

Zimbabwe Rule of Law Journal

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FOREWORD

I am delighted to welcome the inaugural issue of the Zimbabwe Rule of Law Journal. The idea of establishing this Rule of Law Journal has largely been influenced by existing demand in the legal fraternity for a peer reviewed law journal with a national scope.

The aim of this Zimbabwe Rule of Law Journal is to make a significant contribution towards knowledge creation, raising general awareness on aspects of the law and instill informed scholarly debates. The journal is a joint endeavor between the International Commission of Jurists Africa Regional Programme and the Centre for Applied Legal Research (CALR). This journal is composed of articles and papers written by academics, legal practitioners and law students.

The rule of law is a foundational value and principle of our Constitution as set out in section 3. The Preamble of the Constitution recognises the need to entrench the rule of law because it underpins democratic governance. The rule of law is the means by which fundamental human rights are protected. It is therefore absolutely necessary that there be a way in which the legal profession is enabled to play its role in ensuring that the rule of law is maintained and promoted. This first issue contains articles on house demolitions in violation of s 74 of the Constitution, the right of access to the voters' roll, fair labour standards, the justice delivery mandate of the Judicial Service Commission, the right to life and applicable criminal defences, employment of persons with disabilities, accountability of persons in high offices and public statements prejudicial to the State.

It is my hope that this journal will play an important role in nation building. It will offer information on rule of law issues and disseminate the jurisprudence of our courts and international and regional courts on this very vital subject. It will hopefully introduce, through the contributions by lawyers and other practitioners of their professional expertise, to the comparative and international dimensions of the rule of law principle and the comprehensive developments in this area. In this way this journal will seek to protect and promote the rule of law through critical analysis of judgments of the courts.

The current Constitution of Zimbabwe was adopted in 2013. Many of its provisions require interpretation by the courts in order to build a body of jurisprudence for the future. It can be said that with the coming into force of the 2013 Constitution and establishment of the Constitutional Court, the process of balancing the Court's functional and institutional establishment has just began. There is a need to strike a proper balance between constitutional functions and the concrete power of the Court and between the objects and subjects of constitutional control. This journal can, with the contribution of many professionals, become a permanent, continual and systemic source of assessment of the work of our courts and provide invaluable insights into the working of our system of governance.

I wish to thank the many individuals who have made it possible for this Journal to be produced and congratulate those who have prepared the articles that make up this first issue. I wish to apologize in advance for any inadequacies that may be picked up in this issue. It is the first and all efforts will not be spared to improve subsequent issues in all respects.

Harare, February 2017

Justice MH Chinhengo, Chief Editor

ASSESSING THE JUSTICE DELIVERY MANDATE OF THE JUDICIAL SERVICE COMMISSION IN ZIMBABWE'S CONSTITUTIONAL FRAMEWORK

James Tsabora¹ and Shamiso Mtisi²

Abstract

The judicial service commission has emerged as one of the most integral institutions in constitutional and democratic states that respect the ideals of the rule of law and constitutionalism. As an institution therefore, a judicial service commission is a critical functionary in a constitutional state; it oils the wheels and fuels the engine of justice. Its integrity and status in a constitutional democracy derives, not only from the nature of its mandate, but also from the manner of its constitution, composition, appointment and most importantly, the scope of its powers. Generally, the mandate of the judicial service commission is to promote judicial independence, which is a fundamental facet in ensuring the rule of law and constitutionalism. Indeed, important debates on the rule of law and constitutionalism have invariably included the contribution of judicial institutional systems in the promotion or erosion of the rule of law and democracy in a constitutional society. Such debates necessarily take new twists and turns with the substitution of a constitutional framework by another.

This article explores the constitutional mandate of Zimbabwe's Judicial Service Commission, and makes the finding that this Commission is vital in the promotion of judicial independence, in safeguarding democracy, and in entrenching constitutionalism in Zimbabwe. It further observes that in view of Zimbabwe's long road to democracy and judicial independence, the Commission can only be applauded and given time to consolidate its true status and position in Zimbabwe's justice administration system.

1. Introduction

The Judicial Service Commission (JSC) is positioned at the fulcrum of the justice administration

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system in Zimbabwe. Its mandate is both regulatory and administrative, and is expected to promote constitutionalism by being independent, impartial, accountable, and efficient as well as through its capability to instill public confidence. These mandates are critical in view of the greatest danger faced by contemporary African democracies, being the subsuming of judicial service commissions as arms or extensions of the executive. This consequently translates to a reality where justice equates to the wishes and whims of the executive, with for instance, the appointment of judges being based not on merit but on political grounds of loyalty.³ Accordingly, one of the most problematic questions in contemporary African judicial systems is how the JSC could effectively discharge its justice delivery and administration mandate without political interference. This question is central to the major arguments fostered in this paper.

Structurally, these arguments are presented in four layers of analysis. The first layer of analysis is the applicable legal framework, including the 2013 Constitution, the Judicial Service Act, the Judicial Service Regulations and the Judicial Service (Code of Ethics). This legal framework establishes the JSC institutional system and illustrates its structure, mandate, powers and limitations. Within the legal framework are different strands of inquiry that will be analysed such as composition of JSC, judicial appointment, tenure of office, removal and resource availability among others. The second level of inquiry is the contribution of the JSC to judicial independence. Measured against international instruments and national legislation, there is need to assess how far the JSC has advanced the principle of judicial independence, which is central to constitutionalism and judicial integrity. The third component will be an assessment of the practical challenges faced by the JSC since its inception in Zimbabwe. The final component suggests possible ways of alleviating some of the challenges, and a statement of recommendations that can be adopted to enhance the capacity of the JSC to effectively discharge its constitutional mandate.

³ J.B Diescho "The Paradigm of an Independent Judiciary: Its History, Implications and Limitations in Africa", in N. Horn and A Bosl (ed) "The Independence of the Judiciary in Namibia" (2008) Konrad Adenauer Foundation (Macmillan Educational Namibia) 35.

1.2 Why is a Judicial Service Commission necessary?

In the Zimbabwean context, the JSC is generally understood as the body responsible for the administration of justice.⁴ However in practice, the JSC has advisory, supervisory and regulatory mandates which enable the judiciary to function efficiently and deliver its constitutional functions⁵. The JSC's administrative role extends beyond mere provision of stationery and salaries; it now extends to judicial selection processes through conducting public interviews and even making regulations governing the judiciary with the approval of the Minister of Justice, Legal and Parliamentary Affairs.⁶ Further, and more substantively, it is now the appointing authority for magistrates in Magistrates' Courts.⁷

It appears that, in other countries the functions of judicial service commissions similarly extend beyond administrative duties. According to Manyatera and Fombad, the emerging trend is that JSCs are becoming increasingly popular and an important feature of most judicial appointment systems in both civil and common law jurisdictions.⁸ The authors cite several jurisdictions that have adopted either judicial selection commissions or judicial services commissions.⁹ The use of judicial appointment commissions might reduce political patronage through use of open and transparent mechanisms in the appointment process.¹⁰ However, all this depends on the surrounding or enabling political or governmental system. As Manyatera and Fombad were quick to note, the existence of JSCs do not necessarily translate to effective and transparent justice delivery by the judiciary; much depends on the composition and competencies of the commission,¹¹ with these commissions faring much better

⁴ The Judicial Service Commission was first introduced into Zimbabwe's Lancaster House Constitution by Constitutional Amendment Act No.23 of 1987 (the 7th Constitutional Amendment).

⁵ This was confirmed in the case of *Judicial Service Commission v Ndlovu and Others* HB 172/13 in which Justice Moyo stated that the Judicial Service Commission does the administrative work leading to the appointment of judges.

⁶ On making regulations see Section 190(3) of the Constitution of Zimbabwe

⁷ Section 181(3) of the Constitution of Zimbabwe

⁸ See generally G. Manyatera and C.M Fombad "An Assessment of the Judicial Service Commission in Zimbabwe's New Constitution" (2014), XLVII Comparative and International Law of South Africa 2-9

⁹ Manyatera and Fombad op cit note 6) 6-7; cited the example of UK, USA, South Africa and some countries in Anglophone Africa as well as Latin American countries such as Argentina, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Panama and Paraguay among others.

¹⁰ Manyatera and Fombad (op cit note 6) at 8

¹¹ Manyatera and Fombad (op cit note 6) at 3

in political contexts which respect and uphold the rule of law.¹²

This is confirmed by international soft law principles that recognise the use of commissions. A good example is the Latimer House Guidelines on the Independence of the Judiciary, which states that a judicial service commission should be established by the Constitution or by statute, with a majority of members drawn from the senior judiciary.¹³ Similarly, the Beijing Statement of Principles of the Independence of the Judiciary also recognise the consultation of JSCs in making appointments and, further, that such commissions should include representatives of higher courts and legal practitioners to ensure judicial competence, integrity and independence.¹⁴

1.3 The constitutional mandate of the Judicial Service Commission in Zimbabwe

Pursuant to constitutional best practises and international standards, Zimbabwe made specific provision for the functions of the JSC in the 2013 Constitution. This is clearly in line with the Latimer House Guidelines which state that judicial appointments should be made by a JSC established by the Constitution or statute.

The Judicial Service Commission is accordingly established in terms of Section 189 of the Constitution. Under the old Lancaster House Constitution, the JSC had been established in terms of Section 84 whose role was to be consulted by the President and recommend appointment and removal of judges.¹⁵

Section 190(2) of the 2013 Constitution establishes the primary responsibility of the JSC, and states that, “*the Judicial Service Commission must promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice in Zimbabwe, and has all the powers needed for this purpose*” (emphasis added). Further, section 190(3) proceeds

¹² Manyatera and Fombad (op cit note 6) at 9

¹³ The Latimer House Guidelines on the Independence of the Judiciary (2008)

¹⁴ Article 15 of the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region 1995.

¹⁵ See generally Brian Crozier ‘Courts and Judiciary Under a New Zimbabwe Constitution’ in N. Kersting (ed) *Constitutional in Transition Academic Inputs for a New Constitution in Zimbabwe*, FES, 2005, 279.

to provide that the Judicial Service Commission, ***with the approval of the Minister responsible for justice*** may make regulations. Moreover, section 190(4) provides for the passage of an Act of Parliament that may confer on the JSC functions in connection with the employment, discipline and conditions of service of persons employed in the higher courts. These provisions have deep implications and need to be clearly analysed and examined.

1.3.1 Comment

Under the 2013 Constitution, the JSC appears to be a *constitutionally entrenched body* responsible for matters relating to the judiciary and the administration of justice.¹⁶ It may be submitted that this entrenchment is general, not specific, and this is strongly supported by a closer reading and contextual analysis of the whole Constitution. It may also be argued that what the constitution did was to merely establish the JSC and set out its functions. The concept of constitutional entrenchment connotes inclusion of provisions in the Constitution that are deliberately and exceedingly difficult or almost impossible to amend. Section 190 that establishes the JSC is not one of the specially protected clauses or strongly entrenched clauses in the constitution such as the Bill of Rights, the land provisions as well as term limits for public office.¹⁷ Those provisions are the 'entrenched' provisions of the Constitution and would demand, for instance, a referendum to be changed, while the rest of the constitutional provisions including the provision establishing the JSC only require 90 days notice, public views and a two-third majority vote in parliament to be changed, an easy task if a ruling political party commands more than two-thirds majority in Parliament. To that extent therefore, the JSC is not a specifically 'entrenched' constitutional institution.

The second point of inquiry is the mention in the Constitution that the JSC has "*...all powers needed*" for the purpose of discharging its constitutional mandate referred to in section 190(2). If measured against the powers of the executive, one may come to the conclusion that the JSC does not have all the powers. This conclusion can be reached after assessing the powers of the Minister and the role

¹⁶ See section 189 of the Constitution of Zimbabwe, 2013; See also Manyatera and Fombad (op cit note 6) at 19.

¹⁷ Section 328 provides for the Amendment of the Constitution.

of Parliament as stated respectively in section 190(3) and (4). The Minister has power to approve regulations made by the JSC. The fact that the JSC can make regulations does not mean that they will automatically pass into law. They require Ministerial approval and if the Minister does not approve them it means the regulations will not be passed. This means that the Constitution came close to granting the JSC law-making powers, but did not go far enough. Further, if Parliament feels threatened by the JSC it may pass an Act that does not provide adequate protections for employment, discipline and conditions of service of persons employed by the courts as contemplated in Section 190(4). Cumulatively, the powers of the executive and even the legislature in the Constitution whittle down the powers granted by the “*all powers needed for the purposes*” provision.

1.3.2 Other functions and contextual aspects on the role of JSC

It is important to state that the functions and responsibilities of the JSC should be understood in the context of the whole Constitution. This is because, unlike other commissions in the Constitution, the JSC is an institution that directly safeguards democracy, constitutionalism and the rule of law. In this regard, the fact that JSC is responsible for facilitating and promoting judicial independence, impartiality, integrity as well as effective and efficient delivery of justice means that it is also concerned with promoting the founding values and principles stated in s 3 of the Constitution. In particular the following values and principles are key; the supremacy of the Constitution, the rule of law, fundamental human rights and freedoms, equality of all human beings, good governance and transparency and accountability. These values tie in very well with the concept of judicial independence which is espoused in s 164 of the Constitution. Section 164 (1) states that the courts are independent and subject only to the Constitution and the law, which they must apply impartially, expeditiously and without fear, favor or prejudice. Section 164(2) goes on to state that the independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance. In this equation it is evident that the JSC should be at the centre of promoting judicial independence, impartiality and effectiveness. It has been observed that rigorous application of rule of law is the bedrock of a democratic society and if the rule of law is to be upheld,

it is essential that there should be an independent judiciary to scrutinise the actions of government and ensure they are lawful.¹⁸ Even the Bangalore Principles of Judicial Conduct states in its preamble that a competent, independent and impartial judiciary is essential if the courts are to fulfill their role in upholding constitutionalism and the rule of law.¹⁹

1.4 The JSC and the legal framework

Under the 2013 Constitution, the JSC clearly has the power to drive and implement judicial reforms.²⁰ However, as highlighted above, the mandate of the JSC to make regulations has to be exercised with the approval of the Minister of Justice.²¹ When the JSC was established (under the Lancaster House Constitution), it had no secretariat and had to meet only when the need arose²² but, despite the lack of secretariat, there were a number of developments between 2006 and 2014 that positively enhanced its justice delivery mandate. These include the passage of the Judicial Service Act in 2006, the Judicial Service Regulations in 2012 and the Judicial Service (Code of Ethics) Regulations in 2014. These statutes were essential to give effect to the constitutional mandates and functions of the JSC and, most importantly, in promoting judicial independence. A short analysis of some of these laws is therefore apposite.

The Judicial Service Act [*Chapter 7:18*] was passed in 2006, giving effect to section 91(1) of the old Constitution. Section 5 (1) of the Act outlined the functions of JSC to include fixing conditions of service, administering and supervising the judicial service, appointing persons and exercising disciplinary powers among other functions. However, there might be need to amend the Judicial Services Act so that it clearly captures the functions of the JSC as currently reflected in the Constitution. This is simply because the Act predates the 2013 Constitution, and does not clearly emphasize the JSC role

¹⁸ Lord Phillips 'Judicial Independence' <http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/lord-phillips-transcript.pdf>, accessed 2 November 2015

¹⁹ The Bangalore Principles of Judicial Conduct, 2002

²⁰ See generally, Chief Justice G. Chidyausiku "The Role of Judicial Service Commissions in Enhancing Judicial Independence and Ensuring the Right to a Fair Trial", (27 -30 August 2015), paper presented during the Southern Africa Chief Justices Forum Annual General Meetings and Conference, 4

²¹ Section 190(3)

²² Chief Justice Chidyausiku op cit note 18 at 4

of promoting and facilitating the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice in Zimbabwe, as prescribed in Section 190 of the new Constitution.

In much the same light, the Judicial Service (Code of Ethics) Regulations were passed in 2012, and similarly predate the 2013 Constitution. However, it is one of the key achievements of the JSC to date due to the establishment of a comprehensive framework on procedures for appointment and recruitment of judicial members, performance, resignation, termination of employment and salaries. Generally, under the Regulations, in order to promote efficiency and effectiveness, the JSC is required to recruit members with knowledge and ability about the task, relevant experience and requisite qualifications and qualities.²³ Therefore, recruitment is based on merit.²⁴ On disciplinary issues and procedures,²⁵ the important aspect is what constitutes acts of misconduct. Some of the acts of misconduct include absence from duty, failure to perform duties, negligence, inefficiency or incompetence, sexual harassment and corruption or dishonesty.²⁶ These Regulations clearly indicate that the JSC has made significant efforts, at least from a legislative perspective, to contribute to judicial independence, impartiality and integrity. The language used in the “code of ethics” is also in accord with international soft law principles and guidelines on judicial service commissions and judicial independence.²⁷

2. Contribution of JSC to judicial independence: theory and practice

2.1 Conceptual meaning and scope of judicial independence

A conceptual analysis of judicial independence is important at this point in order to fully assess how the JSC has contributed to judicial independence. The independence of the judiciary is pivotal to the protection of human rights²⁸ and instrumental in the pursuit of constitutional values and the

²³ Section 3

²⁴ Section 3 (2)

²⁵ Section 45 -46

²⁶ Third Schedule to Section 45

²⁷ Bangalore Principles op cit note 17; Latimer House Guidelines op cit note 11

²⁸ L.Chiduzo “Towards the Protection of Human Rights. Do the new Zimbabwean Constitutional Provisions on Judicial

rule of law.²⁹ As a starting point, judicial independence was one of the concepts associated with the separation of powers doctrine in the writings of the French jurist, Montesquieu in the second half of the 18th century.³⁰ The basic importance of judicial independence is that it is a balancing power on the exercise of power by the other two arms of government, namely the executive and the legislature.³¹

In principle this means that some constitutional guarantees and safeguards are important to protect the judiciary from interference by the executive. In that regard the words of Judge 'O' Linn in the Namibian case of *S v Heita* are most apposite. The learned judge stated that

*"... the judiciary has no defence force or police force. They are not politicians. They cannot descend to the arena to defend themselves....precisely because they cannot protect themselves, unscrupulous persons may exploit this weakness by scandalising the court..."*³²

At the international level, judicial independence has been recognised in many instruments, and the emphasis has been on the need for competent, independent and impartial tribunals or courts.³³ Further, judicial independence has been characterised as having two components or two separate pillars, namely institutional independence and individual independence.³⁴ It manifests itself through several essential criteria that include security of tenure, integrity, impartial judicial appointments and dismissal mechanisms as well as ability of the judiciary to manage its own budget and administration of the

Independence Suffice" (2014) PER/PELJ (17) 1.

²⁹ J. Ferejohn "Dynamics of Judicial Independence: Independent Judges, Dependent Judiciary" (November, 1998) 7; <http://www.usc.edu/dept/law/symposia/judicial/pdf/ferejohn.pdf>, accessed 2 November 2015

³⁰ See generally O.C Ruppel "The role of the Executive in Safeguarding the Independence of the Judiciary in Namibia" (2008) http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/ruppel.pdf, accessed 2 November 2015

³¹ N. Horn and A Bosl (ed) "The Independence of the Judiciary in Namibia" (2008) 10 Konrad Adenauer Foundation, Macmillan Educational Namibia

³² *S v Heita* (1992) 3 SA 785 (NmHC)

³³ See Article 19 of the Universal Declaration of Human Rights 1948, Article 14 of the International Covenant on Civil and Political Rights 1966 and Article 7 of the African Charter on Human and Peoples' Rights. The treaties recognise the right of every person to equality and to a fair and public hearing by an independent, competent and impartial tribunal or judiciary established by law.

³⁴ International Bar Association "Beyond Polokwane: Safeguarding South Africa's Judicial Independence" (July 2008) 20; <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=B2397A56-9D7C-4990-9B57-2749409604A5>; accessed 3 November 2015; also see generally the words of Justice Parker in *Jacob Alexander v The Minister of Justice and others* (Unreported case) HC of Namibia Case No. A210/2007 and Value 1 of *The Bangalore Principles of Judicial Conduct*, 2002.

courts.³⁵ Financially, a restricted budget, for example, can create inefficiency and affect independence and this will eventually lead to the manipulation of the judiciary by the executive.³⁶

However, it has been stated that there is an exception to the rule of judicial independence which exists for purposes of facilitating the achievement of the mandate of the judiciary.³⁷ The exception is the requirement that the state should take measures to protect the judiciary and, in fact, the executive is legally obliged to protect the judiciary.³⁸ John Ferejohn candidly stated that, even if judges enjoy some insulation from political intrusions, the Constitution ensures that the institutions within which they work, i.e. the courts, remain remarkably dependent on executive power-wielding officials.³⁹ This is because the courts rely on parliament and government for implementation of judicial decisions, allocation of funds and passage of laws. This portrays a necessary linkage between the judiciary and the executive. If the limits and scope of this necessary linkage is not properly established, the legislature, for instance, can interfere with judicial independence by passing legislation to limit the jurisdiction of the courts if they feel threatened.⁴⁰

2.2 Analysis of the legal functions of JSC in promoting judicial independence

As observed above, the concept of judicial independence has significant meaning and relevance for promoting the rule of law and constitutionalism in Zimbabwe. For a start, the JSC itself is at the centre of promoting judicial independence as stated in s 190 (2) which states that the JSC must promote and facilitate the independence, accountability, and the effective and efficient administration of the judiciary. Such a mandate supposes that the JSC should promote the practical application of s 164(1)

³⁵ See generally M. Diibotelo (Chief Justice of Botswana) (August 2015) "*Importance of Appointment Procedures in ensuring judicial Accountability and Independence of the Bench*" paper presented during The Southern Africa Chief Justices Forum Annual General Meeting and Conference held at Victoria Falls from 27 – 30 August 2015

³⁶ See generally O.C Ruppel op cit note 28 at 224

³⁷ Op cit note 28 at 219

³⁸ Op cit note 28 at 219

³⁹ J. Ferejohn op cit note 27 at 6

⁴⁰ In Zimbabwe during the height of the land invasions and land reform programme, government passed Constitutional Amendment No. 17, through insertion of Section 16B in the old Constitution, now Section 72 (3)(b) in the new Constitution which ousted the jurisdiction of the courts after a string of Supreme Court decisions based on discrimination, inequality. See generally, *Commercial Farmers Union v Minister of Lands and Others* 2000 (2) ZRL 469 (S)

which states that courts are independent and are subject to the Constitution and law which they must apply impartially, expeditiously and without fear, favour or prejudice. It can also be argued that under s 164 (2) (a), the state is required not to interfere with the functioning of the courts, and the JSC has an implicit duty to ensure this is the case. Further, given its administrative functions to make the judiciary operate efficiently and effectively, the JSC has a clear duty to ensure that the state, as proclaimed in s 164 (2) (b), assists and protects courts to ensure their independence and well-being. This the JSC can do by approaching the state for adequate funding for salaries and administration costs.

Moreover, the JSC has a duty implied in s 165 to ensure that its members follow the guiding principles related to judicial independence such as to desist from any political activity, or acceptance or solicitation of any gift, loan or favour that may influence their judicial conduct.⁴¹

As indicated already, the adoption of the Judicial Service Act, the Judicial Service Regulations and the Judicial Service (Code of Ethics) Regulations has been made in order to enhance the mandate, role and responsibility of the JSC under the Constitution. There are many provisions in these Acts that have a direct bearing on judicial independence and those provisions are an expression of the commitment of JSC towards promoting judicial independence. These include personal and institutional independence, integrity, propriety, equality, impartiality and competence and diligence.⁴² Other important aspects related to judicial independence relate to the need to curb corruption, dishonesty and involvement in political activities.⁴³ These are similar to the principles expressed in s 165. Therefore to a large extent, by including these values and principles as part of the ethics that the judiciary should abide by, the JSC's constitutional mandate of promoting judicial independence is made very clear.

2.3 Composition of JSC and judicial independence

The composition of the JSC itself, in theory and in practice, has great implications for the independence of the judiciary and its integrity. This is because if the JSC is not composed of fit and proper persons

⁴¹ Section 165 (5)

⁴² Section 4

⁴³ Third Schedule to Section 45 of the Judicial Service Regulations

or is packed with people who advance the interests of a certain faction, then this will be a threat to judicial independence. Madhuku therefore correctly notes that the extent to which the appointment of judges is free from political manipulation is largely reliant on the independence of the JSC itself.⁴⁴ In terms of composition, s 189 (1) states that the JSC is made up of the Chief Justice, Deputy Chief Justice, Judge President of the High Court, one judge nominated by other judges, Attorney-General, Chief Magistrate, Chairperson of the Civil Service Commission, three practicing legal practitioners, one professor or senior lecturer of law, a public accountant and a person with human resources experience. The Chief Justice presides over the meetings of the JSC.⁴⁵ Section 189(3) states that some members of the JSC will serve for only one non-renewable term of six years. Those that serve one term include the judge nominated by other judges, legal practitioners, law professor or lecturer, public accountant and human resources person.

An analysis of the composition of the JSC shows that there has been an attempt to promote diversity in terms of representation of various interests. Further, the inclusion of the representatives of the senior members from the judiciary and the independent legal profession goes a long way in ensuring judicial independence, integrity of the judicial sector and impartiality of judges and magistrates. Manyatera and Fombad, rightly note that such a composition might augur well for the assessment of judicial candidates as most of the members are well placed to critically scrutinise the suitability or otherwise of the candidates to the judicial office.⁴⁶

Apart from these observations, however, there are several issues to examine as they may in practice affect decisions of the JSC to effectively promote judicial independence. The first issue is that there are two opportunities for Presidential appointment of members of JSC. These include the human resources person in terms of s 189(1) (k) and a possible appointee by the President from the academic field in terms of s 189(1) (i). Section 189(1)(i) states that one professor or senior lecturer

⁴⁴ L. A Madhuku (2002), *Journal of African Law* 238; see also L. Chidzuza op cit note 26 at 379.

⁴⁵ Section 189 (2)

⁴⁶ Manyatera and Fombad op cit note 6 at 18

of law designated by an association representing the majority of the teachers of law at Zimbabwean universities or, in the absence of such an association, appointed by the President. What is worrying about this provision is that, it is possible that such an association might not exist. If that is the case, then the President will make an appointment of a senior law lecturer or a professor to sit in the JSC for a period of six years. Section 189(1)(i) and (k) are just a simple indication of how it is virtually impossible to completely exclude political appointments to the JSC.

The second point arising from Section 189 in relation to nominations by associations is that it is not clear what criteria the associations will use, within their internal systems, to select members who will sit in the JSC. Both the Constitution and the Judicial Service Act appear to be silent on the qualities and abilities of members that may be chosen to represent their associations in the JSC. The importance of this is that given the crucial role the JSC is supposed to play in the appointment, removal and administration of justice the qualities of people who should be chosen by the associations to sit in JSC should also fit within the framework of what is called a fit and proper person.

The third and somewhat worrisome point is that, as in other countries, the Chief Justice is the Chairman of the JSC. The Chief Justice already has other responsibilities including head of the Supreme Court and the Constitutional Court. There is too much concentration of powers in one individual, and there is a high chance of him failing to effectively fulfil his duties.

Comparatively, however, the South African JSC has been criticised as heavily weighted with Presidential and parliamentary appointees and in that sense, it has become too political.⁴⁷ This is because South Africa adopted a multistakeholder approach. The South African JSC is made up of representatives of the judiciary, legal profession, including attorneys, academics, advocates, political parties represented in parliament, members of the national and provincial executive and presidential appointees.⁴⁸

⁴⁷ E. Camer "*Judicial Selection Process*" <http://www.courtingjustice.com/judicialselection.html>, accessed 4 November 2015

⁴⁸ See Democratic Governance and Rights Unit (DGRU) "*Judicial Selection in South Africa*" (2010) www.dgru.uct.ac.za/usr/dgru/...judicial%20selectionoct2010pdf, accessed 9 November 2015

Commenting on the composition of the South African JSC, Magaisa stated that it is a system that says democracy is about majority rule, but it also considers the interests of the minority and recognizes the importance of skills and expertise.⁴⁹ This is a sober assessment of the position in South Africa, but it does not make the system attractive in any way since it is heavily composed of political players. It defeats the whole purpose of judicial independence and it inevitably raises the risk of political-party based deliberations and decision making.

2.4 Appointment of judges generally

Appointment of judicial officers has a great bearing on judicial independence. Theoretically, there are several threats to judicial independence that may be brought about by judicial appointments. Executive controlled judicial appointments processes mostly result in “court packing”. The International Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa recommend that an independent body should be entrusted with selection of judicial officers.⁵⁰ There are a wide variety of judicial appointment mechanisms world-wide that reflect different levels of adherence to the concept of judicial independence.⁵¹ In the USA, for example, the President appoints judges whom are then subjected to interrogation by the Senate. During apartheid in South Africa, the courts were packed with political appointees and prosecutors and judges had to follow the direction of the incumbent leaders and deal with enemies of the apartheid regime.⁵²

As stated already, the Latimer House Guidelines makes it clear that constitutional systems should have an appropriate independent process in place for judicial appointments which should be made by a JSC and based on merit,⁵³ while judicial positions are also advertised.⁵⁴ What this boils down to

⁴⁹ A. Magaisa “Does the public have a role in Zimbabwe’s new Judicial appointment process?” (July 2014) <http://alexmagaisa.com/does/-the-public-have-a-role-in-zimbabwes-new-judicial-appointments-process/>, accessed 30 October 2015

⁵⁰ L.Chiduzo op cit note 26 at 376

⁵¹ Ginsburg and Garoupa “*The Comparative Law and Economics of Judicial Councils*” 2008, Berkeley Journal of International Law Vol 27.1.53 quoted by Manyatera and Fombad op cit note 6 at 2

⁵² J. B Diescho op cit note 1 at 35

⁵³ Principle II of Annex of the Commonwealth (Latimer House) Principles on the Three Branches of Government (2003) and see also Principle 12.3 of the Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (2010)

⁵⁴ Latimer House Guidelines, 1998

is that to secure judicial independence, judicial appointments should be made on the basis of clearly defined criteria and a publicly declared process to enhance equal opportunity.⁵⁵ On tenure, the UN Basic Principles on the Independence of the Judiciary state that once a person is appointed as a judge, their tenure should be guaranteed until mandatory retirement age or expiry of their term of office. Therefore, security of tenure is an important factor in promoting judicial independence.

2.5 The appointment process and role of JSC in Zimbabwe

As stated, the JSC plays a role in the selection and appointment of judges, magistrates and other judicial officers. The appointments are in terms of the Constitution and the Judicial Service Act. In order to critically assess the performance of the JSC on judicial appointments it is important to analyse the specific rules first.

Section 180(1) provides for the appointment of all judges and s 180(2) goes on to state that whenever it is necessary to appoint a judge, the JSC must **advertise** the position, and **invite the President** and the **public** to make nominations. Thereafter, JSC is required to prepare a list of three qualified persons as nominees and submit the list to the President whereupon the President must appoint one of the nominees. However, if the President considers that none of the persons on the list submitted by the JSC is suitable for appointment, he must require the JSC to submit a further list of three qualified persons from which he will appoint one of the nominees.⁵⁶ Another important provision is s 184 which provides that the appointments to the judiciary must reflect broadly the diversity and gender composition of Zimbabwe. What is clear is that s 180 sets out the procedures for the appointment of judges and JSC plays a role. Below is an analysis of the intricate aspects about these provisions as well as what the JSC did in practice.

⁵⁵ Latimer House Guidelines *ibid*

⁵⁶ Section 180(3)

2.5.1 Advertisement of positions

The first issue and mandatory duty⁵⁷ of the JSC is the requirement to advertise the position. Clearly, this is a positive development that may enhance transparency and also shows the application of and adherence to internationally accepted standards.⁵⁸ Advertising has been hailed as vital in that it opens the door to a wider group of potentially qualified people⁵⁹ and competition might improve the chances of selecting the best candidates. In compliance with this constitutional duty, in 2014, the JSC issued an advertisement calling for nominations to three positions each for Judges of the Supreme and High Courts. The advert was widely circulated and flighted in the media to invite members of the public to nominate suitably qualified persons to fill the positions for which nomination forms from the offices of the JSC in Harare, or the offices of Provincial Magistrates in the Provinces and also online from the JSC website (www.jsc.co.zw) were available. This was a positive transparent public relations exercise by the JSC.

2.5.2 Nominations by the President and the public

The second issue for consideration is the requirement that the JSC should invite the President and the public to make nominations.⁶⁰ This means the President and the public are all required to make nominations, yet the President is responsible for appointing the judges. Chiduzza, rightly in our view, termed this provision alarming.⁶¹ In general, the fact that the President also nominates and at the same time appoints judges puts to the test the whole concept of judicial independence. The question that arises is whether the nominations by the public will have any effect since the President is also required to submit nominations.⁶² Magaisa aptly stated that the situation creates a moral hazard, which he called the risk that the appointing authority is more likely to prefer his/her own nominees for appointment over those by the public.⁶³ Magaisa went on to recommend

⁵⁷ A. Magaisa op cit note 47.

⁵⁸ Principle II of Annex of the Commonwealth (Latimer House) Principles on the Three Branches of Government (2003) calls for advertisement of judicial positions; see also Principle 12.3 of the Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (2010)

⁵⁹ Democratic Governance and Rights Unit (DGRU) op cit note 46 at 26

⁶⁰ Section 180(2)(b)

⁶¹ L. Chiduzza op cit note 26 at 382

⁶² A. Magaisa op cit note 47

⁶³ A. Magaisa op cit note 47

that the JSC should develop safeguards such as being fair, impartial and give equal opportunity to all candidates regardless of the source of their nomination, ensure a merit based approach, disclose the source of nomination – whether it was the President or the public – and disclose all information about the candidates including their personal background, qualifications and track records. The submissions by Magaisa are very valid; judicial independence will be compromised if the President is to appoint his own nominees.

In practice, the JSC invited the public to make nominations when it issued the advert for positions of judges at the Supreme and High Courts in 2014. It is assumed that the public indeed made nominations, although it is not clear which section of the public did so. One can only speculate that it is most likely the legal fraternity. It is also not clear how the President was invited to nominate and whether he indeed made nominations as the JSC does not disclose detailed information about the whole process. These are some of the reasons why the assertion and call by Magaisa for disclosure of the source of nominations for candidates remains valid.

2.5.3 Short listing for public interviews

The requirement that the JSC should conduct public interviews is also a progressive approach to judicial appointments. On this point, Magaisa stated that after calling for nominations the ***JSC is required to consider and shortlist them if necessary***, (although it is unclear whether Magaisa was referring to any Constitutional section when he stated this or whether he was simply referring to standard practice) and then the JSC should carry out public interviews of the prospective candidates.⁶⁴ There is nowhere in s 180 where it is stated that the JSC will consider and shortlist candidates. The only reference to a list is the list prepared by JSC that will be submitted to the President for appointment after the interviews or a second list, in the event that the President rejects the first list. Therefore, what is not clear from the Constitution is the process the JSC will go through in vetting, selecting, screening or shortlisting candidates. It is also not clear within the text of the Constitution if the screening, vetting or shortlisting is done by a special committee within the JSC. This is an important

⁶⁴ Magaisa op cit note 47

process that goes to the core of judicial independence in that during shortlisting, if the JSC is not independent as well, it might tinker with the process by selecting persons who may not be fit and proper, but who represent executive interests.⁶⁵

For interest sake, the Regulations outline some of the General principles applicable to recruitment of members used by the JSC such as merit, knowledge, experience, qualifications and potential for training.⁶⁶ They also provide that the JSC shall complete to its satisfaction all the checks necessary to confirm that the candidate is eligible for appointment.⁶⁷ The point here is that what is in the Constitution is not adequate in terms of procedures that are followed by JSC in selecting, screening or shortlisting candidates who would have been nominated by the public or the President so that they attend public interviews for the position of a judge. This point is made, despite the fact that the JSC might have some policy guidance document it uses to screen, evaluate or shortlist nominees. This leaves room for manipulation of the system and paints an unclear picture on the process.

However, the above analysis is contrary to the view of Manyatera and Fombad who stated that one inescapable conclusion from an analysis of the new judicial selection procedures is that they are intended to ensure greater transparency and accountability in the selection of judges.⁶⁸ This general conclusion is only acceptable if this new process is compared to the unknown system under the Lancaster House Constitution. However, it is submitted that the level of transparency is not sufficient under the current system where the vetting, screening, evaluation process and short-listing procedures of candidates to attend public interviews are not clearly stated.

In practice, the JSC has managed to organise the first batch of public interviews for the positions that were advertised in 2014. The public interviews elicited much public interest and excitement. However, what emphasises the need to come up with a strong and publicly known screening,

⁶⁵ On a "fit and proper person" see Section 177(2), 178(2) and 179(2)

⁶⁶ Section 3

⁶⁷ Section 5(5)

⁶⁸ Manyatera and Fombad op cit note 6 at 20

evaluating, selecting or shortlisting process is the fact that some of the candidates who attended the public interviews performed dismally and this was noted even by ordinary members of the public. Some of the candidates did not have adequate knowledge of the law and procedures. The question is then whether these persons were properly passed through the screening or vetting process. If they did, questions remain on the nature and manner of the secret vetting and process itself.

2.5.6 List of qualified persons, appointment or rejection

The other function of JSC is to submit a list of three qualified persons as nominees to the President,⁶⁹ whereupon the President must appoint one of the nominees to office. However, the President holds an ace card. He may reject the list of three nominees that has been submitted by the JSC using s 180(3). The JSC will then be required to submit a second list from which the President must choose one nominee.⁷⁰ This may sound like a buffer for ensuring that a "suitable" candidate" is chosen although it may be a point for further discussion as to whether the phrase "fit and proper person"⁷¹ to hold office as a judge and the phrase "suitable for appointment"⁷² are referring to the same qualities or not. However, it is inevitable that there is a degree of pressure on the JSC when the President rejects the first list, and there is need for a second list to be submitted to him.

Manyatera and Fombad stated that the fact that executive discretion is limited to the list submitted by the commission goes a long way in guaranteeing the separation of powers and independence of the commission at the appointment stages.⁷³ This point is contested and contradicted by Chiduzza, however, who argues that the President might refuse to make an appointment if his preferred candidates are not included on the first list submitted by the JSC.⁷⁴ This is a vital point, and we associate with Chiduzza as there is no safeguard in the Constitution against this eventuality. Magaisa, alive to the dangers of Presidential nominations, suggests that the only safeguard to curb this is the disclosure of

⁶⁹ Section 180(2)(d) and (e)

⁷⁰ A. Magaisa op cit note 47

⁷¹ Sections 177(2), 178(2) and 179(2)

⁷² Section 180 (3)

⁷³ Manyatera and Fombad op cit note 6 at 21

⁷⁴ L.Chiduzza op cit note 26 at 382.

the sources of the nominees from the President and the public.⁷⁵ This may help to curb the possible abuse of the powers by the President to reject the first list submitted by the JSC since it will put the whole process under the public spotlight.

2.5.7 Appointment of Magistrates and role of JSC

The appointment of magistrates is now the responsibility of the JSC in terms of s 182 which states that an Act of Parliament must provide for the appointment of magistrates and other judicial officers, but magistrates must be appointed by the JSC. It also states that such appointment must be made transparently and without fear, favour, prejudice or bias. Previously magistrates were appointed by the Public Service Commission (PSC) under the ministry of Public Service and this made them less independent from the executive. The Judicial Service Regulations regulates the appointment of members of the judiciary by setting out some general JSC principles, such as suitability with regard to task knowledge, relevant experience, qualifications and qualities and potential for training and development.⁷⁶ In some cases entry examinations may be set.⁷⁷

In theory, the transfer of the appointment of magistrates from the PSC to the JSC is a welcome development. However, it might be argued that magisterial appointments have not been treated with as much weight as judicial appointments. The motivation for this is practical, since it would be difficult and costly to advertise, invite public and presidential nominations, and hold public interviews for appointment of magistrates given the high number of magistrates required at various stations in the country.

It may be stated that although magistrates belong to lower courts, the concepts of judicial independence, impartiality, rule of law and democracy should not be sacrificed because of the court hierarchy system. It is also important to note that while the appointment of magistrates does not enjoy extensive

⁷⁵ See generally Magaisa, *op cit* note 47, and also Democratic Governance and Rights Unit *op cit* note 46.

⁷⁶ Section 3

⁷⁷ Section 4

constitutional recognition like that of judges, this may pose a threat to judicial independence because magisterial courts are the courts of first instance⁷⁸ for the appearance of litigants and for some it is their only contact with the justice delivery system of Zimbabwe.⁷⁹ Many problems related to judicial independence, impartiality, lack of competence and corruptions among others occur at the lower courts.

The Magistrate Courts are also a fertile ground for political interference and court packing if the appointment processes by the JSC are not watertight in practice. Many people are convicted and may not appeal, or their cases are not reviewed. This is despite the fact that the appeal or review process is supposed to act as a way of ensuring that people who face injustice at the lower courts at least find justice in the upper courts. In the case of *Van Rooyen and Others v The State and Others*, Chief Justice Chaskalson (*as he then was*) stated that;

*"...magistrates' courts are courts of first instance and their judgments are subject to appeal and review. Thus higher courts have the ability to protect the lower courts against interference with their independence, but also to supervise the manner in which they discharge their functions."*⁸⁰

In practice therefore, judicial independence should not be restricted to judges of the superior courts; it should begin at the lower courts where external influence and pressure is easy to exert on adjudicating personnel.

2.5.8 Financial independence

Section 164 (2) (b) provides that the state must assist and protect the court to ensure their independence. This provision entails that the state must also provide all resources including financial resources for the courts to effectively carry out their mandate. Regarding financial independence, s 188 (3) of the Constitution states that the salaries, allowances and other benefits of members of the judiciary are a charge on the Consolidated Revenue Fund. Section 20 of the Judicial Service Act

⁷⁸ Magistrates Court Act [Chapter 7:10]; Section 5 states that the Magistrate Court shall be a court of record.

⁷⁹ Judicial Service Commission, www.jsc.co.zw, accessed 10 November 2015

⁸⁰ *Van Rooyen and Others v The State and Others* (2002) ZACC 8; 2002 5 SA 246

states that the funds of the Judicial Service shall consist of moneys appropriated by Act of Parliament for the salaries and allowances payable to and in respect of members of the Judicial Service and the recurrent administrative expenses of the Judicial Service. Funds of the JSC also include any donations, grants, bequest made to the Judicial Service and accepted by the Commission with the approval of the Minister. These provisions raise the question on whether the courts will be independent if the JSC and the courts rely on the state for financial resources. However, it is important to point out that the JSC has a duty to approach the state for adequate funding for salaries and administration costs.

3. General challenges faced by the Judicial Service Commission

The JSC is now an established constitutional body, having existed since 1987. As with many other Commissions and constitutional bodies aimed at safeguarding democracy and the rule of law, it continues to face many challenges ranging from the limitations of financial resources and human resources, among others.

3.1 Financial resources

The lack of adequate financial resources for the JSC has affected the effective and efficient administration of justice. Most administrative issues which the JSC deals with require funding and these include construction of courts, stationery, recording equipment, libraries, transcribers, computers, transport and furniture. Many of the Magistrates Courts in Zimbabwe, except the regional magistrates, lack basic modern technology such as desktop computers. This affects their research capacity given the current worldwide reliance on internet and online sources of legal data. Further, case management has also been a major problem at both the High Court and Magistrates Courts where court records have been known to occasionally disappear.⁸¹ Generally, if the state is failing to provide adequate funds to the JSC it means that it is failing to fulfill its duty in terms of Section 164(2)(b) which requires the state to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and

⁸¹ This was again confirmed by Chief Magistrate Guvamombe who stated that "because of manual filing we sometimes lose records or take time to locate them, thus delaying court proceedings; see *Zimbabwe jobs freeze puts pressure on country's judiciary*, The Independent, March 21, 2014. <http://www.theindependent.co.zw/2014/03/21/zimbabwe-jobs-freeze-puts-pressure-countrys-judiciary/>

effectiveness.

3.2 Human resources

The main challenge related to human resources is the shortage of magistrates country-wide as well as the paucity of magistrates' court buildings. Reports indicate that the shortage of magistrates was caused by the fact that JSC had frozen recruitment of magistrates due to budgetary constraints.⁸² This has reportedly resulted in magistrates working longer hours which may compromise the quality of judgments.⁸³ Although there is a shortage of magistrates it has been reported that there is no backlog at the magistrate's courts. This is commendable due to the efforts of JSC. However, it is understood that the High Court has a huge backlog which it is battling to clear and this means that many litigants will not have access to justice.⁸⁴ This will be contrary to the constitutional requirement that justice must not be delayed.⁸⁵

3.3 Training

The closure of the Judicial College in 2008, due to financial challenges, has also affected training programmes for magistrates in Zimbabwe. However, acknowledging the role played by the Judicial College, the JSC is making efforts to reopen it for purposes of offering refresher courses to magistrates,⁸⁶ with the objective of improving the quality of judicial service.⁸⁷ Training of judges and magistrates is very important as it may help to ensure that members of the judiciary are aware of new legal developments, trends and approaches. It is in this light that even the Judicial Service Regulations acknowledge the need for such a college of continual education.⁸⁸

⁸² *The Independent*, op cit note 79

⁸³ *The Independent*, op cit 79

⁸⁴ It must be highlighted that the introduction of digital records in the High Court has helped solve this problem.

⁸⁵ Section 165(1)(b)

⁸⁶ *The Herald* 'JSC resuscitates Judicial College' (July 30, 2015)

⁸⁷ *The Herald* op cit note 83

⁸⁸ Section 42

4. Addressing the challenges

4.1 Funding

The delivery of justice and its administration has cost implications. Poor funding is detrimental to justice delivery, and jeopardizes the work of judicial officers and various other stakeholders in the justice delivery system. Thus, the fact that government continually faces financial challenges and competing budgetary commitments does not justify underfunding or under-resourcing the judiciary. It is important that the state give priority funding to the judiciary as this guarantees judicial integrity and the quality of judicial services. The state has a duty to ensure that the judiciary's mandate is both facilitated and enhanced. It has been suggested that to avoid political influence, the budget for the judiciary should be set or fixed as a percentage to be charged on the national budget every year.⁸⁹ However, it is also important for the JSC to ensure that it properly manages and accounts for all funds received in line with the Public Financial Management Act and the Audit Office Act.

Further, to ensure effective and efficient administration of justice, JSC should also find ways of getting additional funding from different sources so that it is able to recruit more magistrates and facilitate the appointment of High Court judges. The conditions of service (salaries) for judicial officers should also be improved to curb corrupt activities.

4.2 Independent judicial monitoring

Another important suggestion is for the JSC to work closely with NGOs that can assist in monitoring the performance of the courts. These groups can also assist the JSC by compiling information and carrying out background checks, on a voluntary basis, on any nominees for judicial appointment for purposes of screening. This system is being used by the Democratic Governance and Rights Unit in South Africa.⁹⁰

⁸⁹ See generally L. Chidzuza op cit note 26 at 395

⁹⁰ Information available at <http://www.dgru.uct.ac.za/> accessed on 20 November 2015.

4.3 Screening, vetting and selection of nominees

On the process of appointing judges, the JSC should improve its screening and selection of nominees invited for public interviews based on well-defined and detailed criteria. If the JSC has already adopted some guidelines then these should be published on the JSC website to build public confidence in the judicial appointment process. Further, as suggested by Magaisa, a set of safeguards to protect public confidence in the judicial appointment process should be adopted that includes disclosure of the source of nomination as to whether it was the President or the public, and sufficient disclosure of all information about the candidates including their personal background, qualifications and track records.

5. Conclusion

There is little doubt that an independent judicial service and a proactive Judicial Service Commission are both critical in the realisation and promotion of rule of law and constitutionalism in Zimbabwe. The Constitution generally enhances the role and purpose and integrity of the judicial system in Zimbabwe, and clearly departs from the system established under the 1980 Lancaster House Constitution. The relevant provisions, as has been demonstrated throughout the article, go a long way towards promoting judicial independence, integrity, transparency and accountability. However, the system is not perfect, with practical as well as legal loopholes that need to be addressed going forward. It is however clear that there is an attempt in the Constitution to balance the interests of various stakeholders in establishing the mandate, scope of powers, the nature of appointment and the constitution of the JSC. This attempt is inevitable in view of the fact that, as an institution that protects and safeguards democracy, the JSC operates within the confines of the larger political environment. What is inescapable is the fact that this constitutional institution greatly contributes to judicial independence, which in turn is critical for the attainment of the rule of law and constitutionalism in Zimbabwe.

