The new politics of judicial appointments in Southern Africa

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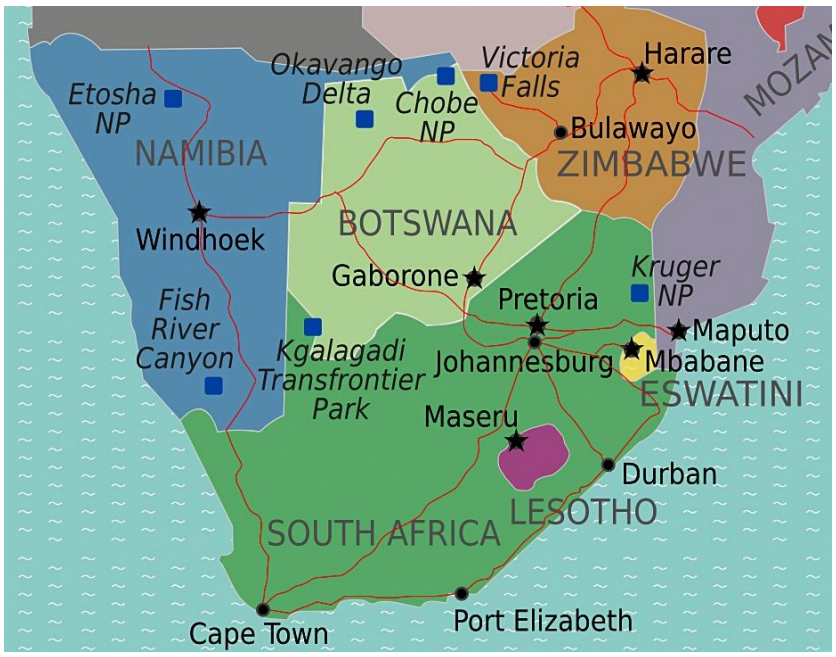
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Fish River Canyon
Pretoria
Maputo
Kgalagadi Transfrontier Park
Johannesburg
Mbabane
ESWATINI
Maseru
Durban
LESOTHO
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Cape Town
Port Elizabeth

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Introduction[1]

A hard-headed political science of judicial appointments has tried to rescue policy-making from delusions of judicial independence. Designers of judicial selection systems, it

1 This research was funded by a British Academy/Leverhulme Small Research Grant (SG 161671).

argues, have reified independence at accountability's expense. In doing so they have lost sight of the many delicate political compromises that have always and everywhere actually been necessary to protect the rule of law. In 'transitional' states, as a result, 'judicial brotherhoods or even mafia-like structures' have been able to evade accountability whilst hiding behind a 'public image of 'norms in black robes'' (Holmes 2004, x; Bobek and Kusar 2014, 1289). Judicial appointments commissions (JACs) are now almost ubiquitous.[2] Their 'allure' stems from their 'seemingly apolitical character' (Volcansek 2011, 812-13). The politics of judicial selection, however, 'runs deep' (Gee 2012, 121). An 'independence-accountability paradox' is 'basic', and can only be negotiated, never abolished (Shapiro 2013, 274-5). By embracing the 'new orthodoxy' of 'merit selection', donors are thus guilty of 'armchair institutional reasoning' (Garoupa and Ginsburg 2015, 99, 137-9).

Where, then, do these delusions come from? Bobek and Kusar (2014, 1258-9) point out that judges themselves have drafted many international appointments standards. More commonly, however, political science accounts explain the global rise of the JAC as a response to the 'judicialisation of politics'. Courts worldwide now rule on questions which would previously have been decided within informal, bureaucratic or political arenas (see generally Tate and Vallinder 1995; Dressel and Mietzner 2012; Brett 2018). This 'new age of judicial power' is responsible for growing 'public and political interest in who judges are and how they are chosen', and has thus produced pressures for new and more transparent selection systems (Malleson 2006a, 3). Ginsburg and Garoupa (2015, 137-9) also explain JACs in these functionalist terms, even whilst (confusingly) denouncing merit selection as a dysfunctional 'best practice'. On their view the inclusion of multiple stakeholders on JACs 'promise[s] that no one institution can easily dominate the judiciary', and 'aim[s] at achieving the appropriate

2 For convenience I will use the acronym JAC even for institutions with slightly different names, such as South Africa's Judicial Service Commission.

balance between independence and accountability in the face of two recurrent phenomena – the politicization of the judiciary and the judicialization of politics – that are reflected in different degrees around the world' (compare Volcansek 2009, 797-800).

This article presents evidence from Southern Africa confounding these expectations. In recent decades there has been increasing pressure across the region to formalise senior judicial appointments, notably through JACs. Yet this has reflected neither simply the self-interest of judges, nor the judicialisation of politics. The senior judiciary, indeed, has often opposed more formal appointments regimes, and judicialisation alone has not produced demands that multiple stakeholders be included on JACs. Pressure for formal appointments also reflects broad social change. In short, even the common-law judiciary is now subject to the same demands for organisational accountability and descriptive representation that sociologists of other professions have documented for decades. And in Southern Africa these demands have now combined with longstanding political and moral imperatives to 'localise' senior expatriate positions.

This argument is structured as follows. Firstly, I use the British case to distinguish between organisational and political accountability, and between descriptive and formalistic representation. Conflating these categories, I argue, has led political scientists to miss how new and fundamental challenges to professional authority have reconfigured supposedly recurrent policy dilemmas. Secondly, I draw on a wide range of sources - including interviews with retired judges - to reconstruct shared informal institutions that governed senior judicial appointments in Southern Africa before recent pressures for formalisation. A third and longest section contrasts the origins of recent pressures for formalisation in a variety of jurisdictions: South Africa, Namibia, Botswana, Lesotho and Swaziland/Eswatini. It emphasises how the

South African judges that once dominated these benches criticised elements of the new JAC model intended to 'de-politicise' appointments. And it shows that while 'judicialisation' has helped fuel demands for change in some jurisdictions (notably Lesotho) it has strikingly failed to do so in others (notably Namibia). New judicial institutions thus reflect broadly social as well as narrowly political pressures.

Organisational accountability

Judicial organisation in Southern Africa is still largely inherited from British colonialism (see below). Until the late-twentieth century the senior judiciary in most Commonwealth jurisdictions remained an almost archetypical self-governing profession (compare British academia in Eustace 1995, 71). In England and Wales judges were formally appointed by the Lord Chancellor, a member of the Executive. In practice, however, judges were approached after 'secret soundings' with the senior judiciary: an opaque process known as 'tap on the shoulder' (Gee et al. 2015, 159-193). In civil law systems judicial training administered by outsiders has long been almost wholly uncontroversial. In 1970s Britain, by contrast, senior judges could still describe this as an intolerable assault on their independence (Kirby 1999, 147-8; Derbyshire 2011, 103-4). Ministers, finally, had no say in discipline. As late as the 1990s they still cited judicial independence as a reason for not seeking to remove the most notorious judge in England and Wales, a notorious misogynist who had once refused to apologise for kicking his own taxi driver in the groin *(The Times* 2021).

The 2005 Constitutional Reform Act (CRA) ended this era. Formal political accountability declined, and the Lord Chancellor's role drastically reduced. 'Organisational' accountability to external audiences was, however, greatly enhanced. The new Supreme Court

had to produce performance statistics (Woodhouse 2007, 164). A new JAC for England and Wales included a large lay membership and a lay chair, who would introduce 'fresh ideas' and a human resources approach (Malleson 2006b, 48). This transparent regime has its ritual excesses: today the Supreme Court even advertises vacancies on Instagram (*The Law Society Gazette* 2020). Such pressures to answer to 'profane' audiences are not, however, unique to judges. They are found across diverse professions and jurisdictions; so many, indeed, as to be inexplicable solely with reference to functional imperatives within law and politics. The contrast between profession and organisation is a classic sociological theme, once tackled by Weber and Durkheim (see Ackroyd 2016, 16-18, 27-8). But the hierarchical, bureaucratic authority of the organisation has gradually displaced *both* the formal political authority of lawmakers *and* collegial forms of professional authority derived from claims to specialised knowledge (see generally Freidson 1994, 128-146). Continental and Scandinavian professions have traditionally been characterised as combining collegial and organisational modes of governance, unlike their more authentically self-governing and collegial Anglo-American counterparts. Recently, however, these models have converged across professional domains (e.g. Svennson 2010, 146).

Descriptive representation

Perhaps the primary justification for the CRA was that it would make the judiciary more representative (Malleson 2006, 43; Gee et al. 2015, 161-2). Lack of diversity had become an 'international embarrassment' which the new JAC was mandated to rectify (Derbyshire 2011, 14). In 1990 only two of 83 High Court judges were women, and as of 2021 no judge from an ethnic minority background has served on the Supreme Court (see Volcansek 2009, 793). This new focus on representation was, however, of a narrow and

specific sort. To borrow Hanna Pitkin's (1967) terms, it was descriptive, not formalistic, substantive or symbolic.[3] The JAC was to focus only, that is, on the extent to which (judicial) representatives shared (racial and gender) characteristics with those represented. It did not aim at formalistic representation authorised through democratic processes (which political scientists often conflate with 'accountability'). Nor did it aim at substantive representation, where agents advance principal's policy preferences; or symbolic representation, where representatives are subjectively accepted by those whom they represent.[4]

Conflating these forms of accountability and representation may explain why external observers have mischaracterised the English and Welsh reforms in such contradictory ways. The Indian Supreme Court, for example, has cited the CRA as an example of a 'trend … to free the judiciary from executive and political control … based purely on merit' (in Chandrachud 2018, 1, n. 2). Political scientists, by contrast, have cited the JAC's inclusion of multiple stakeholders as a move towards 'accountability' inevitably triggered by Britain's own judicialisation of politics (Volcansek 2009, 794; Ginsburg and Garoupa 2015, 126-7). In reality, however, the CRA reflected both international normative pressures and local political forces. But these normative pressures were not primarily for merit selection. Indeed, as early as the mid twentieth-century 'most' had already 'accepted that [executive] appointments were made on merit, with no weight attached to partisan considerations' (Gee et al. 2015, 161). The more significant components of the new international orthodoxy were, in fact, its emphases on descriptive representation and organisational accountability. Formal political accountability and representation were increasingly taboo.

3 I do not seek here to defend Pitkin's preference for substantive forms (see Childs and Lovenduski 2013).

4 Some commentators, however, including the recently retired President of the Supreme Court, Baroness Hale (2014,4), have hoped that the descriptive will nonetheless lead eventually to the symbolic: '[t]he public should be able to feel that the courts are their courts; that their cases are being decided and the law is being made by people like them'.

New orthodoxies

In 1988 Ontario's JAC pioneered the inclusion of 'demographic considerations' in nomination criteria (see Corder 1992, 214–16). At this time international standards still only stipulated that judges be appointed 'on merit' or at least 'not for improper motives' (IBA 1982; UN 1985). After 1989 they became more prescriptive, insisting on less Executive representation in appointment bodies (e.g. IFES 2004; Venice Commission 2007). Commonwealth instruments, meanwhile, began seeking to make all levels of the judiciary descriptively representative of society; rendering merit selection compatible with the need to progressively attain gender equity or remove gender imbalance alongside 'other historic factors of discrimination' (Commonwealth Secretariat et al. 2004, 17). These ideas are now orthodox. As one recent 'primer' for constitution-builders puts it: '[f]actors to consider in the appointment process include (a) the independence of the judiciary from the executive and legislature, party politics and vested interests; (b) ensuring the representativeness and inclusiveness of the judiciary, especially with regard to gender, status, ethnicity or origin' (Bulmer 2017, 3-4).

The global rise of the JAC has, meanwhile, helped entrench organisational accountability. Multi-member commissions including lay stakeholders have now become the most popular governance technique for judicial selection. In the thirty years from 1985 the proportion of jurisdictions worldwide choosing their judges this way leapt from 10 to 60%, and in the Commonwealth the figure became 81% (Garoupa and Ginsburg 2015, 101; van Zyl Smit 2015, xvii). Of those created in recent years the clear global trend has been for larger commissions with lay memberships and a majority of neither (senior) judges nor politicians (see also the 'model constitutional clause' in Commonwealth Magistrates' and Judges'

Association et al. 2013, 6).[5] As Hammergren (2002, 153) once summarised, '[w]hile there has been an accompanying trend to stress 'merit' appointments, the new demand is for the entire mechanism to be more transparent and open, if not to actual participation of the wider public, then at least to their scrutiny.' Thus even in Zimbabwe, where partisan competition over senior judicial appointments is notoriously fierce, aspirant judges are publicly interviewed in a standardised human resources format (Masengu 2016; Verheul 2021, 193-6). And in Turkey President Erdoğan has managed to present increasing control over appointments through lay proxies as compliance with international best practice (Varol, Dalla Pellegrina, and Garoupa 2017, 198–99; George 2018).

Informal appointments in Southern Africa

Figure 1. Southern Africa[6]

This section reconstructs the informal institutions that until very recently still governed the most senior judicial appointments in Southern Africa. These institutions emerged despite British late colonial efforts to formalise. The section that follows shows how local social and political shifts have combined with the new international orthodoxies outlined above to displace informal mechanisms.

Britain's approach to law during decolonisation was characterised by double-standards.

5 Worldwide, only one of the six JACs that was created before 1989 and remains active has more more than ten members (Cyprus). For those created since 2004 the proportion is 16 out of 35, and includes those imposed with least local political input, such as Iraq and Bosnia-Herzegovina (Garoupa and Ginsburg 2015, Appendix B). In the Commonwealth both the remaining JACs comprised entirely of judges predate 1989 (van Zyl Smit 2015, 35).

6 https://upload.wikimedia.org/wikipedia/commons/0/0b/Map-Africa-Southern_Africa-Regions.png

It sought to empower courts whilst insulating them from political control. It advocated Bills of Rights for colonies whilst opposing a written constitution for the United Kingdom (e.g. Hirschl 2004, 97). And after 1954 the colonial administration exported a JAC model it would never have contemplated for England and Wales. These bodies were not, however, designed to promote transparency to profane audiences. They were usually small in their membership and always opaque in their procedures. Their chair was typically a Chief Justice who sat alongside one or two other senior judges, the chairman of the Public Service commission, and in some cases the Attorney-General (van Zyl Smit 2017, 64-5). They were expected to appoint all senior judges, often with only the exception of the Chief Justice. By convention, the Executive was expected to act on their advice. Nigeria's constitution soon became an African blueprint. It included a Bill of Rights modelled on the European Convention and made removal of judges subject to lengthy judicial proceedings (Nwabueze 1977, 267-8; Parkinson 2007, 17). The cumulative effect was to constrain rapid 'localisation' of the expatriate judiciary after independence.

In most former British sub-Saharan colonies the result was precisely that anticipated by political science. Over-emphasising judicial independence produced 'political kickback' and increased (formal political) accountability (see Shapiro 2013, 259). By the early 1970s half of Britain's former African colonies had thus already reverted to some form of Executive appointment, often following judicial challenges to authoritarian legislation or the legality of coups (Nwabueze 1977, 268-70; compare Palley 1969, 1–3). Principled arguments for these new arrangements highlighted their capacity to rapidly produce a more (racially) representative judiciary. These arguments combined symbolic notions of representation with more descriptive ones characteristic of recent orthodoxy. In Tanganyika/Tanzania, for example, Prime Minister (later President) Nyerere initially favoured replacing white

expatriate judges by first appointing from the relatively large pool of qualified local Asian lawyers: a process clumsily labelled 'belongingisation'. Soon, however, the government concentrated its efforts on recruiting black judges from elsewhere in the Commonwealth, first from Nigeria and later the Caribbean. These men, Nyerere asserted, could symbolically represent Tanzanians, 'by virtue of their shared experiences as Africans under British colonial rule' (see Feingold 2018, 165-236).

Not every Commonwealth country aimed at transforming its expatriate bench. Conspicuous among these were Botswana, Lesotho and Swaziland (renamed Eswatini in 2018): the so-called 'BLS' grouping. These former British 'High Commission Territories' were all relatively late to decolonise - in the mid-1960s - and were all economically dependent, to some degree, on their powerful South African neighbour. This dependence limited the political space for signalling a break with the colonial past (for an overview Polhemus 1994).[7] Socialist and radical nationalist political parties were, in any case - when unbanned - marginal influences on these 'neo-traditionalist' regimes (e.g. MacMillan 1985, 658-666; Maundeni 2010, 132-3; Gulbrandsen 2012, 117-121). At independence these BLS states inherited a common Appeal Court and university law faculty established by their British coloniser. Although all three countries soon established their own appeal courts, these courts retained a shared pool of judges (Crawford 1970, 476). The majority of these judges were South African retirees. This was a source of potential international embarrassment during the apartheid era, but the embarrassment was mitigated somewhat by the relative liberalism and professional prestige of those who served.[8] By the 1980s Botswana, alone, had begun appointing from

[7] In Lesotho President Leabua Jonathan's increasingly hostile stance towards Pretoria was central to the 1986 coup that deposed him (Baynham and Mills 1987, 52). Swaziland was by then firmly subject to South African hegemony (Bischoff 1988, 467-8). Botswana - slightly larger, (soon) much richer, and less geographically vulnerable – always retained more room for manoeuvre (see Müller 2012).

[8] Between 1969 and 1987 BLS appeal courts were led by first Oliver Schreiner (once known in liberal circles as 'The Greatest Chief Justice South Africa never had') and then Israel 'Isie' Maisels (who famously led

elsewhere in the black Commonwealth (for background Frimpong 2007, 118).

Between 1945 and 1990, meanwhile, Namibia was occupied by South Africa, which treated the territory as its de facto 'fifth province': South West Africa (Silvester 2015). South African judges thus also served on its Supreme Court (although final appeal still lay to the Appellate Division in Bloemfontein). Again, limited localisation only began in the 1980s, with South-African trained white Namibians slowly replacing South Africans (e.g. Smuts 2019, 69-70). After 1990 independent Namibia gradually transformed its Supreme Court. A majority of local judges became the norm in the mid-2000s, at a time when all (white) expatriate benches were still standard in BLS. The first all-black panel to sit in a BLS appeal court dates only from 2012.[9]

In theory, these expatriate judges were recruited using both formal and informal means. Posts were not advertised and potential candidates were approached following British-style 'secret soundings'. Formally, however, final appointment was still ultimately made by some form of JAC (with a small or non-existent lay membership). In BLS, unusually, these bodies remained small and (until very recently, at least) opaque. They have retained other increasingly unusual features such as unfettered Executive power to appoint the Chief Justice (van Zyl Smit 2015, 22, 35). At independence in 1990 Namibia adopted a similarly constituted JAC. Its five members are all judges and lawyers (including the Attorney-General). Deliberations are private. Parliamentary debates during the constitution's drafting gave little thought to organisational accountability (Mathe 2009, Appendix D, 70-73). The

Nelson Mandela's defence during his trial for treason (1959-60) and who always refused a judicial appointment in South Africa). Other famous South African advocates who only served as judges in BLS included George Bizos (in Botswana) and Jules Browde (In Lesotho and Swaziland). For more details see Forster (1981, 98-100).

9 With a research assistant, Maryam Nahhal, I have collected data on every judge to sit in BLS and Namibia since 1990. Data available on request.

formal mechanism as a whole was remarkably insulated from political influence.

In reality, however, on the appeal courts at least, even these limited formal mechanisms were soon supplanted by informal ones imported by South African judges. Apartheid South Africa largely followed British practice, with no JAC and appointments made following a 'tap on the shoulder' by the Minister of Justice after consultation within the profession. Descriptive representation was certainly no criterion. In 1990 all permanently-appointed South African judges were white and all but two were male (Corder 2011: 97-8). 'The repayment of political debts' may have played some role in appointments (Moerane and Trengove 1995, 149). But overt interference with judicial self-government was rare. The fiercest controversies erupted when Ministers refused to honour a convention that the Chief Justiceship 'automatically went to the senior judge of appeal' (Dugard 1978, 286; Cameron 1987, 343-6). This convention then travelled with South African judges to BLS appeal courts. Judges were assigned a position in the order of seniority according to when they arrived on the court, with the Court President having the discretion to assess seniority in other ways if appointments were made on the same day.[10] As recently as 2015 the (all white South African) Court of Appeal bench in Lesotho resigned *en masse* citing, amongst a variety of other reasons, the Prime Minister's refusal to observe this convention by appointing a judge directly from the Labour Appeal Court (Shale 2018: 172-3).[11] Relevant actors have understood this unwritten convention to be a rule of conduct, and have sought to enforce it outside official channels. It thus constitutes an informal institution (Helmke and Levitsky 2004, 727).

Unsurprisingly, other South African variants on British practice also survived late colonial formalisation. The resilience of 'secret soundings' was, notably, obvious from the

10 In Botswana this principle eventually became part of the Court of Appeal Act (in Otlhogile 1996, 214).
11 Interviews with retired judges of Lesotho Court of Appeal (Cape Town), July 25 and 27, 2018.

earliest days of independence. The Prime Minister of Lesotho appears to have used independence celebrations to ask visiting appeal court judges to consult with their (South African) colleagues about who to appoint.[12] Thereafter formalities were apparently dispensed with ever more openly. One South African retiree appointed to Botswana's Court of Appeal in the late 1990s did remember being interviewed by the Chief Justice. But this took place in the office of an old friend and judicial colleague who had recommended him for the post. Questions were perfunctory and answers contained in the CV.[13] A Scottish colleague was appointed following a similar meeting with the Chief Justice in London (Brand 1995, 190). Even for Botswana's High Court constitutional appointment procedures were 'little used' (Othlhogile 2001, 365). The other South Africans I spoke to, appointed throughout BLS between 2007 and 2012, did not encounter any application or interview requirements. One had his appointment arranged by the Judge President of the Lesotho Court of Appeal (a South African and an old friend).[14] Another was appointed on an emergency basis to Swaziland's Supreme Court after an old friend serving there encountered health problems days before a court session.[15] He too never encountered the Judicial Service Commission. In Namibia, too, finally, the creation of a JAC at independence does not appear to have changed appellate appointments. A Zambian expatriate appointed in the early 1990s (after retirement at home) and again in the late 1990s (after retiring from a small West African jurisdiction) was approached without warning by the Chief Justice on both occasions, again without interview.[16] (The Commonwealth Magistrates' and Judges' Association (CMJA) in London has helped inform court leaders about these imminent retirements.[17]) One South African

12 'Aide Mémoire for Prime Minister: High Court' (n.d.). From O.D. Schreiner's uncatalogued private papers, deposited in the Central Registry, University of the Witswatersrand, Johannesburg. Consulted July 2018.
13 Interview with retired judge of Botswana's Court of Appeal (Cape Town), July 7, 2017.
14 Interviews with retired judge of Lesotho's Court of Appeal (Cape Town), July 25, 2018.
15 Telephone interview with retired judge of Swaziland's Court of Appeal, July 22, 2018.
16 Telephone interview with acting justice of Namibian Supreme Court, July 25, 2017.
17 Interview with Karen Brewer (CMJA, London), June 15, 2017.

judicial memoir recalled exactly the same process in 1981, prior to Namibian independence (Diemont 1995, 291). Before 2009 only one expatriate judge in the whole region had been a woman (Leonora van den Heever). Both political accountability *and* new orthodoxies were absent everywhere.

Case studies

Economic dependence on South Africa has often seen these four states analysed as a unit: 'BLNS' (e.g. Gibb 1997). But they share legal dependence too (generally Fombad 2010). They are one of only four distinct groups of countries where foreign judges still routinely adjudicate constitutional questions (generally Dixon and Jackson 2019)[18]. Two of these groups, moreover - small island nations (in the Pacific and Caribbean) and European principalities (such as Andorra and San Marino) - do so almost overwhelmingly for reasons of practical necessity. Whilst in Kosovo and Bosnia-Herzegovina foreign judges sit thanks to European Union requirements. In Southern Africa these arrangements have represented, to a greater degree than elsewhere, a domestic political choice.[19] BLNS thus offers a wonderful opportunity for the 'most similar cases' method of comparison (for application to comparative constitutional politics see Hirschl 2014, 245–53). This section analyses the diverging speed and scope of local pressures to formalise a once shared informal institution. It begins, however, with the dramatic formalisation of appointments in post-apartheid South Africa; a shift within the regional hegemon that shaped subsequent developments in the periphery.

South Africa

18 Examples of individual countries include the Gambia and Belize.
19 Rachel Ellett makes a similar point in draft manuscript she has recently shared with me.

The section that follows analyses South Africa's move to formal judicial appointments during the post-apartheid transition. This was an anticipation of the new age of judicialised politics that would be ushered in by its famously progressive constitution. Confronted with political pressures for executive appointments, the existing judiciary supported the creation of an independent JAC. They objected, however, to elements of the new orthodoxies that now sat alongside merit selection. The emergence of these new orthodoxies had thus reconfigured supposedly timeless dilemmas about how to balance 'accountability' with 'independence'.

The mid 1980s saw the African National Congress (ANC) and their Communist Party allies gradually abandon their traditional socialist scepticism towards constitutional rights. During the negotiation of an interim constitution to organise the transition from apartheid (1991-3), they focused instead on creating a new, activist constitutional court (see Klug 2000: 81-85). This would be staffed by new judges who would interpret a Bill of Rights in a progressive manner (for the next two paragraphs, unless otherwise indicated, Spitz and Chaskalson 2000, 202-7). The appointment mechanism for this new court was the very last issue to be agreed during talks, and proved intensely controversial. The ANC's initial position was that executive appointments should be approved by a large parliamentary majority, a mechanism adopted by comparable courts in Europe and Africa (O'Malley 1993). This would safeguard the interests of (white) minorities whilst making politically powerful judges politically accountable. It was a scheme endorsed even by Arthur Chaskalson, a human rights lawyer and constitutional drafter who eventually headed the new court.

To the ANC's amazement, however, the ruling National Party (NP) proposed instead that the President have almost unfettered appointment powers. Astonishingly, some NP negotiators apparently expected that their party would continue to receive a significant black

vote after apartheid. For them power-sharing, at least, remained a real possibility, and there was thus no need to insulate appointments from political control. The small liberal Democratic Party (DP) was horrified, and desperately sought to rouse some last-minute opposition. Their argument was that 'the lynchpin of the new legal order would be open to blatant political manipulation' despite being 'entrusted with far greater and more sweeping powers than any other in South Africa's history' (Leon 2008, 200). It obtained statements from judges and legal academics in support of a JAC that would appoint all judges, including the Constitutional Court justices. These liberal efforts shaped the final settlement. In the end the President would only appoint the first slate of eleven constitutional court justices, in consultation with the Chief Justice, and with four appointees having to come from the existing judiciary. A JAC would appoint all judges thereafter. This large Commission would include an unusually large number of political appointees and none of the lay representation that most observers had expected (see Olivier and Hoexter 2014, 163-4). It was still, however, under the Interim Constitution at least, 'dominated by lawyers' (Moerane and Trengrove 1995, 149).[20] This outcome was a significant political achievement for the liberal opposition.

The first and fiercest conflicts surrounding the new Commission revolved around organisational accountability. Descriptive representation was of course a political priority after the end of white minority rule. The interim and final (1996) constitutions eventually directed the Commission to transform the racial and gender composition of South Africa's almost exclusively white male judiciary (Albertyn 2014, 255-9). Some in the legal profession have often argued – mostly anonymously - that merit is opposed to, and has been sacrificed for, diversity. But in principle, at least, the argument for transformation 'has been won' (Johnson 2014, 605-611; also Masengu 2020, 164). Accountability to profane audiences soon

[20] Olivier and Hoexter (2014, 163-4) suggest that there was an implicit agreement between the parties that political representation would increase under the final 1996 constitution.

proved more openly controversial. The best-known disputes were triggered by most judges' refusal to make submissions to the Truth and Reconciliation Commission (1996-2003), which had asked for a public reckoning with their role under apartheid. This the judges considered an affront to their independence (see Dyzenhaus 1998). The first conflicts, however, revolved around the Commission's transparency, which had been left unaddressed by the constitution. Despite 'sharp difference of opinion' amongst commissioners it was decided that the first Constitutional Court interviews (1994) would be held in public, and the next year the same step was taken with respect to the Supreme Court of Appeal - again despite 'strong feelings on the subject expressed by the organised Bar and the established judiciary' (Moerane and Trengrove 1995, 149). Those same liberal academics who had argued most strongly for judicial independence during the transition now most favoured *organisational* accountability. Accountability and independence were in this sense not opposed:

> 'Openness. Responsiveness. Transparency. Accountability. Participation. The clarion calls of a new age, a new politics, a new government, a new South Africa. By holding public hearings, the Judicial Services Commission can demonstrate the death of the old ways – of secrecy, of paternalism, of exclusivity (Klaaren and Woolman 1994, 33).

One academic who adopted this stance - Etienne Mureinik, who had been the Democratic Party's most effective operative during its campaign against executive appointment - advocated not just televising the JAC's hearings but also publishing its deliberations and decisions (see Corder 2011, 103). This infuriated Chief Justice Michael Corbett, and subsequent conflict between the two reportedly contributed to Mureinik's tragic suicide in July 1996 (Lewis 1998, 7-10; Leon 2008, 221).

Under the post-apartheid constitution an extraordinary range of political conflicts have been fought in South Africa's courts. This judicialisation has deepened organisational but not political forms of accountability. Proceedings have in fact become ever more formal and *notionally* transparent. Televised hearings began in 2010, and the Constitutional Court has ordered disclosure of the JAC's private deliberations.[21] Some have called for even the proceedings of the sifting sub-committee, which examines applications, to be made public (Judges Matter 2016, 4; Masengu 2020, 168-170).

This certainly does not mean, of course, that politics and informality have been abolished. The legacy of 'secret soundings', firstly, is still evident from the disproportionate weight attached to nominations from the organised legal profession, and the continued consultation amongst judges on *some* courts in advance of hearings (Oxtoby and Masengu 2017, Judges Matter 2018, 19-20). Political lines of questioning are, moreover, now more common than ever (Oxtoby 2021, 42-4). One especially partisan interview round has had to be rerun on order of the South Gauteng High Court (Pillay 2021). Since 2009 it has even been widely suspected that the ANC has been running its own undeclared appointments process in parallel to the Judicial Service Commission (e.g. Brickill et al 2011, 21; Olivier and Hoexter 2014, 169-172; Hoexter 2017, 93). This 'caucusing' has been at least a theoretical possibility ever since the 1996 constitution came into force, and granted the President and ANC a majority of political appointments to the Commission. In practice, however, the Commission began by appointing the 'truly best candidates' (Trengove in Olivier and Hoexter 2014, 170). By the time Jacob Zuma was elected President in 2009, however, he was dealing with numerous - albeit perhaps, in part, politically motivated - prosecutions for corruption (Klaaren and Roux 2010; le Roux and Davis 2019, 277). His supporters thus had every incentive to try

21 Famously, *Helen Suzman Foundation v Judicial Service Commission* (CCT289/16) [2018] ZACC 8.

and obtain a more pliant senior judiciary. The policy of appointing officials most likely to 'implement the will of the leadership of the party as primary directive' had long been justifiable ideologically within the ANC using the Leninist language of 'cadre deployment' (Booysen 2011, 379-381, 395, n. 45). Now something like this policy was seemingly extended to the judiciary, despite it being clearly inconsistent with constitutional principles governing public administration (e.g. Malan 2014, 2020, n. 186). Recent revelations that the ANC's Deployment Committee was (still) making its own secret recommendations for judicial appointments in 2019 have certainly scandalised liberal opinion (e.g. Davis 2022). On a pessimistic view, the introduction of a JAC after apartheid may thus 'have succeeded merely in replacing 'one form of undue influence with another'' (Hoexter 2017, 100).

For our purposes, however, the important point is that these (resilient) features of appointment politics are always identified as problems by the appointments system, and greater accountability to external audiences is almost always proposed as a solution. Thus, when President Cyril Ramaphosa was challenged about 'cadre deployment' of judges at the Commission of Inquiry into State Capture, his suggestion for reform was that this process be made visible to the public and non-ANC members of the JAC (Commission of Inquiry into State Capture 2021). Strikingly, moreover, where the South African experience has informed constitutional design elsewhere it has been its organisational and not political accountability dimensions that have been exported.[22] Reference to the South African 'model' is ubiquitous in discussion of appointments reform in BLNS. But there is never any suggestion that large numbers of parliamentarians be included on JACs, or – of course – that 'cadres' be 'deployed' to independent courts.

22 Kenya's JAC thus includes numerous transparency mechanisms but no parliamentarians. For South African expertise and the 2010 constitution see Ghai and Ghai (2018).

Namibia

In Namibia apartheid rule ended in 1990. As in South Africa, a new Bill of Rights soon judicialised politics. Unlike in South Africa, however, the ruling South-West African People's Organisation (SWAPO) has not insisted on formal political representation in appointments. As this section will show, it has concentrated its efforts instead on *descriptive* representation, and on expanding the pool of eligible black Namibians. Formalising the workings of the JAC has been a slow and gradual process, whilst international instruments have only recently been used to advocate greater organisational accountability.

There is compelling evidence that, as a liberation movement in exile, SWAPO had always been considerably less committed to socialist ideas than its Cold War antagonists had feared (Dobell 1998). In 1989, certainly, as the Berlin Wall was coming down, it suddenly swapped a 'scientific socialist' constitutional blueprint for one that contained a Bill of Rights. Even this draft, however, still envisaged executive appointment of judges (Steytler 1993, 486-7). It is remarkable, therefore, that during constitutional negotiations SWAPO accepted a JAC without any of the formal political accountability later insisted upon by the ANC in South Africa. A constituent assembly 'extensively debated' adopting US-style parliamentary confirmation procedures, but the result was still a small, depoliticised JAC (Diescho 1994, 37; Mathe 2009, Appendix D, 70-73). This comprised only the Attorney-General, Chief Justice, Judge-President of the High Court and two lawyers' representatives. Appointment power was thus 'firmly in the hands of the judiciary and the organized legal profession' (Steytler 1993, 488). And in practice the Commission would play no role in the first decade of appointments the new Supreme Court (see below). These appointments were made entirely on an acting basis through informal contacts initiated by the Chief Justice. The constitution as a whole

placed great stress on descriptive representation ('affirmative action'), but mandated no appointment criteria. The JAC was effectively free to operate without external scrutiny. The existing judiciary was delighted. As the Judge-President declared in 1997:

> 'the role played by the Judicial Service Commission in maintaining the standard of the Bench and to depoliticise any appointment to the Bench is of paramount importance. The way in which the Commission is constituted can leave no doubt that all the members thereof are committed to ensure the independence of the Bench and that it maintains a high standard […] whenever I am questioned by visitors from overseas concerning the independence of the bench, my argument begins and ends with the Judicial Service Commission' (1997 address to Law Society of Namibia AGM in Steinmann and Cohrssen 2006).

Hard-headed political scientists worried, however, that judicialisation would undermine this formal independence (Steytler 1993, 497). Rulings against the government on symbolically sensitive questions - notably the sentencing of pro-apartheid coup instigators, and, later, Caprivian secessionists - did indeed soon elicit outraged statements from senior politicians. They accused white liberal judges of racism and apartheid sympathies (e.g. O'Linn 2010, 1-27). But all subsequent attempts within cabinet to politically reshape the Commission were 'held at bay' by a contervailing 'liberal agenda [that] operated within the executive branch' (VonDoepp 2012, 472).[23] A 2004 manifesto promise to make the JAC 'adequately represent all relevant stakeholders' and 'comply with the will of the people' remained dead letter (SWAPO 2004). The government *did*, however, become strongly focused on improving descriptive representation. Like other new states it sought to localise its judiciary by lowering

23 This is the subject of a parallel research project.

the bars to entry to the profession and expanding the pool of from which judges could be appointed (compare Harrington and Manji 2019). As summarised by Vondoepp (2009, 122):

> 'apparent threats to judicial autonomy did not necessarily reflect a government program to control or manipulate the bench. Efforts to deprioritise merit appointments in judicial appointments, for example, partially reflected attempts to transform the legal system to make it more representative of Namibia's racial makeup'.

SWAPO's first efforts at transformation nonetheless angered lawyers. During early apartheid the Society of Advocates (SOA) had regularly complained about appointments of under-qualified South African civil servants.[24] Informal local 'soundings' only began in the 1980s. These historic sensitivities about political interference help explain the (still mostly white) SOA's fierce opposition to legislation in 1995 that, *inter alia*, required the JAC to have 'due regard to affirmative action' on race and gender.[25] The SOA outraged SWAPO by (unsuccessfully) appealing to the International Bar Association and UN Human Rights Commission with demands for merit selection (Kavendjii and Horn 2008, 295; Vondoepp 2012, 470). Even black lawyers' representatives joined it, however, in opposing later efforts to exempt 'legal practitioners' from certain exams. A temporarily united profession doubted that this was a sincere attempt to make the judiciary more representative. They treated it instead as a means of allowing SWAPO's preferred candidate to be appointed Prosecutor-General. In 2002 lawyers' associations challenged the legislation in court. Their lawsuit inadvertently formalised appointment powers, by uncovering the continued existence of (foreign) soundings before acting appointments, in contravention of the Judicial Service Commission Act 1995.

24 This story is currently told in heroic mode on the Society of Advocates website: https://www.namibianbar.org/about.html [accessed 5 October 2021].

25 See Legal Practitioners' Act 1995, and Judicial Service Commission Act 1995, 5. (1), referring to Article 23 of the Namibian Constitution.

Eight Supreme and High Court judges - including three Zimbabweans and a Zambian - all had to have their appointments discretely rationalised in order to avoid judicial crisis (Tjombe 2008).

More recent controversies surrounding the same Prosecutor-General have triggered the first sustained (but still limited) political pressures for organisational accountability. In late 2020 it became clear that Martha Imalwa was going to seek re-appointment for a third term. This was in the context of high-profile electoral and corruption disputes that have dramatically deepened the judicialisation of Namibian politics (Melber 2020, 101-111; Ndeunyema 2020). Although not yet directly threatening SWAPO's grip on power, these disputes have nonetheless obliged judges to adjudicate on its central political interests for the first time (contrast VonDoepp 2009, 146). Opposition parties now demand transparency from the JAC, citing a new generation of international instruments demanding 'extensive stakeholder engagement at all relevant stages' (e.g. Kavetu 2021). Although the position was publicly advertised for the first time, demands for South-African style public interviews have been refused.

Even this, however, marks a watershed. Formalisation has hitherto been slow, gradual and largely shaped by economic not political pressures. In 2011 the JAC published regulations for the first time. These still allowed the Chief Justice to 'privately contact suitable persons … and … privately consult … comparable institutions and bodies in other Commonwealth states'.[26] Interviews remained at the Commission's discretion. One judge appointed in the mid-2000s, had only had to send a CV.[27] Another, appointed to the Supreme Court as late as 2016 – and famous for his rulings against the government in the Caprivi

26 Judicial Service Commission Regulations 2011, 2. (5).
27 Interview with retired judge of the Namibian High Court (Windhoek), July 31, 2017.

'treason trials' – was also not interviewed. He was the only nominee of all lawyers' associations.[28] That this was even possible for such a politically significant appointment highlights the severe but underappreciated practical constraints on appointment politics in small jurisdictions with few aspirant judges. Governments such as Namibia's that wish to retain at least some experienced personnel on the bench will often be forced to appoint politically unsuitable judges, even if only temporarily (see Bukukura 2002, 28-30). Only recently have multiple candidacies become routine, obliging the Law Society to formalise internal nominations procedures.[29] There are a host of reasons, in short - political, economic and social - why the judicialisation of politics need not politicise the judiciary.

Botswana

This section shows how in Botswana, too, judicialisation can only partially explain recent pressures to formalise appointments. By itself it was not enough to make the Court of Appeal a focus of political attention. Two additional social conditions were necessary: the emergence of organised interests in Botswanan politics, and a pool of qualified local lawyers from which judges could be appointed. That process was itself, in turn, fuelled by two cultural catalysts: a pronounced 'legal consciousness' and a widespread anxiety surrounding opaque (even occult) uses of political power. These pressures to formalise, once they emerged, combined demands to *reduce* formal political accountability with demands to *increase* organizational accountability. References to international standards governing descriptive representation - of women, in particular - have, however, been rare (cf. Bauer and Ellett 2015).

28 Interview with justice of the Namibian Supreme Court (Windhoek), August 1, 2017.
29 Interview with Reitha Steinmann, Ramon Maasdorp and Meyer van den Berg, Law Society of Namibia, (Windhoek), July 17, 2017.

Botswana, famously, was the only mainland African country under majority rule to hold regular multiparty elections between the mid-1960s and mid-1990s. These elections have been essentially free and fair, even if always won by the Botswana Democratic Party (BDP). The independence constitution thus survived the Cold War, including the small JAC that the British had hoped would guard against rapid 'localisation' (see above). Tensions with the Executive did emerge, but these never led to attempted restructuring or political 'kickback' (e.g. Ontebetse 2017). The BDP remained notionally committed to 'localisation' (Botswana Democratic Party 1979). But its closest actual approximation was the appointment of Ghanaian and Nigerian judges to the Court of Appeal in the early 1980s: a Ghanaian Chief Justice having become impatient with the judicial conservatism of his South African colleagues (Frimpong 2007, 118).

Dow v The Attorney General (1992) appeared to mark a watershed. The Appeal Court declared that 'it is the primary duty of judges … to make the Constitution grow … to meet the just demands and aspirations of … larger human society'.[30] This was, in one judge's words, a 'monumental' case, judicialising politics (Tshosa 2009, 70-4). And soon afterwards the JAC expanded from three to seven - creating the first permanent majority of practising lawyers, but maintaining a majority of Presidential appointees (Aguda et al 1997, 113). This expansion, however, actually reflected increasing workload, rather than a need to incorporate more stakeholders created by judicialisation. In the 1990s Botswana's tiny legal profession had begun rapidly expanding (e.g. Bauer and Ellett 2015, 38-9). In 1992 the first Motswana had sat on the High Court (the Court of Appeal would remain wholly expatriate as late as 2010).[31] The Chief Justice - the Commission's only practising lawyer - suddenly found himself busy with Commission tasks (Aguda et al 1997, 107-8). Reforms to appointments certainly did not

30 *Dow v Attorney-General* (1996) 103 *International Law Reports* 173.
31 The first black Motswana, Elijah Legwaila, was appointed in January 2012.

result from public criticism of existing arrangements (Aguda et al 1997, 106-7). Less than 5% voted in a 2001 referendum approving them (R. Werbner 2004, 87). The Court of Appeal, meanwhile, was left essentially untouched. Judicialisation produced no change in the informal arrangements governing appointments to the highest court.

Social changes were, however, exerting gradual pressure. By 1996 Botswana finally had an organized profession, and by the mid-2000s many Law Society members were eligible for judicial appointment. The Society's leadership now began criticising secretive appointments, highlighting 'positions seemingly tailored for some people'. This was an unambiguous reference to Ian Kirby, a naturalised white Motswana who had been shuttling between positions at the High Court and Attorney-General's office (Good 2017, 120). In 2008 High Court posts were advertised for the first time, but President Ian Khama rejected the JAC's nominees (Modise 2009). The Law Society then began challenging the legality of this refusal, highlighting the unusual dominance of political appointees on the JAC.[32] They also (unsuccessfully) demanded organisational accountability in the form of public interviews. Intense public debate suddenly focused on extreme formalities. The constitution, for example, declares that 'judges ... shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission'. This raised the question of whether the comma in the sentence was 'syndeton or asyndeton' (Gasennelwe 2018)?

It took longer for appellate appointments to become a political concern. The proximate cause was industrial militancy. Organized interests had been weak in post-independence Botswana, and trade unions 'actively discouraged' in the name of patriotism and development (P. Werbner 2014, 8). International Labour Organisation conventions were only domesticated

32 An abridged version of the 2011 original is currently available at: https://www.mmegi.bw/opinion-analysis/the-lsb-case-position-paper/news [accessed 9 November 2021].

in 2005. New and more conflictual attitudes emerged, however, in the wake of the global financial crisis of 2008 and 'Arab Spring' of 2010-1. Austerity measures, intended to rescue public finances amid collapsing diamond exports, saw the largest public sector union launch the 'mother of all strikes'. This was the first legal strike in the country's history. It called for 'regime change', and paralysed services (Makgala and Malila 2014, 54, 128-9, 189-190). An outraged government dismissed and then refused to reinstate 750 'essential workers'. The Manuel Workers' Union (MWU) had success challenging this refusal in the Industrial and High Courts, but was disappointed at the Court of Appeal. Its supporters contrasting the apparent conservatism of (by now) Court of Appeal Judge President Ian Kirby, and the apparent progressivism of High Court Judge Key Dingake (Makgala and Malila 2014, 230-232; P. Werbner 2014, 236, 248-9). Dingake was particularly influential amongst younger High Court judges and with a progressive 'new thinking' in the academy and profession.[33] Unions leaders compared case allocation to the 'the Lotto, you either have the Key or you do not!' (Motlogelwa and Moeng 2012). They accused Appeal Court judges, meanwhile - especially the newer expatriates - from taking their cue from Kirby; an 'executive-minded' ex-Attorney-General who ran his court 'single-handedly' (Bothoko 2020; also *Sunday Standard* 2017).

This persuaded the MWU to challenge the informal institutions that allowed Kirby significant influence over appellate appointments. The High Court agreed with the union that most appellate judges had been unconstitutionally appointed. The Court of Appeal itself eventually agreed, but avoided a full-blown judicial crisis by approving the retrospective regularisation of their colleagues' contracts (for details Sebudubudu 2018, 440). Government still refuses to advertise positions, publish appointment criteria or conduct interviews, 'since

33 Interview with advocate regularly appearing before the Court (Cape Town), July 26 2018; with retired judge of Botswana's Court of Appeal (Cape Town), July 2, 2018.

the Court has been appointed all along from distinguished and deserving jurists from home and abroad' (Mosikare 2020). Unions, the Law Society and some opposition politicians remain staunchly critical of these arrangements. Their arguments have increasingly combined demands for transparency and organisational accountability with a relatively new emphasis on descriptive representation in terms of race and, less often, gender (e.g. Lekgowe and Motswagole 2011 in Bauer and Ellett 2015, 39). Thus '[l]egislation regularising appointments was hastily approved 'to entrench patronage and … frustrate heightened calls for localization ...[t]he CoA [Court of Appeal] … look[s] like a court during apartheid South Africa' (Mosarwe 2017). Recruitment, meanwhile, 'seems to be based on friendship, dislike or prejudice' (Bothoko 2020). But the notion of symbolic representation - or diverse 'life experience', gestured at in some other African appointment criteria - has been notable by its absence.[34]

The emergence of (militant) organized interests was thus essential for judicialisation to translate into an appointments politics. But the process was fuelled by cultural catalysts. Firstly, a famous 'consciousness of legal entitlement' has long been as pervasive amongst Batswana as in Tocqueville's America (Merry 1990, 181 discussed in P. Werbner 2021). The MWU's exhausting and expensive litigation battles are incomprehensible without recognising this Batswana tradition of 'living their lives in courts' (Gulbrandsen 1996; P. Werbner 2014, 231-4). Secondly, the intense public interest in informal judicial governance that emerged after 2011 was fuelled by a 'growing popular concern about … [the] hidden exercise of power' (Gulbrandsen 2012, 295). At times this manifested in ethnic conspiracy theories. The first public demand for transparent judicial appointments thus originated from Tswana nationalists who accused the Kalanga minority of monopolising localised posts (R. Werbner 2004, 56-7).

34 See Section 13 (f) of Kenya's Judicial Service Act (2011) at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Judicial_Service_Act_2011.pdf [accessed 9 November 2021]. For South African influence on Kenyan judicial selection see Ghai and Ghai (2018).

At other times this 'popular imaginary' had been 'nourished by notions of 'authorities as potential sorcerers' (Gulbrandsen 2012, 295). In 2015, for example, amid severe polarisation on the bench, Chief Justice Dibotelo suspended four judges - including, most significantly, Key Dingake - for misusing housing allowances. In response twelve High Court judges publicly accused Dibotelo of possessing an 'intense belief in witchcraft', and an anonymous letter - complete with a 'demonic sigil' and decomposing lizard' - accused him of 'despis[ing] your predecessor just because he was a Kalanga' (*Sunday Standard* 2016; for magical beliefs as explanations in African politics see, famously, Ellis and ter Haar 2004). Dingake never returned to the High Court and now sits in the Seychelles. There are, in short, putting it too simply, both global and more local reasons for why transparency and organisational accountability have occupied such a central place in Botswanan campaigns for appointments reform.

Lesotho

Of all BNLS states Lesotho most conforms with political science expectations. Since 2012 electoral reforms have greatly increased the numbers of internal political disputes decided by the Court of Appeal. The Prime Minister, meanwhile, has extensive powers to remove the heads of independent agencies. The result - amidst constant political uncertainty - has been repeated and spectacular levels of political interference in senior judicial appointments. In this sense, politicisation did immediately follow judicialisation. And regional and international agencies responded exactly in precisely the (misguided) manner that political science predicts: by insisting on a reduced role for the Executive in appointments. This is not, however, the whole story. First of all, as elsewhere, international agencies have also called for 'accountability' in the form of organisational transparency and

(some) improved descriptive representation. And secondly, as in Botswana, the whole process has depended on broader social conditions and cultural catalysts. A volatile appointments politics is thus favoured by 'neo-patrimonial' features of the political system; by a small governing class, where every member of the elite becomes identified with a political faction; and, relatedly, by persistent and sensationalist media coverage of judicial affairs.

Lesotho's institutions have been less durable than Botswana's. Leabua Jonathan's increasingly dictatorial regime suspended the 1966 constitution only four years after independence. It briefly reintroduced a 3-person JAC (1983-6), seeking greater international legitimacy (generally Maqutu 1990). But a new constitution would only be introduced in 1993, after *coups d'état*. The new JAC still reflected the British tradition of executive appointment. Three of the four members - the Chief Justice, Attorney-General, and Chairperson of the Public Service Commission - were effectively appointed by the Prime Minister. Whilst the fourth (not necessarily a lawyer) was appointed in accordance with the advice of the Chief Justice (van Zyl Smit 2015, 159-160). In practice the JAC only rubber-stamped appellate appointments arranged informally by the Court's South African judges (see above). Under Lesotho's first-past-the-post electoral system (1993-2002) defeated candidates routinely challenged the outcome in court, sometimes alleging, when unsuccessful, that the JAC's composition was incompatible with international judicial independence standards (S. Shale 2008, 112).[35]

These legal challenges were symptomatic of a political arena with few agreed 'rules of the game'. Neither the political system or the economy as a whole can easily be characterised as 'neo-patrimonial' (for the historic importance of South African mining wages, see,

35 See also *Basotho National Party and Another v Government of Lesotho and Others* (Constitutional Case No.5/2002) [2003] LSHC 6. At: https://lesotholii.org/ls/judgment/high-court/2003/6 [accessed 10 November 2021].

famously Ferguson 1990). Nonetheless, a notoriously 'politicised civil service' has long ensured that 'losing power means losing access to wealth and … augments the stakes of electoral success' (Weisfelder 2015, 73). South Africa has constantly mediated political conflicts, and the Southern African Development Community (SADC) has intervened militarily five times (Deleglise 2021, 224). One such South African-led intervention, after the opposition rejected the results of the 1998 poll, resulted in a more inclusive Mixed Member Proportional system, favouring smaller parties (MMP). Since 2012, in particular, this new system has produced 'intense partisan struggles within a weak multiparty coalition government', and 'increased demands on party central committees to be more open and transparent in the management of the candidate nomination processes and procedures' (Weisfelder 2015, 52; V. Shale 2017, 35). Many such demands have ended up in court.

In such situations, VonDoepp (2004, 277-8) argues - which combine fluid political allegiances with significant 'uncertainty over who will hold political power over the medium to long term' - judges in neo-patrimonial contexts have little strategic incentive to mollify executives. The period since the formation of Lesotho's first governing coalition in 2012 has certainly seen a number of high-profile rulings against the government that relate to politically-sensitive appointments and internal political party processes. These have helped precipitate an extraordinary series of Prime Ministerial efforts to remove judicial leaders (for the rest of this paragraph, unless otherwise indicated, see I. Shale 2018, 166-176). Michael Ramodibedi, the first Basotho to sit permanently on the Court of Appeal, was impeached as Court President in 2014. On the eve of the 2015 elections Acting President Douglas Scott was then summarily replaced by Kananelo Mosito - the head of the Labour Appeal Court - after ruling that Prime Minister Thomas Thabane could not compel the Director of Public

Prosecutions to retire early.[36] The all-white South African bench now resigned *en masse* protesting this unexplained decision that violated an informal norm emphasising seniority (see above). Mosito was soon removed by a new coalition government but re-appointed after Thabane's victory in the June 2017 elections (Lesotho's first female Chief Justice Nthomang Majara was herself soon suspended). In 2019 Thabane then sought to remove Mosito, after his Court of Appeal invalidated the ruling party's constitution, and amidst claims that Mosito now favoured an opposing party faction ('Nyane 2019, 16-7; Rickard 2019).

Amid such extreme politicisation, informal practices governing expatriate appointments could hardly hope to survive unscathed. Botswanan judges recruited to hear especially contentious cases (using SADC funds) have thus recently resigned, citing delays caused by continual challenges to the constitutionality of their appointment (Phakela 2021).[37] Unsurprisingly, international agencies have insisted on formal guarantees of judicial independence. Endlessly delayed SADC-sponsored governance reforms are expected to reduce executive control over judicial appointments and discipline, and to make merit a formal criterion (for background Monyake 2020, 7-8). This is not entirely, however, the policy package that political scientists have decried. Some element of organisational accountability and/or descriptive representation (of women, in particular) form part of most proposals (e.g. I. Shale 2018, 192-3; 'Nyane 2019, 15, 26). For twenty years judicial leaders had opposed expanding the JAC to include more lawyers' representatives, *despite* the high degree of formal political accountability that it was subject to. They contrasted the relatively collegial authority exercised by this 'professional body' with its 'unwieldy' South African counterpart (Ellett 2011, 39). But now demands to include profane publics have become

36 *Thetsane v Prime Minister and Others* (Civil Case No.51/2014) [2014] LSCA 53. At: https://lesotholii.org/node/3405 [accessed 10 November 2021].

37 *Mokhosi & 15 others V Justice Charles Hungwe & 5 others* (Constitutional Case No.02/2019) [2019] LSHC 9. At: https://lesotholii.org/ls/judgment/high-court-constitutional-division/2019/9-0 [accessed 10 November 2021].

harder to ignore. And indeed the first 'open process' of interviews for advertised posts has already taken place ('Nyane 2021).

Nor, finally, can it be said that judicialisation alone explains pressures to formalise. The initial removal of Michael Ramodibedi, for example, owed as much to the unusual intimacy of the Basotho elite as it did to any Appeal Court decisions. Ramodibedi's appointment as the first 'localised' Appeal Court President had immediately sparked a protocol conflict about whether Chief Justice Mahapela Lehohla (leading the High Court) still headed the judiciary. This was, at least partly, a straightforward case of personal animosity. In 2012, infamously, one of the judges' vehicles - precisely whose is contentious - almost injured pedestrians by overtaking the other during an official convoy (Ngcobo et al. 2013, 37-8). Such 'personnel disputes' are, moreover, persistently 'sensationalized … like soap opera[s]' by newspapers (Ellett 2011, 58; compare Phakela 2019). This, in turn, 'has played a significant role in politicising the judiciary' thanks to the widespread habit of identifying of judges with particular political factions and personalities: an almost inevitable consequence of an entire political and (localised) legal elite that now graduates from the same National University (Ellett 2011, 58).[38] After the convoy incident, for example, Ramodibedi accused Leholha of having 'basked in the knowledge', under the 'previous regime' that 'his younger brother was Deputy Prime Minister' (Ngcobo et al. 2013, 45). Both were soon out of office. In Lesotho, in short, the judicialisation of politics goes furthest to explaining the politicisation of the judiciary and subsequent pressures to reform appointments, but various idiosyncratic features of the polity and its politics have favoured this outcome.

38 Interview Mamosebi Pholo (Maseru), August 3, 2018.

Swaziland/Eswatini

Our final section briefly analyses a more unusual case, and a very different regime type. Eswatini is often described as 'Africa's last absolute monarchy' (e.g. Motsamai 2011). In late 2021 it remains relatively impervious to international pressures for reform, even as it deploys ever more violent means of repressing popular protest at home (e.g. Maphalala 2021). In Swaziland, as the country was known until 2018, an old world of informal appointments organised through South African and Commonwealth channels ended after a series of rulings that challenged principles of royal authority. But the 'localised' JAC system that notionally replaced it did not seek to incorporate a wide range of stakeholder interests, or even to increase organisational accountability. Instead it entrenched an opaque form of executive control over appointments entirely out of step with international trends. In short, the new appointments politics in Eswatini is not easily explained by the domestic pressures highlighted by political science. But nor is it a direct consequence of the new orthodoxies and diffuse social pressures analysed in this paper.

After 1945 British colonial rule in Swaziland initially strengthened rather than undermined monarchical authority (MacMillan 1985, 649-658). During independence talks, however, it attempted to impose a constitutional monarchy similar to that of the United Kingdom itself (Dlamini 2019, 129-233). As so often elsewhere, these arrangements soon produced political 'kickback'. Swaziland's independence constitution (1968) was to prove almost as short-lived as Lesotho's. 'Traditionalists', who had never embraced constitutional monarchy, were outraged when non-royalists were elected in the 1973 elections. A (white South African) Court of Appeal bench then compounded Executive displeasure by refusing to disqualify these candidates on citizenship grounds (Baloro 1994, 25). The Judicial Service

Commission was abolished and only reintroduced for appellate appointments in 2005.[39]

Informal appointments mechanisms survived this early turbulence, but always only in the shadow of Executive displeasure. Rulings subjecting royal authority to law, even in politically inconsequential cases, have been enough to provoke royal anger. Political interference in appointments did not, therefore, follow from the 'judicialisation of politics' as conventionally understood. In November 2002, for example, an (all white) South African appeal court bench frustrated royal interests in a land dispute, and declared a Royal decree making fraud a non-bailable offence unconstitutional. The government accused it of being influenced by 'forces outside' Swaziland. The court refused to sit for three years until government relented (Amnesty International 2004: 21-3; Tebbutt 2016: 209-215). By this time, however, a new constitution had been introduced. This highly unorthodox document created a seven-person JAC entirely composed of royal appointees (which met in the royal palace), and stipulated, pointedly, that foreigners would be ineligible for appointment from 2012. Overall, this 'new dispensation … simply entrenched' the 'exorbitant powers exercised by the King' (Fombad 2007, 108).

In practice this new JAC system has not served to formalise judicial selection. In 2014 the High Court refused a challenge by the Law Society to the unconstitutional appointment of one unqualified appellate justice. This decision was made on the grounds that neo-traditional understandings of Swazi custom forbade any inquiry into the King's actions (compare Booth 1983, 45-6). His was 'the mouth that does not lie' (*umlomo longacali manga*), and all other constitutional text was irrelevant (Dube and Nhlabatsi 2016). Defenders of judicial independence amongst the legal profession were not able to resist this assertion of royal

39 The (Executive-dominated) body created by the 1982 Judicial Service Commission Act seems only to have appointed High Court judges.

prerogative. Chief Justice Michael Ramodibedi, who was still also heading the Court of Appeal in Lesotho, played a 'reprehensible' role in defending royal interests - at least according to the International Commission of Jurists (2016, 5). According to Section 157 (1) of the 2005 constitution, localising appointments, Ramodibedi's own term in office should, in fact, have already come to an end. More recently, nonetheless, the Ugandan Benjamin Odoki has been recalled to the Supreme Court of Eswatini, despite himself being well past retirement age. These and other failures to observe formal process have been regular denounced by international agencies and local civil society organisations, but to little avail (e.g. Maseko 2020). The new system has made some show of organisational accountability - since 2015, for example, some interviews have been held in public (Ndzimandze 2015). In practice, however, it has remained 'an affair between the … Chief Justice and the King, shrouded in secrecy and conducted without any form of oversight' (International Commission of Jurists 2016, 23). Moreover, any public confidence created by this appearance of transparency has been undermined by the Chief Justice's claims that the JAC is under pressure from a 'treasonous political elite' bent on regime change (Dlamini and Ndzimandze 2019). Eswatini's senior judiciary is now, finally, descriptively representative, at least in racial terms. BLS' first all-black appeal court bench sat in 2012 (Simelane 2012). Appointments of women, by contrast, remain unusual.

Conclusion

The informal appointment of appellate judges in BLNS was an imperial relic. Perhaps unsurprisingly, it did not long outlive the dramatic formalisation of appointments in South Africa itself. Unlike in South Africa, however, the judicialisation of politics in these jurisdictions has not generally been accompanied by increased pressures for formal political

accountability, or for more political representation on JACs. There is little evidence for the timeless 'independence-accountability paradox' identified by political scientists. Specific forms of (organisational) accountability and (descriptive) representation *have*, however, become central components of international best practice, *alongside* the 'new orthodoxy' of merit selection (Garoupa and Ginsburg 2015, 99). This composite, unstable orthodoxy has done much to shape the increasingly formal regimes that ostensibly govern appellate appointments in the region.

There is, to be sure, significant variation between cases. Local social, economic and political pressures account for the differing speeds with which the old world of informal appointments collapsed in BLNS. In Namibia both localisation and formalisation have been more gradual affairs, despite judicialisation. In Lesotho one informal system - organised through South African networks - was replaced with another informal system almost overnight. Formalities have been largely externally-imposed. Judicialisation, in Lesotho, *has* been an important catalyst. In Botswana, meanwhile, gradual change was greatly accelerated by the emergence of organised interests and industrial militancy: forms of social change invisible to any narrowly political research agenda. In Swaziland/Eswatini, finally, a localised and (notionally) transparent regime emerged after judicial rulings that did not so much judicialise politics as merely assert the principle that royal authority was subject to law.

International explanations are, however, ultimately more compelling than domestic ones. The 'BLS' grouping includes a consolidated democracy (Botswana), an unstable 'neo-patrimonial' one (Lesotho), and an absolute monarchy (Swaziland/Eswatini). Yet in all three cases the old world of appellate appointments died a sudden death in the space of a decade (2005-15). Constitutional provisions governing judicial appointments have, it is true, recently

become fiercely contested elsewhere in Africa (for Kenya Rickard 2021; for Zimbabwe Verheul 2021, 194-6). It might be tempting, therefore, to understand this development as part of a more specifically African 'institutionalisation of political power', where violence has become gradually displaced as a means of resolving political disputes, and leaders habituated 'to achieve their goals by working through, not around, formal institutional channels' (famously, Posner and Young 2007, 127). Yet nowhere in BLS, at least, is there any good evidence for such pacific trends. If anything the opposite is true (e.g. Ookeditse 2020; Deleglise 2021, 223-6; Maphalala 2021). In Botswana, meanwhile, institutionalised politics has a much longer history (e.g. Charlton 1991). In every case, moreover, local campaigns for reform have been justified using a new international vernacular inflected with accents from South Africa, the regional hegemon. This new language marries judicial independence with an emphasis on judicial representativity and accountability to 'profane' audiences. It has made the secret self-selection of foreign judges, notably men from South Africa's white minority, harder to justify.

These diffuse international pressures originate from beyond law and politics. Sociologists have long documented the demise of collegial authority in other professions. This development has simply come late to the senior judiciary in Commonwealth countries. For a time some judges and theorists could hope the law would escape these democratic changes. In an 'increasingly conflictual society', Robert Badinter (2003: 9-10) once suggested, 'traditional moral authorities … have become discredited'. 'Only *judicial power* escapes this shipwreck', combining the role of 'sphinx' and 'prophet' to become a new 'secular papacy' [emphasis in original, author's translation]. Any such hopeful expectations were, however, always doomed to disappointment. As one President of the United Kingdom's Supreme Court has argued, '[t] the public should be able to feel that … their cases are being decided and the

law is being made by people like them, and not by some alien beings from another planet'. This, she is right to insist, is a feature of a 'modern world, where social deference has largely disappeared' (Hale 2014, p. 4). New appointment orthodoxies have thus much deeper roots than any particular political circumstance or donor delusion.

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