Supreme Court, the President of the Court of Appeal under section 238(1) and the Chief Judge of the Federal High Court under section 250(1). Under the Ghanaian Constitution of 1992, it applies under article 144(1) and (2) to the Chief Justice and justices of the Supreme Court and under the Kenyan Constitution of 2010, it only applies to the Chief Justice and Deputy Chief Justice under article 166(1)(a). The Kenyan approach is adopted in the July 2013 draft of the Tanzanian Constitution in articles 151 and 152.
46. Studies such as those by De Jager and Du Toit (2013), De Walle (2003) and Young have revealed the weaknesses of African legislatures vis-à-vis the executive.
47. See, for example, article 166(b) of the Kenyan Constitution of 2010, article 82(1) of the Namibian constitution of 1990, and articles 250(2) and 256(2) of the Nigerian Constitution of 1999.
48. See article 144(3) of the Ghanaian Constitution of 1992, section 77(3) of the Mauritius Constitution of 1968 and section 153(1) of the Swaziland Constitution of 2005.
49. See, for example, articles 162(1) and 163(1) of the Tanzanian draft Constitution of 2013 and section 180(1) of the Zimbabwean Constitution of 2012. The South African Constitution of 1996 provides for nominations by the Judicial Service Commissions in section 174(4) but this only provides a list which the president is supposed to use and consult the Chief Justice and

- the leaders of parties represented in the National Assembly before making a decision as to who to appoint.
50. See article 128 of the Constitution of Benin of 1990, article 37(3) of the Constitution of Cameroon of 1996, article 70 of the Constitution of Gabon of 1991, article 119 of the Constitution of Niger of 1999 and article 90 of the Constitution of Senegal of 2001. It is referred to as the Superior Council of Judicial Power in article 109 of the 2011 Constitution of Morocco, High Council of the Judicial Bench in article 184 of the 2010 Angolan Constitution and Supreme Council of the Judiciary in article 170(2) of the 1990 Constitution of Mozambique.
 51. See article 15 of the Beijing Statement, <http://lawasia.asn.au/objectlibrary/147?filename=Beijing%20Statement.pdf> (accessed in May 2014).
 52. According to section 178(1) of the South African Constitution, the JSC is constituted of the following:
 - (a) The Chief Justice, who presides at meetings of the Commission.
 - (b) The President of the Supreme Court of Appeal [Para. (b) substituted by section 16(a) of Act 34 of 2001.]
 - (c) One Judge President designated by the Judges President.
 - (d) The Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member.
 - (e) Two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President.
 - (f) Two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President.
 - (g) One teacher of law designated by teachers of law at South African universities.
 - (h) Six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly.
 - (i) Four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces.
 - (j) Four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly.
 - (k) When considering matters relating to a specific division of the High Court of South Africa, the Judge President of that division and the Premier of the province concerned, or an alternate designated by each of them.
 53. See sections 103–104 and article 85 of their constitutions.
 54. See section 978(1) of the Constitution.
 55. See article 153 of the Constitution.
 56. See section 178(1) of the Constitution.
 57. See section 178(1) of the Constitution.
 58. See article 172(1) of the draft Constitution.
 59. Contrast this with Cameroon's continuous inability to find a suitable constitutional framework for the harmonious co-existence of the former English and former French parts of the country (Fombad 2008b, 121–156).
 60. See sections 103–104 of the Constitution.
 61. Under section 85 of the Constitution of Mauritius, potentially all members of the JSC are presidential appointees also.
 62. In Ghana, about 6 out of the 18 members of the JSC, and in Nigeria, 7 out of the 21 members are appointed directly or indirectly by the President. See article 153 and section 12, Part 1 of the Third Schedule Ghanaian and Nigerian Constitutions.
 63. See article 171(2) of the Constitution.
 64. See article 85 of the Constitution.
 65. See article 189(1) of the Constitution.
 66. For examples of such obscure provisions, see article 166(1)(a) and (b) of the Kenyan Constitution, sections 231(1) and (2), 238(1) and (2) and articles 151(1), 152(1) and 153 of the draft Tanzanian Constitution.
 67. See, for example, article 144(2) and (4) of the Ghanaian Constitution and section 174 of the South African Constitution.

68. For example, in making his appointments, President Zuma usually started consultations only after making public his preferred appointees for the position. After protests by opposition leaders, he has now agreed to what has been referred to as “real and meaningful consultations,” most probably meaning that he will talk to them before making public his preferred choice. See further, “Zuma agrees to more consultation,” <http://www.iol.co.za/news/politics/zuma-agrees-to-more-consultation-1.1334468#.UiCD4lJMfcc> (accessed in May 2014).
69. A number of decisions of the Indian Supreme Court have dealt with the important issues of the nature of the constitutional obligation to consult. None of these appear to suggest that it means anything more than imposing an obligation to ascertain the views of the party that must be consulted. See the advisory opinion it gave in *Re Presidential Reference*, AIR (1999) SC 1.
70. This is provided for under section 174(4) of the South African Constitution only with respect to judges of the Constitutional Court and under section 180(2) (d) of the Zimbabwean Constitution.
71. For example, the numerous attempts by the executive to manipulate the judicial appointment processes in South Africa have been significantly checked by the solid constitutional foundation and the right it gives citizens to challenge any violations. It is thus no surprise that the JSC has been taken to court whenever there was a suspicion that its decisions had been unreasonably influenced by the executive. Thus, in *Judicial Service Commission v Cape Bar Council*, 2013 (1) SA 170 (SCA), the Supreme Court of Appeal held *inter alia* that the decision by the JSC not to recommend any of the candidates it had interviewed for judicial appointment to fill existing vacancies without giving any reasons was *prima facie* irrational and invalid. The effect of this has been to ensure that the judicial appointment processes are transparent and fair. In spite of this, the South African constitutional framework is not perfect. See, for example, the discussion by Forsyth (2012, 69–84) of one of the matters that was poorly handled by the JSC.
72. See article 89 of the Senegalese Constitution of 2001.
73. For example, under article 115 of the 7-member Benin Constitutional Court, 4 members of the court are appointed by the National Assembly and 3 by the president; under article 51(2) of the Cameroon Constitution, the 11-member Constitutional Council is composed of 3 persons, including its president, designated by the president, 3 members designated by the president of the National Assembly, 3 members designated by the president of the Senate and 2 members designated by the CSM. It provides that former presidents are *ex officio* members. Under article 89 of the Constitution of Gabon, the 9-member Constitutional Court is made up of 3 members each designated by the president of the Republic, the president of the National Assembly and the president of the Senate.
74. See, for example, article 130 of the Constitution of Morocco which provides for a 12-member Constitutional Court with 6 members designated by the President, 3 elected by the Chamber of Representatives and 3 by the Chamber of councillors. Article 180 of the Angolan Constitution provides for an 11-member Constitutional Court composed of 4 presidential appointees, 4 members elected by the National Assembly and 2 elected by the Supreme Judicial Council.
75. See, for example, article 70 of the Constitution of Gabon and article 115 of the Constitution of Morocco which provides for the King to chair. In most instances, such as Cameroon, it is the ordinary laws which confer these powers on the President and his/her minister of justice. Some aspects of this are discussed by Abdourhamane, who points out that in spite of the constitutional reforms of the last two decades, there have been little changes in the laws regulating the judiciary in Francophone Africa especially those that still allow the President of the Republic and his/her minister of justice to be chair and deputy chair, respectively, of the CSM.
76. See, for example, article 121 of the Constitution of Niger,
77. See, for example, article 115 of the Constitution of Benin and article 89 of the Constitution of Gabon,
78. For a discussion of separation of powers in Africa, see Fombad (2005).
79. For purposes of this analysis, if we consider a dominant party as one which has a majority of 65% and above of the members of parliament, then one could rightly say that many of the African parliaments are under the control of such dominant parties. However, for a more theoretical discussion of this topic, see Bogaards (2004), Brooks (2004, 1–24) and Van Ejd (n.d.).
80. See generally, Premph, Kwasi. 2008. “Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa,” *Hastings*

- Constitutional Law Quarterly* 35 (4): 761–834; and Fombad Charles Manga, and Nwauche, Enyinna. 2012. “Africa’s Imperial Presidents: Immunity, Impunity and Accountability,” *African Journal of Legal Studies* 5(2): 91–118.
81. For example, the South African Constitution states in section 174(3) that the President appoints the Chief Justice and Deputy Chief Justice “after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly.” This has given rise to all sorts of sophisticated semantic arguments. For example, Advocate Dumisa Ntsebeza, in a letter of 18 August 2011 has argued that: “The Constitution, . . . deliberately wanted to give a President much more leeway in the appointment of a CJ. He does not appoint IN consultation with the JSC and leaders in the National Assembly (NA), but merely AFTER consultation. See further, “Nomination of Mogoeng Mogoeng for position of Chief Justice,” http://www.ifaisa.org/Nomination_of_Mogoeng_Mogoeng_for_CJ.html (accessed in May 2014).
 82. See, for example, article 74 of the Constitution of Central African Republic and article 121 of the Constitution of Niger.
 83. Article 1(1) states that “The United Republic of Tanzania is a Federation which is sovereign and has resulted from the Union of two countries of the Republic of Tanganyika [often referred to as mainland Tanzania] and the People’s Republic of Zanzibar which before the agreement of the Articles of Union of 1964 were independent states.”
 84. According to the Tanzanian National Bureau of Statistics census results of 2012, the population of the Mainland is 43, 625,354 million and that of Zanzibar is 1,303,569 million. See <http://www.nbs.go.tz/> (accessed in May 2014).
 85. The common law applied in the two Anglophone regions which make up 20% of the population whilst the civil law applied in the eight Francophone regions which make up 80% of the population. Because no constitutional provision clearly recognises and protects this religious diversity, there has been a progressive dismantling of the common law system through the imposition of civil law principles and practices in the Anglophone regions (Fombad 2014b).
 86. After decades of marginalisation, the important role customary law and customary courts can play in adjudication is increasingly being recognised all over Africa. For example, there are currently 429 customary courts in Botswana. See <http://www.gov.bw/en/Ministries–Authorities/Ministries/Ministry-of-Local-Government-MLG1/FAQ/Tribal-Administration/> (accessed May 2014). It has been argued that there is now a need to re-design African law school curricula to make the teaching of customary law and/or Islamic law mandatory in order to adequately prepare the law students of today to work in Africa’s pluralistic legal environment (Fombad 2014c).
 87. Also, see article 173(3)(c) of the draft Tanzanian Constitution where the need to observe “representation in terms of gender” appears to be imposed on the JSC.
 88. That is, be made up of the exact proportion of the different races which presently stand at 79% blacks, 9.8% whites, 8.9% coloured and 2.5% Indians.
 89. Many Francophone countries have not yet purged their systems of the inherited Gallic obsessive fear of so-called “government by judges.”
 90. For this change, see article 125 of the Constitution of Benin; article 101 of the Constitution of Côte d’Ivoire of 2000; article 80 of the Constitution of Guinea; article 80 of the Constitution of Senegal and article 113 of the Constitution of Togo. As, Monsi points out, besides introducing the concept of judicial powers, the judiciary still operates under pre-1990 laws which contain numerous constraints on the ability of judges to act independently and impartially without frequent interference from the executive. Abdourhamane also notes that there have also been no changes in many Francophone countries in the laws regulating the judiciary.
 91. For a constitutional system that lays so much emphasis on constitutional values and principles, it was unwise to make the Chief Justice the chair of the JSC. The present Chief Justice is now under fire and an official complaint calling for his impeachment has been lodged at the JSC in response to controversial speech he gave in which he attempted to deflect some of the criticisms levelled at the JSC. The complainant rightly argues that by making and disseminating the speech “the Chief Justice brought the judiciary and the high office which he holds into disrepute in that he descended into the arena of contestation and controversy in respect of issues which are pending in the High Court and which, in the light of their constitutional nature, are likely to require final determination in the Constitutional Court.”. Such conduct, the complainant argues “is in conflict with the provisions of clause 10(1) of the Code of Judicial Conduct for Judges.” See further, *Legalbrief Today* Issue No: 3332 of Tuesday 6 August 2013.

92. For example, Chief Justice Mogoeng Mogoeng has defended the allegations of political interference in the work of the South African JSC by citing foreign jurisdictions, especially the USA where the appointment of judges according to him is a “politicians’ work.” See, report in City Press, Monday 18 August 2013. <http://www.citypress.co.za/news/advocates-body-backs-leaner-jsc> (accessed in May 2014).
93. One of this is the famous *Bush v Gore* 531 US 98 (2000) case, where the Supreme Court was split five to four along ideological lines (Republican appointees versus Democratic appointees) in favour of Bush for reasons that were not entirely convincing.
94. Some, such as Dr Karen Brewer, the Secretary General of the Commonwealth Magistrates’ and Judges’ Association who has carried out some research on this topic, told the Commonwealth Law Conference in Cape Town that the best model is for a commission that had “no members of the executive or legislature whatsoever.” See report in City Press, Monday 18 August 2013. <http://www.citypress.co.za/news/advocates-body-backs-leaner-jsc> (accessed in May 2014). Such an extreme position is certainly not desirable and will raise questions of political legitimacy and accountability.
95. It is important to always include a senior recently retired judge who would probably know the legal practitioners better than the politicians and other non-legal members of the commission and be in a better position to inform the deliberations with useful insights drawn from the wealth of experience that such judges usually possess.
96. These commissions, like any governmental institution, operate under and must comply strictly with the requirements of the constitution. If they act or decide matters in an irrational manner, then these can be challenged before the courts. Having the head of the courts as its head will place him/her in an awkward situation when decisions taken by the commission come before the courts.

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